

THE CONSTITUTION IN THE SUPREME COURT: 1910-1921

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The unprecedented promotion¹ of Associate Justice Edward Douglass White to succeed Melville Fuller as Chief Justice in 1910 marked a significant divide in the membership of the Supreme Court. Within a single presidential term (1909-1912), William Howard Taft appointed five new Justices: Horace H. Lurton, Charles Evans Hughes, Willis Van Devanter, Joseph R. Lamar, and Mahlon Pitney. Once Pitney had succeeded John M. Harlan in 1912, the only additional changes during White's eleven years as Chief Justice came when Woodrow Wilson replaced Lurton, Lamar, and Hughes with James C. McReynolds, Louis D. Brandeis, and John H. Clarke about midway through the period. Like White, Joseph McKenna, Oliver Wendell Holmes, and William R. Day were long-sitting holdovers who served with the Chief Justice until his death in 1921.²

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1. Justice Cushing was nominated and confirmed as Chief Justice in 1796, but he declined the promotion. See 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 139-40 (rev. ed. 1928).

2.

Justices of the Supreme Court during the Chief Justiceship of Edward D. White: 1910-1921

		1910	1912	1914	1916	1918	1920
John M. Harlan (1877-1911)		—					
Edward D. White (1894-1921)		_____					
Joseph McKenna (1898-1925)		_____					
Oliver W. Holmes (1902-1932)		_____					
William R. Day (1903-1922)		_____					
Horace H. Lurton (1909-1914)		_____					
Charles E. Hughes (1910-1916)		_____					
Willis Van Devanter (1910-1937)		_____					
Joseph R. Lamar (1910-1916)		_____					
Mahlon Pitney (1912-1922)		_____					
James C. McReynolds (1914-1941)		_____					
Louis D. Brandeis (1916-1939)		_____					
John H. Clarke (1916-1922)		_____					

Adapted from G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 1717 app. A (10th ed. 1980).

In terms of membership, therefore, the Court over which White presided had an identity rather distinct from that of its predecessor. In terms of constitutional development, however, the White period was largely a time of continuity. With the striking exception of *Hammer v. Dagenhart*,³ the Court continued its general tendency toward broad construction of congressional powers, from the commerce clause in the *Shreveport Rate Case*⁴ and the tax power in *United States v. Doremus*⁵ to the war powers in *Hamilton v. Kentucky Distilleries & Warehouse Co.*⁶ and the treaty power in *Missouri v. Holland*.⁷ Due process and equal protection continued to be employed erratically to invalidate occasional economic measures such as the state ban on yellow-dog contracts in *Coppage v. Kansas*,⁸ while the Court receded from its blockade of maximum-hour legislation in *Bunting v. Oregon*.⁹ The Court did pay increasing attention to the Civil War amendments in the field of racial justice, striking down a peonage law in *Bailey v. Alabama*,¹⁰ a grandfather clause for voting in *Guinn v. United States*,¹¹ and a residential segregation ordinance in *Buchanan v. Warley*.¹² A series of decisions beginning with *Southern Pacific Co. v. Jensen*¹³ overshadowed the usual run of cases on the negative effect of the commerce clause by proclaiming a preemptive force in article III's grant of admiralty jurisdiction far stronger than that ever attributed to the commerce clause itself. The most interesting and important aspect of the White years, however, was the famous series of wartime freedom of expression cases beginning with Justice Holmes's opinion for the Court in *Schenck v. United States*,¹⁴ and concluding with the emergence of a more protective philosophy in his dissent in *Abrams v. United States*¹⁵ later the same year.

Like earlier installments in this series,¹⁶ the present article explores

3. 247 U.S. 251 (1918).

4. *Houston, E. & W. Tex. Ry. v. United States*, 234 U.S. 342 (1914).

5. 249 U.S. 86 (1919).

6. 251 U.S. 146 (1919).

7. 252 U.S. 416 (1920).

8. 236 U.S. 1 (1915).

9. 243 U.S. 426 (1917).

10. 219 U.S. 219 (1911).

11. 238 U.S. 347 (1915).

12. 245 U.S. 60 (1917).

13. 244 U.S. 205 (1917).

14. 249 U.S. 47 (1919).

15. 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

16. D. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS* (1985); Currie, *The Constitution in the Supreme Court: The Protection of Economic Interests, 1889-1910*, 52 U. CHI. L. REV. 324 (1985) [hereinafter cited as *Fuller I*]; Currie, *The Constitution in the Supreme Court: Full Faith and the Bill of Rights, 1889-1910*, 52 U. CHI. L. REV. 867 (1985) [hereinafter cited as *Fuller II*].

these and other decisions of the period from a lawyer's critical perspective in an investigation of methods of constitutional decisionmaking and the quality of judicial craft.¹⁷

I. ENUMERATED POWERS

A. *The Courts.*

As early as 1792, in *Hayburn's Case*, several Justices had concluded on circuit that article III forbade federal courts to exercise nonjudicial functions,¹⁸ and the whole Court had seemed to confirm this conclusion the following year in the famous letter declining to give advisory opinions.¹⁹ One of the first problems confronting the Court after White's appointment as Chief Justice was the application of this principle.

In 1902 Congress had provided for allotting to individual members of the Cherokee Nation lands previously belonging to the tribe itself. When later statutes diminished the value of these individual allotments, Congress authorized suits by named beneficiaries of the original provision against the United States "to determine the validity of" the impairing statutes.²⁰ Citing *Hayburn's Case*, the *Correspondence*,²¹ and two later decisions, the Court in *Muskrat v. United States* held that the statute giving it appellate jurisdiction over these suits was invalid for want of a judicial "Case" or "Controversy."²²

17. The indispensable overall Court history of these years is 9 A. BICKEL & B. SCHMIDT, *THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES* (1984). Standard older histories such as 2 C. WARREN, *supra* note 1, at 690-756, and A. MCLAUGHLIN, *A CONSTITUTIONAL HISTORY OF THE UNITED STATES 760-94* (1935), barely mention the White period. Biographies of the Justices include F. BIDDLE, *MR. JUSTICE HOLMES* (1942); M. HOWE, *JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS, 1841-1870* (1957); M. HOWE, *JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS, 1870-1882* (1963); M. KLINKHAMER, *EDWARD DOUGLAS [sic] WHITE, CHIEF JUSTICE OF THE UNITED STATES* (1943); A. MASON, *BRANDEIS: A FREE MAN'S LIFE* (1946); M. McDEVITT, *JOSEPH MCKENNA, ASSOCIATE JUSTICE OF THE UNITED STATES* (1946); J. McLEAN, *WILLIAM RUFUS DAY* (1946); M. PUSEY, *CHARLES EVANS HUGHES* (1951); H. WARNER, *THE LIFE OF MR. JUSTICE CLARKE* (1959).

18. *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410-14 n.(a) (1792).

19. *Correspondence of the Justices*, reprinted in H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 64-66 (2d ed. 1973); see D. CURRIE, *supra* note 16, at 11-12.

20. See *Muskrat v. United States*, 219 U.S. 346, 348-51 (1911). Three separate provisions were challenged: the enlargement of the class of allottees, the lengthening of a time period within which the original allottees were forbidden to alienate their land, and a grant of authority to the federal government to convey pipeline rights of way over the land. *Id.* at 348-49. For further explanation of the legislative background of *Muskrat*, see *Gritts v. Fisher*, 224 U.S. 640, 642-46 (1912).

21. See *supra* note 19 and accompanying text.

22. *Muskrat*, 219 U.S. at 352-61 (citing *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1852), discussed in D. CURRIE, *supra* note 16, at 262 n.197; and *Gordon v. United States*, 69 U.S. (2 Wall.) 561 (1865), discussed in D. CURRIE, *supra* note 16, at 356 n.36). Finding Supreme Court review an essential part of the statutory scheme, the Court ruled the review provision inseparable and thus held that the Court of Claims could not exercise original jurisdiction either. *Muskrat*, 219 U.S. at 363.

The opinion, by Justice Day, begins with what appears to be a sweeping denunciation of Congress's purpose as expressed in the jurisdictional statute: "[T]he object and purpose of the suit is wholly comprised in the determination of the constitutional validity of certain acts of Congress; . . . there is neither more nor less in this procedure than an attempt to provide for a judicial determination . . . of the constitutional validity of an act of Congress."²³ If the other requisites of justiciability are met, however, it is difficult to see why a congressional desire for a determination of constitutionality would make the suit any the less a "Case." It would hardly invalidate the general provision for jurisdiction over cases arising under the Constitution, for example, if it were shown that Congress's purpose in enacting it had been to enable the Court to act as a check upon other branches of government.

Indeed the opinion does not rest with its aspersions on legislative motive. The reason why the present effort to obtain a declaration of constitutionality did not present a "Case" or "Controversy," Justice Day continued, was that the United States, though made a defendant by the statute, "has no interest adverse to the claimants."²⁴ Thus the Court invoked the now standard learning, suggested perhaps by its division over the Attorney General's right to litigate *ex officio* in *Hayburn's Case*, that a "Case" or "Controversy" requires adverse parties with stakes in the outcome—in order, among other things, to help assure that both sides of the argument are adequately presented.²⁵

Just why the government had no adverse interest in *Muskra*t, however, the Court did not say. Nor was it obvious. In the first place, the United States in *Muskra*t arguably had the same type of *parens patriae* concern that traditionally gives the government a stake in the outcome of criminal prosecutions, and which has led later Congresses to authorize the government to sue for damages on behalf of workers under the Fair

Thus, the Court did not have to decide whether the special status of the Court of Claims excepted it from the rule that article III courts could exercise only judicial functions. *See also* Richardson v. McChesney, 218 U.S. 487, 492 (1910) (Lurton, J.) (refusing to decide a reapportionment claim mooted by an election because "[t]he duty of the court is limited to the decision of actual pending controversies").

23. *Muskra*t, 219 U.S. at 360-61.

24. *Id.* at 361.

25. *See* *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), discussed in D. CURRIE, *supra* note 16, at 6-9. For the modern view and its policy justification, see, e.g., *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) ("As an aspect of justiciability, the standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction . . .") (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)); *United States v. Fruehauf*, 365 U.S. 146, 157 (1961) (refusing to give "legal judgment upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument").

Labor Standards Act and to intervene as a party whenever the constitutionality of an act of Congress is challenged.²⁶ More pointedly, the statutes under attack contemplated various actions by federal officials affecting the interests of the plaintiffs. Indeed, the very next year, and without even discussing justiciability, the Court unanimously entertained a suit by some of the same plaintiffs to enjoin federal officers from carrying out one of the same statutes, on the same constitutional grounds.²⁷ It is true that the petition in *Muskra*t, while reporting the relevant allegations of the pending injunction suit, had neglected to specify that the same threat of official action made the United States an appropriate defendant in *Muskra*t itself.²⁸ There is some evidence in the opinion that the Court was seizing upon this failure of phrasing.²⁹ To have relied wholly on that, however, would probably have been extremely picky even in 1911.

That something more substantial may have underlain the conclusion that the government was not adverse to the particular petitions filed in *Muskra*t was suggested by the Court's insistence that "the only judgment required is to settle the doubtful character of the legislation. . . . [T]he judgment could not be executed, and amounts in fact to no more than an expression of opinion upon the validity of the acts in question."³⁰ The implication seems to be that the judicial power did not extend to a complaint seeking only a declaratory judgment—though that was the essence

26. 29 U.S.C. § 216(c) (1982) (allowing Secretary of Labor to bring suit on behalf of employee claiming violation of Fair Labor Standards Act); 28 U.S.C. § 2403(a) (1982) (allowing intervention by the United States whenever constitutionality of act of Congress is called into question and the United States, its agencies, officers, or employees are not parties to the case). For counterexamples involving the sovereign interest of a *state* government, see *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 77 (1868) (no Supreme Court jurisdiction of suit by state to enjoin execution of Reconstruction Acts), discussed in D. CURRIE, *supra* note 16, at 302-04; *Oklahoma v. Atchison, T. & S.F. Ry.*, 220 U.S. 277, 289 (1911) (Harlan, J.) (no original Supreme Court jurisdiction of suit by state to prevent overcharges to citizens).

27. *Gritts v. Fisher*, 224 U.S. 640, 647-48 (1912) (upholding the addition of new allottees on the ground that the original promise of allotment had created no vested rights). The Secretary of the Interior had ultimate authority to approve additions to the allotment rolls compiled by a federal commission; federal officials were directed to distribute assets to the allottees; and one of the statutes authorized the Secretary to grant rights of way, which he had proceeded to do. Act of July 1, 1902, ch. 1375, §§ 11, 29, 37, 32 Stat. 716, 717, 720-21, 722. See also *Heckman v. United States*, 224 U.S. 413, 438-39 (1912) (Hughes, J.) (upholding authority of United States as guardian of Cherokee rights to sue to enforce the extended restraint on alienation challenged in *Muskra*t).

28. Record at 9, *Muskra*t v. United States, 219 U.S. 346 (1911). For similar allegations in the other case decided with *Muskra*t, see Record at 10, *Brown v. United States*, 219 U.S. 346 (1911).

29. See *Muskra*t, 219 U.S. at 362 (finding it irrelevant that the petitioners had filed other suits because statute giving jurisdiction "must depend upon its own terms").

30. *Id.* at 361-62. The Court added that such a judgment would "not conclude private parties, when actual litigation brings to the court the question of the constitutionality of such legislation." *Id.* at 362. A judgment that binds *nobody* is the essence of an advisory opinion; but there seems no reason to doubt the judgment authorized would have bound the government as well as the plaintiffs.

of traditional suits to quiet title or remove a cloud from title, to which Justice Day did not refer.³¹

The statutory provision for payment of the plaintiffs' attorneys' fees "out of the funds in the United States Treasury belonging to the beneficiaries" of the initial allotment legislation, though prominently mentioned in the opinion, was not expressly relied on as a basis of the decision.³² If one party pays the other's expenses, the suspicion may be strong that the suit is collusive—as the Court would emphasize in throwing out a suit on that ground a generation later.³³

An absolute rule against paying even a losing opponent's costs, however, would go too far. When the government is the one that pays, collusion is not the only permissible inference. In criminal cases publicly financed defense lawyers flourish like rabbits, and there is an increasing tendency to extend the principle of government support to other contexts as well.³⁴ No one seems to think provisions such as these make a suit collusive. Similarly, the plaintiffs in *Muskrat*, who as original allottees stood to gain something of value and who had demonstrated their apparent good faith by presenting the same claims in another suit without promise of fees, might well have been expected to argue vigorously in support of their position. More important, fees were to be paid only if the plaintiffs won. Far from indicating the absence of an adversary relationship between the parties, this now familiar extension of the traditional assessment of costs actually reinforces such a relationship by

31. See also *id.* at 361 (stressing that the complaint sought no "compensation" from the United States). Chief Justice Taney had said in his 1864 opinion prepared for *Gordon v. United States*, published posthumously at 117 U.S. 697 (1886), that the award of execution was a necessary ingredient of any judicial judgment. *Gordon*, 117 U.S. at 702. There is no evidence, however, that Taney was speaking for the Court, which had decided the case without opinion some years before. *Gordon v. United States*, 69 U.S. (2 Wall.) 561 (1865), discussed in D. CURRIE, *supra* note 16, at 353 n.10. Nor was Taney's statement necessary to the result in *Gordon*, for the statute there in question had given the Executive the power to redetermine matters decided by the Court of Claims. The legislature's attempt to vest such a power in the Executive had doomed the pension law in *Hayburn* seventy years before. Taney's observations on the judicial power were quoted in *Muskrat*, but his dictum regarding execution was not emphasized. *Muskrat*, 219 U.S. at 354-55. See generally Borchard, *The Declaratory Judgment—A Needed Procedural Reform*, 28 YALE L.J. 1, 105 (1918) (giving other examples of purely declaratory remedies and tracing the declaratory judgment itself to both English and Roman law); Sunderland, *A Modern Evolution in Remedial Rights—The Declaratory Judgment*, 16 MICH. L. REV. 69 (1917) (giving examples of purely declaratory remedies in England, and arguing that the contemporary American practice of restricting use of declaratory judgments creates "serious hardship in this country").

32. See *Muskrat*, 219 U.S. at 351, 360.

33. *United States v. Johnson*, 319 U.S. 302, 304-05 (1943); see also D. CURRIE, *supra* note 16, at 32 (discussing this issue in connection with *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796), in which the Court may have been unaware of the problem).

34. See, e.g., 15 U.S.C. § 2605(c)(4)(A) (1982) (attorneys' fees may be awarded to parties who present views that contribute to fair determination in rulemaking proceeding, even if they lose).

increasing the incentive for each party to prevail. Finally, since the fees were to be paid not from the government's own funds but from those it held in trust for the plaintiff's class, *Muskkrat* was not a case of one party's paying the expenses of the other at all.³⁵

The fact that the statute singled out named individuals as plaintiffs does raise a red flag: the government's ability to pick its adversary gives it a grand opportunity to choose a patsy. No doubt it is better to have a broad prophylactic rule against that sort of thing than to engage in a subjective and burdensome assessment of the performance of counsel in the particular case—especially since collusion poses a threshold issue that ought to be resolved before there is a record on which to base the decision. This may indeed be the strongest point in favor of the Court's conclusion, but it was not a part of the Court's stated reasoning.

We are thus left wondering whether there was any justifiable basis for the conclusion that the dispute was nonjusticiable, and, if so, just what it was. In hinting at such a number of less than wholly persuasive bases for the decision, Justice Day left us a monument of confusion full of uncertain implications for future litigation.³⁶ Perhaps the only reliable lesson to be drawn from this episode is that if Congress wants to provide for a test case it should be careful not to invite the conclusion that it has provided instead for an advisory opinion.³⁷

35. Perhaps that is why, despite suggestively calling attention to the fee provision, the opinion did not explain the provision's bearing on the decision.

36. See H. HART & H. WECHSLER, *supra* note 19, at 124: "Complete the following sentence: 'The Supreme Court held that no justiciable controversy was presented in the *Muskkrat* case because . . .'" For vehement criticism of no fewer than seven decisional grounds perceived in *Muskkrat*, see 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 21.01, at 120-24 (1958).

37. Apart from the unassailable application of the principle of *Hans v. Louisiana*, 134 U.S. 1 (1890) (article III does not authorize a citizen to sue his own state), *discussed in* D. CURRIE, *supra* note 16, at 100 n.61, to admiralty cases in *Ex parte New York*, 256 U.S. 490, 497-98 (1921) (Pitney, J.), the most interesting developments in the judicial power during the White period concerned political questions. In refusing to determine whether a state might constitutionally legislate by initiative or referendum, the Court in *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 143-51 (1912) (White, C.J.), followed the pattern of the Fuller Court, *see Taylor v. Beckham*, 178 U.S. 548, 578-81 (1900), in overgeneralizing from the narrow alternative holding of *Luther v. Borden*, 48 U.S. (7 How.) 1, 38-47 (1849) (recognition of state government committed to political branches), *discussed in* D. CURRIE, *supra* note 16, at 252-57, to the flat conclusion that all controversies over the meaning of article IV's guarantee of a republican form of government were nonjusticiable. *Accord* *Marshall v. Dye*, 231 U.S. 250, 256-57 (1913) (Day, J.) (refusing to decide whether article IV, section 4 guaranteed the right to vote on proposed new state constitution). Interestingly, the Court managed in *Pacific States*, 223 U.S. at 139-41, to dismiss even allegations based on the equal protection clause on the ground that they were essentially efforts to raise the guarantee clause claim under another label—a judicial technique repudiated in *Baker v. Carr*, 369 U.S. 186, 209-10 (1962), over Justice Frankfurter's emphatic dissent. *See also* *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 569-70 (1916) (White, C.J.) (disposing similarly of contention that article I, section 4's explicit reference to state "Legislature[s]" forbade state to determine congressional districts by referendum). Later decisions reaching the merits of challenges to procedures for the ratification of constitutional amend-

B. Congress.

1. *The Shreveport Rate Case*. As early as 1838, in upholding a federal statute outlawing the theft of shipwrecked goods in *United States v. Coombs*,³⁸ the Supreme Court had held that, in order to protect interstate commerce from interference, Congress could regulate conduct that was not itself commerce.³⁹ Although this thesis had received a setback in the 1895 sugar-trust case of *United States v. E. C. Knight Co.*,⁴⁰ by 1908 the Fuller Court had returned to the traditional position in upholding the application of the Sherman Act to the Danbury hatters.⁴¹ Under Chief Justice White the Court consistently followed the logic of this position to uphold a number of far-reaching exercises of congressional authority.⁴²

In 1911, in one of his first constitutional opinions, the recently appointed Justice Hughes wrote for a unanimous Court to sustain a statute limiting the number of hours a railroad employee engaged in interstate commerce could work even on local trains:

The length of hours of service has direct relation to the efficiency of the human agencies upon which protection to life and property necessarily depends. . . . [Congress's] power cannot be defeated either by prolonging the period of service through other requirements of the carriers or by the commingling of duties relating to interstate and intrastate operations.⁴³

Later the same year, in a brief unanimous opinion by the even more recently appointed Justice Van Devanter, the Court upheld the extension

ments, however, suggested that the White Court was prepared neither to apply this reasoning to every attack on the constitutionality of referenda nor to extend the political question category to new areas unrelated to the guarantee clause. See *Hawke v. Smith*, 253 U.S. 221, 227 (1920) (Day, J.) (holding state could not make ratification of amendment to United States Constitution dependent on referendum in light of article V provision for ratification by "Legislatures"); *Dillon v. Gloss*, 256 U.S. 368, 375-76 (1921) (Van Devanter, J.) (upholding power of Congress, in light of perceived constitutional policy requiring contemporaneous consensus, to require ratification of constitutional amendment within seven years); see also *Missouri Pac. Ry. v. Kansas*, 248 U.S. 276 (1919) (White, C.J.) (assuming justiciability in reasoning that veto could be overridden under article I, section 7 by two thirds of members present and voting).

See also *Evans v. Gore*, 253 U.S. 245 (1920) (Van Devanter, J.) (reasoning cleanly, if somewhat mechanically, that a general income tax reduced the compensation of federal judges in violation of article III—a conclusion later abandoned, *O'Malley v. Woodrough*, 307 U.S. 277 (1939), for the expectable reason, given by Holmes and Brandeis in dissent in *Evans*, 253 U.S. at 265, that the generality of the tax reduced its threat to the underlying policy of judicial independence, *O'Malley*, 307 U.S. at 281-83); *Virginia v. West Virginia*, 246 U.S. 565 (1918) (White, C.J.) (Court has authority to enforce judgment against state).

38. 37 U.S. (12 Pet.) 72 (1838) (Story, J.).

39. *Id.* at 78-79, discussed in D. CURRIE, *supra* note 16, at 234 & n.268.

40. 156 U.S. 1 (1895), discussed in *Fuller I*, *supra* note 16, at 346.

41. *Loewe v. Lawlor*, 208 U.S. 274 (1908).

42. See generally 9 A. BICKEL & B. SCHMIDT, *supra* note 17, at 200-42, 414-76 (discussing the decisions).

43. *Baltimore & O.R.R. v. ICC*, 221 U.S. 612, 619 (1911).

of the Safety Appliance Act to require appropriate couplers on cars traveling locally on interstate railroads, reasoning that interstate and local cars were frequently parts of the same train, and that an accident to a wholly local train could impede the passage of an interstate one. The power over interstate commerce, the Court concluded, "may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it."⁴⁴ Similarly, early in 1912, Justice Van Devanter wrote again for a unanimous bench to sustain the application of the Federal Employers' Liability Act to an injury sustained by an employee who was engaged in interstate commerce although the employee who had caused the injury was not: "[S]uch negligence, when operating injuriously upon an employé engaged in interstate commerce, has the same effect upon that commerce as if the negligent employé were also engaged therein."⁴⁵

The culmination of this line of authority came in 1914, in the famous case of *Houston, E. & W. Tex. Ry. v. United States* (the *Shreveport Rate Case*).⁴⁶ Finding that low intrastate rates set by the Texas Railroad Commission diverted traffic that would otherwise have traveled between Texas and Shreveport, Louisiana, the Interstate Commerce Commission ordered the affected railroads to equalize their local and interstate rates. Accepting the railroads' contention that compliance might require them to raise local rates, the Court nevertheless upheld the Commission's order on the basis of the decisions just noted: "Congress is entitled to keep the highways of interstate communication open to interstate traffic upon fair and equal terms."⁴⁷

This conclusion followed with impeccable logic from prior decisions. Van Devanter had been stating settled law when he said in the coupler case that Congress could protect interstate commerce no matter what the source of the danger. That the danger in the cases before

44. *Southern Ry. v. United States*, 222 U.S. 20, 27 (1911).

45. *Second Employers' Liability Cases*, 223 U.S. 1, 52 (1912); see 9 A. BICKEL & B. SCHMIDT, *supra* note 17, at 208 n.28 (suggesting that this decision cast doubt on the earlier conclusion, in *First Employers' Liability Cases*, 207 U.S. 463 (1908), that Congress could not regulate liability of an interstate carrier for injuries to workers not engaged in commerce, because even in the latter case liability might affect interstate commerce). These decisions, together with others discussed in *Fuller I*, *supra* note 16, at 363-69, call into question Professor Tribe's assertion that "willingness on the part of the pre-1937 Supreme Court to see the interconnectedness of formally interstate and intrastate activities was unusual," L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 235 (1977).

46. 234 U.S. 342 (1914).

47. *Shreveport*, 234 U.S. at 353-54. See also *id.* at 355 ("[I]n removing the injurious discrimination against interstate traffic arising from the relation of intrastate to interstate rates, Congress is not bound to reduce the latter below what it may deem to be a proper standard fair to the carrier and to the public.").

Shreveport had been that of physical rather than economic obstruction seemed irrelevant to the question of congressional power, and thus the precedents seemed to fit like a glove.⁴⁸

What was perhaps most interesting about the opinion was the subtle way in which Justice Hughes modified the standard learning even as he applied it to what may have been the most extreme case yet decided.⁴⁹ Whereas Van Devanter had said the source of the threat was irrelevant, as it surely was to the scope of the federal interest in protecting commerce, Hughes chose to focus on the fact that the carriers whose local rates had been challenged were also engaged in interstate operations: "Congress . . . may . . . requir[e] that *the agencies of interstate commerce* shall not be used in such manner as to cripple, retard or destroy it."⁵⁰

Possibly, like the careful jurist he was, Justice Hughes was only trying to avoid prejudging future controversies. In light of the unexplained dissenting votes of Justices Lurton and Pitney, however, the conspicuous repetition of the fact that the railroads before him were instrumentalities of interstate commerce may suggest that Hughes was attempting to find some way to limit the implications of his decision. As Chief Justice Fuller had emphasized in essaying a different but equally unsatisfying limitation in the sugar-trust case, the argument that Congress may protect commerce from any interference seemed likely to push the Court to the position, in the teeth of the careful enumeration of limited powers confirmed by the tenth amendment, that Congress could regulate just

48. For an effort to distinguish the coupler case, see Coleman, *The Evolution of Federal Regulation of Intrastate Rates: The Shreveport Rate Cases*, 28 HARV. L. REV. 34, 69-70 (1914). For a defense of the rate decision, see Biklé, *Federal Control of Intrastate Railroad Rates*, 63 U. PA. L. REV. 69 (1914). The argument that the common law against whose background the commerce clause had been adopted forbade trespasses but not competition suggests that Congress could not limit competition even in commerce itself and is hard to square with the purpose for which the clause was adopted—to prevent otherwise lawful state taxes. Indeed, the result in *Shreveport* had been foretold the preceding year in the Minnesota Rate Cases, 230 U.S. 352, 417, 432-33 (1913) (Hughes, J.) (refusing to strike down similar state rates in the absence of federal legislation).

In the same spirit as the decisions discussed in the text was *United States v. Ferger*, 250 U.S. 199 (1919) (White, C.J.) (Congress may protect interstate commerce from false bills of lading).

49. See also *Wilson v. New*, 243 U.S. 332 (1917) (White, C.J.) (upholding requirement that railroad workers be paid ten hours' wages for eight hours' work to prevent strike interrupting commerce); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 72-74 (1913) (Day, J.) (allowing Congress to provide for sale of power produced by navigation dam), discussed in 9 A. BICKEL & B. SCHMIDT, *supra* note 17, at 221 (describing the decision as "[t]he most ungrudging legitimation of federal power" during the White years"); *ICC v. Goodrich Transit Co.*, 224 U.S. 194, 214 (1912) (Day, J.) (perfunctorily upholding requirement that interstate carriers file reports covering even local operations), discussed in 9 A. BICKEL & B. SCHMIDT, *supra* note 17, at 214-15 (arguing that the case could have gone even further).

50. *Shreveport*, 234 U.S. at 351 (emphasis added). Numerous other examples of such qualifying language are found in *id.* at 351-55.

about anything it liked—for there is scarcely anything in a mobile society that cannot be plausibly argued to affect interstate commerce.⁵¹

If that was what troubled Justice Hughes, he deserves some credit for a modest attempt to slow the juggernaut. The line he attempted to draw, however, was an unconvincing one that had been rejected three quarters of a century before when the Taney Court held that Congress could provide for punishing a thief who was not an agency of commerce.⁵²

2. *Hammer v. Dagenhart*. If Justice Hughes in the *Shreveport* case was trying to limit the logical growth of the commerce power, he managed to uphold a striking exercise of that power in the process. Just the year before, moreover, in *Hoke v. United States*,⁵³ the Court had followed the implications of yet another Fuller Court precedent in holding that Congress could outlaw the interstate transportation of women for immoral purposes. As in the *Lottery Case*,⁵⁴ wrote Justice McKenna without provoking a dissent, it was no objection to the validity of Congress's enactment that the purpose and effect of the statute were to promote morality rather than to prevent obstructions to commerce: "Congress[']s . . . power over transportation 'among the several States' . . . is complete in itself," and rules adopted under it "may have the quality of police regulations."⁵⁵

51. See Jefferson's early demonstration of the need to find some limiting principle, quoted in G. GUNTHER, *supra* note 2, at 95-96. For Fuller's efforts, see *United States v. E.C. Knight Co.*, 156 U.S. 1, 13 (1895). Fuller's distinction between "direct" and "indirect" injuries to commerce might plausibly have been employed to preclude federal regulation in *Shreveport*, because the immediate effect of a low state rate was on those who shipped locally; the concomitant loss to interstate business could fairly be described as secondary. Unfortunately, this line of reasoning fails to distinguish the safety appliance case, in which Van Devanter had relied in part on the existence of a potential secondary effect—obstructing interstate traffic—caused by an accident disabling a local train. Moreover, the direct/indirect distinction seems quite irrelevant to the inquiry at hand.

52. For decisions of the White years broadly construing Congress's power to ensure the enforceability of measures regulating interstate commerce itself, see *McDermott v. Wisconsin*, 228 U.S. 115, 136 (1913) (Day, J.) (upholding power to require that labels remain on goods after interstate shipment to facilitate inspection for previous violation), and *Hipolite Egg Co. v. United States*, 220 U.S. 45, 58 (1911) (McKenna, J.) (upholding power to seize adulterated food after illegal interstate shipment). For further evidence of the contrasting fear of construing the commerce clause too broadly, see the *Pipe Line Cases*, 234 U.S. 548 (1914) (Holmes, J.) (taking a surprisingly grudging line in reaching the easy conclusion that economic regulation under the Interstate Commerce Act could be extended to interstate oil pipelines), *discussed in* 9 A. BICKEL & B. SCHMIDT, *supra* note 17, at 232-38 (revealing the extent to which Holmes was forced to tone down the opinion).

53. 227 U.S. 308 (1913).

54. *Champion v. Ames*, 188 U.S. 321 (1903), *discussed in Fuller I*, *supra* note 16, at 354-55.

55. *Hoke*, 227 U.S. at 323. For invocation of the *Lottery Case*, see *id.* at 321. See also *Caminetti v. United States*, 242 U.S. 470, 491-92 (1917) (Day, J.) (upholding the same statute as applied to interstate transportation of a woman for personal rather than commercial purposes); *Clark Distilling Co. v. Western Md. Ry.*, 242 U.S. 311, 325-32 (1917) (White, C.J.) (upholding act of Congress

When, however, Congress predictably took advantage of this reasoning to discourage child labor by prohibiting interstate shipment of goods made in factories employing children, a divided Court executed a sharp about-face. The statute, said Justice Day in *Hammer v. Dagenhart*,⁵⁶ "in a twofold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend."⁵⁷

By this peculiar reference to "twofold" unconstitutionality, Day may only have meant to make the obvious point that a statute Congress was not authorized to pass offended the tenth amendment as well.⁵⁸ If he meant that a measure lying within Congress's delegated authority might nevertheless be invalid because the matter was "purely local," however, the statement was revolutionary and quite insupportable. As more able Justices than Day had said before and would say again, the tenth amendment takes nothing from the federal government that other provisions have given; it reserves to the states only those powers *not* granted to the United States.⁵⁹

If Justice Day meant that the tenth amendment showed there must be some significant powers that Congress could not exercise,⁶⁰ he was on firmer ground. That Congress's powers are limited, however, does not tell us where to draw the boundary. As an original matter, a respectable

prohibiting shipment of liquor into state for sale or use in violation of its laws); *Weber v. Freed*, 239 U.S. 325, 329-30 (1915) (White, C.J.) (upholding congressional authority to ban import of boxing films); *Hipolite Egg Co. v. United States*, 220 U.S. 45, 57-58 (1911) (McKenna, J.) (assuming the unchallenged authority of Congress to exclude adulterated food from interstate commerce); 9 A. BICKEL & B. SCHMIDT, *supra* note 17, at 224-32 (finding in *Hoke's* reference to "immoral" purposes, 227 U.S. at 320, and *Hipolite's* reference to "illicit" articles, 220 U.S. at 57, ambiguities that might significantly limit the sweep of their reasoning); 9 A. BICKEL & B. SCHMIDT, *supra* note 17, at 433 (castigating *Caminetti's* wooden approach to statutory construction, and adding that, although the Court in *Caminetti* had conceded "that Congress could not simply regulate the conduct that a traveler in interstate commerce intended to engage in once he reached his destination," it "affirmed a power to do precisely that in the case of a man and a woman voluntarily traveling together"); *cf. infra* note 167 (discussing another aspect of *Clark Distilling*).

56. 247 U.S. 251 (1918).

57. *Id.* at 276.

58. The amendment was invoked, *id.* at 274, and erroneously paraphrased, *id.* at 275, as reserving to the states "the powers not expressly delegated to the National Government" (emphasis added).

59. *United States v. Darby*, 312 U.S. 100, 123-24 (1941) (Stone, J.); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (Marshall, C.J.), *discussed in* D. CURRIE, *supra* note 16, at 160-68.

60. *See Hammer*, 247 U.S. at 276: "[I]f Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, . . . the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed." *Cf. McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (insisting that measures adopted under necessary and proper clause be consistent with "spirit" as well as letter of the Constitution), *discussed in* D. CURRIE, *supra* note 16, at 164.

argument could have been made that the commerce power should be construed, in light of its purpose, only to authorize measures that removed obstructions to commerce. The difficulty was that this position had been rejected both in the *Lottery Case* and in *Hoke*, neither of which the *Hammer* Court purported to question.⁶¹

Apart from an otherwise unexplained reference to “the character of the particular subjects dealt with” in earlier cases, the only basis for distinction the Court offered was that in each of the prior cases “the use of interstate transportation was necessary to the accomplishment of harmful results,” whereas in the child-labor case the harm was over before interstate commerce began.⁶² Conspicuously, Justice Day made no effort to say why that mattered. Holmes, who said all the right things in his dissent, thought the difference immaterial: “It is enough that in the opinion of Congress the transportation encourages the evil.”⁶³ It is hard to believe that the majority found its own distinctions persuasive.⁶⁴

61. Justice Day protested that both the purpose and the effect of the law prohibiting commerce in child-made goods were to prevent child labor in the factory itself, but both the lottery and white-slave laws had survived similar objections. The suggestion that prohibition was not regulation, *Hammer*, 247 U.S. at 269-70, had been rejected not only in the same two cases but also—in the context of foreign commerce—many years before by one of the most state-minded Justices ever to sit on the Court. See D. CURRIE, *supra* note 16, at 234 n.270 (discussing *United States v. Marigold*, 50 U.S. (9 How.) 560 (1850) (Daniel, J.)).

62. *Hammer*, 247 U.S. at 270-72. For elaboration of this distinction, see Cushman, *The National Police Power and the Commerce Clause of the Constitution*, 3 MINN. L. REV. 289, 381-400 (1919) (the most comprehensive contemporaneous commentary). Professor Bickel took the reference to the “character of the particular subjects” as harking back to the insistence in *Hoke* and *Hipolite*, see *supra* note 55, that those cases dealt with “immoral” behavior and “illicit” articles. See 9 A. BICKEL & B. SCHMIDT, *supra* note 17, at 447; *id.* at 454-58 (adding that *Hammer* came as a shock to the public and was poorly received by academics). The relevance of an external standard of “immorality,” if that was what the Court had in mind, was never made clear.

63. *Hammer*, 247 U.S. at 279-80. For contemporaneous support of this position, see Biklé, *The Commerce Power and Hammer v. Dagenhart*, 67 U. PA. L. REV. 21, 28-36 (1919); Brinton, *The Constitutionality of a Federal Child Labor Law*, 62 U. PA. L. REV. 487, 502-03 (1914); Gordon, *The Child Labor Law Case*, 32 HARV. L. REV. 45, 51-54 (1918); Lewis, *The Federal Power to Regulate Child Labor in the Light of Supreme Court Decisions*, 62 U. PA. L. REV. 504, 506-08 (1914); Parkinson, *Congressional Prohibitions of Interstate Commerce*, 16 COLUM. L. REV. 367, 370-71 (1916); Powell, *Child Labor, Congress, and the Constitution*, 1 N.C.L. REV. 61, 62-68 (1922). Both Gordon and Parkinson noted the inability of states to forbid interstate transportation of child-made goods, and pointed out the anomaly of interpreting a clause dividing authority between state and nation so as to extinguish authority altogether. See also T. POWELL, *VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION* 68 (1956) (describing the lot of the nation, under a holding denying to both Congress and the states of destination the power to exclude products from other states that are not impure, as “not wholly a happy one”).

64. The shift cannot be explained in terms of intervening changes in personnel. Of the three Justices appointed between *Hoke* and *Hammer*, Brandeis and Clarke joined Holmes and McKenna (the author of *Hoke*) in the *Hammer* dissent. Day was joined in the majority not only by the newly appointed and implacably conservative McReynolds but also by White, Van Devanter, and Pitney, all of whom, like Day himself, had voted to uphold the white-slave law. Commentators suggested a possible basis for distinction not noted by the Court: that Congress’s power may be greater when it

3. Doremus, Hamilton, and Holland. The feebleness of the majority's efforts in *Hammer* to get around the preexisting law, like Justice Hughes's insistence that the *Shreveport* case involved an instrumentality of interstate commerce, suggests an increasing uneasiness about the implications of earlier decisions for the notion of a limited central government. In the term after *Hammer*, White, Van Devanter, and McReynolds displayed a similar concern by voting in *United States v. Doremus*⁶⁵ to strike down a statute that patently attempted to regulate narcotics sales under the cloak of the federal tax power.⁶⁶

The regulatory aspect of the law was unmistakable: the law required sales to be made on specified forms open to inspection, and it forbade use of the forms except for legitimate purposes. "In other words," wrote Professor Bickel, "no addicts could be served, whether or not they paid the tax." Moreover, the tax itself was so small—one dollar per year—as to raise serious doubts whether it served any legitimate revenue purpose.⁶⁷ If there were cases for invoking Marshall's admonition that federal powers were not to be used as the "pretext" for invading state authority,⁶⁸ *Doremus* seemed a strong candidate for inclusion.⁶⁹ Without even citing *Hammer*, however, the majority blithely upheld the tax in an opinion looking for all the world like Holmes's dissent in that case, relying on all the precedents establishing that the tax power was no more defeated by a purpose or effect of intruding on local affairs than the commerce clause had been before *Hammer* itself. This time the author was not Holmes, but Day, who had so emphatically said the opposite as to the commerce clause in *Hammer* only the year before, and he took Pitney with him.⁷⁰

acts to reinforce rather than to contradict state policy. See Bruce, *Interstate Commerce and Child Labor*, 3 MINN. L. REV. 89, 95-96 (1919); Cushman, *supra* note 62, at 400-12. This suggestion will be discussed in the next installment in this series, Currie, *The Constitution in the Supreme Court: 1921-1930*, 1986 DUKE L.J. — (forthcoming), in connection with *Brooks v. United States*, 267 U.S. 432 (1925).

65. 249 U.S. 86 (1919).

66. *Id.* at 95 (dissenting opinion). For unexplained reasons, they were joined by Justice McKenna, who had written for the Court to uphold the white-slave law and had dissented from invalidation of the child-labor provision.

67. See 9 A. BICKEL & B. SCHMIDT, *supra* note 17, at 435.

68. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819).

69. Cf. *Guinn v. United States*, 238 U.S. 347 (1915) (holding that grandfather clause violates fifteenth amendment), *discussed infra* notes 116-17 and accompanying text.

70. "We cannot agree with the contention that the provisions . . . controlling the disposition of these drugs in the ways described, can have nothing to do with facilitating the collection of the revenue . . ." *Doremus*, 249 U.S. at 95. Professor Powell, T. POWELL, *supra* note 63, at 87, termed this decision "[h]ardly candid." For an effort to distinguish earlier cases on the bizarre ground that prohibition was a more legitimate use of the tax power than was regulation, see Long, *Federal Police Power Regulation by Taxation*, 9 VA. L. REV. 81, 83-94 (1922). The best contemporaneous discussion of the general problem is Cushman, *The National Police Power and the Taxing*

If these Justices were worried about residual state sovereignty, they were highly selective about it. If the distinction was between the tax and commerce powers, it seemed backwards: because the commerce power can be used for ulterior ends only to the extent that interstate or foreign intercourse is implicated, exercise of the tax power seems to pose the greater danger. One hopes the explanation is not simply that Day and Pitney liked dope peddling less than child labor.⁷¹

In 1919, on the basis of unspecified war powers, the Court in *Hamilton v. Kentucky Distilleries & Warehouse Co.*⁷² upheld an act of Congress flatly banning the sale of distilled spirits for beverage purposes “until the termination of demobilization.”⁷³ What was remarkable about this result was not that the statute had been enacted after the armistice, for earlier cases had correctly recognized that some of the military powers in the Constitution, such as that respecting the raising and maintenance of armies, were not limited to times of actual hostilities.⁷⁴ The striking thing was rather the enormously broad scope the Court was willing, even after

Clause of the Constitution, 4 MINN. L. REV. 247, 261-65 (1920) (giving the standard argument for limiting the use of the tax power for regulatory purposes but despairing of the Court's ability to administer meaningful limitations).

71. Other significant federal tax cases of the White period include *LaBelle Iron Works v. United States*, 256 U.S. 377 (1921) (Pitney, J.) (holding excess-profits tax consistent with fifth amendment); *Merchants' Loan & Trust Co. v. Smietanka*, 255 U.S. 509 (1921) (Clarke, J.) (capital gain from stock sale is “income”); *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 24 (1916) (White, C.J.) (an almost unreadable opinion upholding an unapportioned income tax after passage of the sixteenth amendment, adding the surprising dictum that the effect of that provision was to subject all income taxation to the requirement of geographical uniformity applicable to duties, imposts, and excises under article I, section 8); *Flint v. Stone Tracy Co.*, 220 U.S. 107, 150-52 (1911) (Day, J.) (analogizing from decisions respecting governmental immunity from taxation to conclude rather formalistically, see Riddle, *The Supreme Court's Theory of a Direct Tax*, 15 MICH. L. REV. 566, 573 (1917), that an “excise” on doing business in corporate form was not a direct tax requiring apportionment according to population even though measured by income). Most notable was the intuitively appealing conclusion in *Eisner v. Macomber*, 252 U.S. 189, 202-03 (1920) (Pitney, J., over four dissents), that a stock dividend was not “income” within the sixteenth amendment because it did not increase a shareholder's wealth. Justice Brandeis's learned dissent in *Eisner* cast cold water on this conclusion by suggesting, among other things, that a pro rata share of undistributed corporate profits could have been taxed as income to the stockholder, *id.* at 230-31 (Brandeis, J., dissenting); a perceptive commentator added that cash dividends and wages did not increase the taxpayer's net worth any more than stock dividends, because both involved the mere exchange of one asset for another of equal value. See Warren, *Taxability of Stock Dividends as Income*, 33 HARV. L. REV. 885, 887-88 (1920). For defense of the decision, see Clark, *Eisner v. Macomber and Some Income Tax Problems*, 29 YALE L.J. 735 (1920). See also the export-tax decisions noted *infra* note 145.

72. 251 U.S. 146 (1919).

73. *Id.* at 153.

74. *E.g.*, *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 507 (1871), discussed in D. CURRIE, *supra* note 16, at 314 n.192: the power to suppress insurrections “is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress.” Indeed, like that of Justice Hughes in *Shreveport*, Brandeis's opinion in *Hamilton* was rather modest on this score. Instead of making the broad argument traced in *Stewart v. Kahn*, he insisted

Hammer v. Dagenhart, to give to such powers during the time they did apply. Indeed Justice Brandeis's opinion does not really address the critical question why the prohibition of liquor was necessary and proper to the exercise of any of the war powers.⁷⁵

The statute stated that its purpose was to "conserv[e] the man power of the Nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy"⁷⁶—apparently on the theory that drunken citizens make poor soldiers and inefficient producers of military supplies.⁷⁷ The connection is real, but the implications are staggering: Congress may regulate anything that has an effect on the efficiency of the armed forces. That, like the broad construction of the tax power in *Doremus*, would seem to leave precious little beyond the reach of Congress.⁷⁸ And this time not a single Justice disagreed.⁷⁹

Finally, in the 1920 case of *Missouri v. Holland*,⁸⁰ the Court over two unexplained dissents upheld a treaty protecting migratory birds despite the assumption that Congress could not have accomplished the same result by statute.⁸¹ At one point, building upon an error made by Chief Justice Marshall in *Marbury v. Madison*, Holmes's opinion for the

only that the wartime emergency had not ended even though some time had passed since the end of the shooting. *Hamilton*, 251 U.S. at 158-63.

75. The opinion dealt also with the issue of confiscation, with an issue of statutory construction, and with the impact of the intervening ratification of the eighteenth amendment. *Hamilton*, 251 U.S. at 163-68. The validity of a prohibition statute during actual hostilities seems not to have been contested. See *id.* 160-61.

76. Act of Nov. 21, 1918, ch. 212, 40 Stat. 1045, 1046.

77. See *Hamilton*, 251 U.S. at 153. See also *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 142 (1948) (prohibition not only "conserved manpower and increased efficiency of production" but also "helped to husband the supply of grains and cereals depleted by the war effort").

78. Indeed, Justice Brandeis went out of his way in *Hamilton*, as had Holmes in his *Hammer* dissent, 247 U.S. at 278-79, and Day in *Doremus*, 249 U.S. at 93-94, to stress that neither the effect on local interests nor the motive of Congress was relevant to the scope of congressional power. *Hamilton*, 251 U.S. at 156, 161.

79. See also *Jacob Ruppert v. Caffey*, 251 U.S. 264, 299-301 (1920) (Brandeis, J., over four dissents) (allowing Congress to specify for ease of administration that any beverage containing 1/2% of alcohol was intoxicating); *Dakota Cent. Tel. Co. v. South Dakota*, 250 U.S. 163, 183 (1919) (White, C.J.) (upholding federal authority to take over telecommunications during wartime); *McKinley v. United States*, 249 U.S. 397, 399 (1919) (Day, J.) (upholding federal prohibition of brothel within five miles of military base as incidental to the raising and support of armies); *Selective Draft Law Cases*, 245 U.S. 366, 377-88 (1918) (White, C.J.) (impressively invoking history of compulsory military service to uphold military draft); 9 A. BICKEL & B. SCHMIDT, *supra* note 17, at 516-40 (discussing the war power cases).

80. 252 U.S. 416 (1920).

81. *Id.* at 431-35; see also *id.* at 435 (Van Devanter and Pitney, JJ., dissenting). Technically speaking, the challenge was to a federal statute implementing the treaty. Since the treaty was upheld, the statute was easily found a necessary and proper means of carrying it out. *Id.* at 432. For the interesting role played by Chief Justice White in the migratory-bird controversy, see 9 A. BICKEL & B. SCHMIDT, *supra* note 17, at 477-79.

Court came close to the horrifying suggestion that the treaty power was not limited by other provisions at all because "Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States."⁸² Later in the opinion, however, he based his holding on the conclusion that the treaty was within federal authority because the subject involved "a national interest of very nearly the first magnitude" that "can be protected only by national action in concert with another power."⁸³

It was just as well Holmes did not rest his holding upon the existence of a "national interest" alone; the Framers' careful enumeration of what they considered in the national interest suggested they did not wish to leave it to the judges to decide what powers the central government deserved.⁸⁴ More to the point was Holmes's insistence that the problem could be solved only by international action; the significant fact was that migratory birds were a legitimate matter of *international* concern. In light of tradition, as Justice Field had said in an earlier formulation that Holmes did not bother to quote,⁸⁵ that was what the treaty power was all about.

The conclusion that the treaty power was not restricted to matters about which Congress could legislate was reasonable enough in light of this tradition. Moreover, it had been foreshadowed not only by Field's definition but more strikingly by an ancient decision reaching the same

82. *Holland*, 252 U.S. at 433 (adding that "[i]t is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention"). Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) (relying in part on the "in Pursuance" language of the supremacy clause, U.S. CONST. art. VI, as support for judicial review of statutes). The reference to laws made in pursuance of "[t]his Constitution," U.S. CONST. art. VI (emphasis added), however, taken in connection with the contrasting mention of treaties made under the authority of the United States, *id.*, suggests, contrary to Holmes's suggestion, that supremacy was to be extended to treaties made under the Articles of Confederation, but not to statutes enacted thereunder. See *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 237 (1796) (giving supremacy to a pre-constitutional treaty), discussed in D. CURRIE, *supra* note 16, at 39-41; see also *id.*, at 72-73 (discussing *Marbury*). Fortunately, Holmes added that "[w]e do not mean to imply that there are no qualifications to the treaty-making power," appending the mysterious qualification that "they must be ascertained in a different way." *Holland*, 252 U.S. at 433.

83. *Holland*, 252 U.S. at 435.

84. Compare Governor Randolph's initial resolution proposing that Congress be given authority over all matters that could not be satisfactorily handled by the states, reprinted in 1 M. FAR-RAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (rev. ed. 1937) (Randolph's sixth resolution).

85. See *Geofroy v. Riggs*, 133 U.S. 258, 266 (1890): "That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations, is clear."

conclusion even as to the feeble Articles of Confederation.⁸⁶ Nevertheless, especially in its inattention to the enunciation of a limiting standard, *Holland* was yet another indication that the Justices were not prepared to do much to ensure the preservation of areas in which the central government could not exercise authority.⁸⁷ Rather they were content to surprise the country every now and then, as in *Hammer v. Dagenhart*, with a bolt out of the blue.⁸⁸

86. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 231-32 (1796), discussed in D. CURRIE, *supra* note 16, at 38-41.

87. See generally 2 C. WARREN, *supra* note 17, at 729-56 (noting Court decisions sustaining the expansion of Congress's powers under the commerce clause). For a conclusory argument that the treaty power went no further than Congress's legislative authority, see Boyd, *The Treaty-Making Power of the United States and Alien Land Laws in States*, 6 CALIF. L. REV. 279, 280-81 (1918); for the narrower contention that migratory birds were not a proper subject of international concern, see Thompson, *State Sovereignty and the Treaty-Making Power*, 11 CALIF. L. REV. 242, 247 (1923).

88. In three additional decisions the Court found that Congress had exceeded its enumerated powers. *Coyle v. Smith*, 221 U.S. 559, 566-68, 580 (1911) (Lurton, J.), was a statesmanlike opinion that relied on tradition and constitutional structure to resolve an issue as old as the Missouri Compromise, see D. CURRIE, *supra* note 16, at 263-73 (discussing *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857)). By reading the equal-footing doctrine, which originated in the uncited Northwest Ordinance, into article IV's provision for admission of "new States . . . into this Union," the Court in *Coyle* concluded that Congress could not, in admitting Oklahoma, forbid it to move its capital. In *United States v. Wheeler*, 254 U.S. 281, 298 (1920) (White, C.J.), the Court reaffirmed the Waite Court's conclusion, see D. CURRIE, *supra* note 16, at 402, that Congress had no power to punish private interference with civil rights. In the strikingly narrow decision in *Newberry v. United States*, 256 U.S. 232, 256-58 (1921) (McReynolds, J.), Justice Holmes cast the deciding vote to hold that Congress's power to regulate the "Manner of holding Elections" for members of Congress, U.S. CONST. art. I, § 4, did not allow it to regulate spending in a senatorial primary. Pitney and others persuasively objected that primaries were so closely related to the general election that Congress's power would be frustrated unless they were included. *Newberry*, 256 U.S. at 279-82 (Pitney, J., joined by Brandeis and Clarke, JJ., concurring in part); *id.* at 258-69 (White, C.J., concurring in part); see also *id.* at 258 (McKenna, J., concurring, reserving the question whether the seventeenth amendment cured the deficiency for future legislation). The rejection in *Newberry* of the argument that Congress's inherent authority over federal elections goes beyond article I, section 4—an argument suggested by Justice Miller in *Ex parte Yarbrough*, 110 U.S. 651, 660-64 (1884), discussed in D. CURRIE, *supra* note 16, at 394 n.174—contrasts sharply with the conclusion in *MacKenzie v. Hare*, 239 U.S. 299, 311 (1915) (McKenna, J.), that Congress could treat marriage to an alien as a voluntary relinquishment of citizenship:

[T]here may be powers implied, necessary or incidental to the expressed powers. As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries.

To which express powers this authority was incidental, the Court did not say. Cf. *The Chinese Exclusion Case*, 130 U.S. 581, 603-04 (1889) (finding Congress's power to exclude aliens inherent in the concept of national sovereignty), discussed in *Fuller I*, *supra* note 16, at 336-37. See Corwin, *Constitutional Law in 1920-21*, 16 AM. POL. SCI. REV. 22, 23-25 (1922) (agreeing with McReynolds that "Manner" of holding elections did not include selection of candidates, but approving the notion of inherent power over primary elections); THE FEDERALIST NO. 60 (A. Hamilton) (denying that "Manner" included "qualifications" for office, which were "fixed in the Constitution"), quoted in *Newberry*, 256 U.S. at 255-56; THE FEDERALIST NO. 59 (A. Hamilton) (defending the grant of power over elections on the ground that "every government ought to contain in itself the means of its

II. CONSTITUTIONAL LIMITATIONS

A. *The Civil War Amendments.*

1. *Economic Due Process.* Before White became Chief Justice, the Court had made substantive due process a painful reality by striking down a state law limiting bakers' hours in *Lochner v. New York*⁸⁹ and a federal law protecting the jobs of union members in *Adair v. United States*.⁹⁰ Nevertheless the Court had employed the doctrine quite sparingly.⁹¹ It continued to do so during the White period, and *Lochner* itself was discredited in the process.⁹²

Reaffirming *Adair* in *Coppage v. Kansas*⁹³ in 1915, a 6-3 majority invalidated a state law against contracts not to join unions, arguing that due process had the same meaning in the fourteenth amendment as in the fifth and that neither encouraging unions nor "leveling inequalities of fortune" was a legitimate end of the police power.⁹⁴ Apart from *Coppage* and one other striking decision discussed below,⁹⁵ however, invalidations on substantive due process grounds during the White years were hard to

own preservation") (emphasis in original); 9 A. BICKEL & B. SCHMIDT, *supra* note 17, at 967-82 (lamenting the "narrow literalism" and "historical rigidity" of the *Newberry* decision).

On the question of intergovernmental immunity as a limit on congressional powers, see Second Employers' Liability Cases, 223 U.S. 1, 55-59 (1912) (Van Devanter, J.), which failed to discuss analogous precedents that limited federal power to regulate or tax state action—e.g., *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861), discussed in D. CURRIE, *supra* note 16, at 245-47; *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1871), discussed in D. CURRIE, *supra* note 16, at 355—in holding that a state court could not refuse on grounds of public policy to entertain an action based on federal law. Cf. *Kenney v. Supreme Lodge*, 252 U.S. 411, 415-16 (1920) (Holmes, J.) (holding, despite an apparently contrary precedent, see *Anglo-American Provision Co. v. Davis Provision Co.*, 191 U.S. 373, 375 (1903), that the full faith and credit clause required one state to entertain a suit on another's judgment). For a ferocious application of *McCulloch v. Maryland's* converse doctrine preventing state interference with federal government functions, see *Johnson v. Maryland*, 254 U.S. 51, 55 (1920) (Holmes, J.) (state may not require post office driver to obtain operator's license: "The decision in [*McCulloch*] was not put upon any consideration of degree . . .").

89. 198 U.S. 45 (1905).

90. 208 U.S. 161 (1908).

91. See generally *Fuller I*, *supra* note 16, at 369-86; Bird, *The Evolution of Due Process of Law in the Decisions of the United States Supreme Court*, 13 COLUM. L. REV. 37, 50 (1913) (finding, especially in light of the decision in *Muller v. Oregon*, 208 U.S. 412 (1908), which upheld a limitation on the working hours of women, little likelihood that the clause would be employed against "soundly progressive legislation").

92. See generally 2 C. WARREN, *supra* note 17, at 729-56. The cases are considered in detail in 9 A. BICKEL & B. SCHMIDT, *supra* note 17, at 276-94, 580-609.

93. 236 U.S. 1, 11-14 (1915) (Pitney, J.).

94. *Id.* at 11, 15-19. Holmes dissented on the straightforward ground that both *Adair* and *Lochner* should be overruled. *Id.* at 27 (Holmes, J., dissenting). Joined by Hughes, Day—who had voted with the majority in *Adair*—tried to show in a separate dissent, *id.* at 27-42 (Day, J., dissenting), that there was a decisive distinction between discharging union members, as in the earlier case, and making a promise not to join a union a condition of continued employment.

95. See *infra* text accompanying notes 121-40 (discussing *Buchanan v. Warley*).

find. This was not the result of a drought of opportunity. In this period the Court upheld against due process objections a great variety of measures, ranging from the outlawing of billiard parlors to emergency rent control, and from progressive taxes to workmen's compensation laws and other laws making employers strictly liable for work-related injuries.⁹⁶

Most notably, after allowing Congress to require ten hours' wages for eight hours' work in 1917,⁹⁷ the Court in *Bunting v. Oregon*⁹⁸ buried *Lochner* without even citing it, upholding a conviction for employing a worker in a flour mill more than ten hours in a day without paying overtime.⁹⁹ Justice McKeima, who had been with the Court in *Lochner*, made no effort to show that a miller's work was more dangerous than a baker's, or indeed that it was dangerous at all. He found the law a reasonable health measure because the state legislature and courts had found it so, because their judgment was shared by many foreign countries, and because the record did not prove the contrary.¹⁰⁰ The contention that the overtime provision showed the measure to be a regulation of wages rather than of health—thus serving the goal of "leveling" declared illegitimate in *Coppage*—was dismissed by terming overtime pay a pen-

96. *Block v. Hirsh*, 256 U.S. 135, 158 (1921) (Holmes, J.) (emergency rent control); *Arizona Employers' Liability Cases*, 250 U.S. 400, 422-24, 430 (1919) (Pitney, J.) (absolute liability); *New York Cent. R.R. v. White*, 243 U.S. 188, 204-08 (1917) (Pitney, J.) (workmen's compensation); *Mountain Timber Co. v. Washington*, 243 U.S. 219, 235-46 (1917) (Pitney, J.) (workmen's compensation with compulsory insurance); *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 24-25 (1916) (White, C.J.) (progressive tax); *Murphy v. California*, 225 U.S. 623, 628-30 (1912) (Lamar, J.) (billiards); see also *LaBelle Iron Works v. United States*, 256 U.S. 377, 392-94 (1921) (Pitney, J.) (excess profits tax); *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389 (1914) (McKenna, J.) (regulation of insurance rates). These decisions represent only the tip of a large iceberg; nearly 200 substantive due process claims were rejected during the White years, while only about a dozen—mostly involving individual rate orders—were sustained. For one relatively significant example of the latter, see the 5-4 decision in *Adams v. Tanner*, 244 U.S. 590, 596-97 (1917) (McReynolds, J.) (striking down a prohibition on fees charged to job seekers by employment agencies).

97. *Wilson v. New*, 243 U.S. 332, 345-46 (1917) (White, C.J.) (stressing that the rule applied only until parties agreed on new contract, and that it would avoid disastrous rail strike). Day, McReynolds, Pitney, and Van Devanter dissented, the last two partly on the basis of substantive due process. *Id.* at 383. The controversy attracted widespread academic attention. See, e.g., Burdick, *The Adamson Law Decision*, 2 CORNELL L.Q. 320 (1917) (suggesting that Court's rationale would justify a great deal of wage regulation as such); Lauchheimer, *The Constitutionality of the Eight-Hour Railroad Law*, 16 COLUM. L. REV. 554 (1916) (noting absence of any health justification and rejection of analogous argument about interruption of commerce in *Adair*, and concluding that the law served only the "leveling" purpose condemned in *Coppage*); Powell, *The Supreme Court and the Adamson Law*, 65 U. PA. L. REV. 607 (1917).

98. 243 U.S. 426 (1917) (McKenna, J.).

99. White, Van Devanter, and McReynolds dissented. *Id.* at 439. For contemporaneous understanding that *Lochner* was dead, see, e.g., Powell, *Decisions of the Supreme Court of the United States on Constitutional Questions II, 1914-1917*, 12 AM. POL. SCI. REV. 427, 430 (1918).

100. *Bunting*, 243 U.S. at 438-39. Cf. Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 HARV. L. REV. 353, 370-72 (1916) (arguing that new understanding of industrial dangers had undermined basis of *Lochner*).

alty imposed by Congress to enforce the hour limitation.¹⁰¹

As indicated by the repeated dissents of McReynolds, Van Devanter, White, and to a lesser extent McKenna, the concept of substantive due process was far from dead.¹⁰² Like the notion of reserved state powers, however, it was able to rouse itself only on rare and unpredictable occasions.¹⁰³

101. *Bunting*, 243 U.S. at 436-37. Note also the distinction drawn between laws designed to protect health and laws regulating workers' contracts in *Lochner*, 198 U.S. at 57-59. In *Wilson v. New*, 243 U.S. 332, 342-43 (1917), a law increasing wages had been upheld—over dissents drawing the same distinction—only by emphasizing the separate purpose of preventing a disruptive strike.

102. All four of these Justices dissented in *Black v. Hirsh*, 256 U.S. 135, 158 (1921), *Arizona Employer's Liability Cases*, 250 U.S. 400, 434, 440 (1919), and *Mountain Timber Co. v. Washington*, 243 U.S. 219, 246 (1917); all but McKenna dissented in *Bunting*, 243 U.S. at 439; Van Devanter, Pitney, McReynolds, and Day—the latter two on commerce clause grounds—dissented in *Wilson v. New*, 243 U.S. 332, 364, 373, 388 (1917); Van Devanter, White, and Lamar—before McReynolds's appointment—dissented in *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 418 (1914). See also *Stettler v. O'Hara*, 243 U.S. 629 (1917) (affirming—by equally divided Court, Brandeis not participating—decisions upholding minimum wage laws). Agreeing with Professor Powell's contemporaneous speculation in *The Constitutional Issue in Minimum-Wage Legislation*, 2 MINN. L. REV. 1, 1-2 & n.2 (1917), Professor Bickel thought it "quite plain[]" that Pitney had voted with White, Van Devanter, and McReynolds to strike down the minimum-wage law, adding that the vote had been 5-4 against validity before the death of Lamar. 9 A. BICKEL & B. SCHMIDT, *supra* note 17, at 598-602. However, although Pitney had been less receptive than the unpredictable McKenna, see, e.g., *id.* at 285, to social legislation in both *Adams v. Tanner*, 244 U.S. 590 (1917), and *Wilson v. New*, 243 U.S. 332 (1917), in other cases McKenna took the more restrictive view. Moreover, it was McKenna who took such pains in *Bunting* to establish that the law there upheld regulated hours rather than wages and who, after Pitney had left the Court, cast the decisive vote to strike down minimum wages in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923). For these reasons Professor Powell seems right in concluding that the fourth vote against minimum wages in *Stettler* was more probably cast by McKenna. See Powell, *The Judiciality of Minimum-Wage Legislation*, 37 HARV. L. REV. 545, 549 (1924). See generally 9 A. BICKEL & B. SCHMIDT, *supra* note 17, at 253 (concluding that even during the early White years, when Progressives were hailing the perceived liberality of the Court, "it was in literal truth only that the day of the Brewers and the Peckhams was over. Doctrinally they lived on, and were to flourish again.").

103. Similarly, the overwhelming percentage of economic measures survived challenges under the equal protection, contract, and taking provisions during the White period.

In the equal protection field the most notable exception without civil rights overtones was *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920) (Pitney, J.), finding no plausible basis for a provision exempting companies doing only out-of-state business from a tax on income earned by residents outside the state. Brandeis and Holmes dissented, arguing that the measure was a reasonable means of encouraging incorporation of outside businesses in the state. *Id.* at 418-19 (Brandeis and Holmes, JJ., dissenting). See also *infra* note 140 (discussing *Truax v. Raich*); 9 A. BICKEL & B. SCHMIDT, *supra* note 17, at 294-300, 640-43 (noting a modest revival of the clause, which had essentially been abandoned until 1914).

As foretold by *Manigault v. Springs*, 199 U.S. 473, 480 (1905) (prohibition against the impairment of contracts does not prevent a state from properly exercising its police powers), discussed in *Fuller I*, *supra* note 16, at 334-35, the Court over four dissents—McKenna, White, Van Devanter, and McReynolds—permitted rent control legislation to override an existing contract on the ground that the contract clause had not been meant to interfere with the police power. *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170, 198 (1921) (Holmes, J.). Moreover, the old learning that grants would be interpreted to reserve the power of eminent domain, *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 531-32 (1848), discussed in *D. CURRIE*, *supra* note 16, at 213-15, was super-

2. *Civil Rights.* There was no doubt that, as Justice Miller had said in the *Slaughterhouse Cases*, the central purpose of the Civil War amendments had been to stamp out official discrimination against blacks.¹⁰⁴ Apart from the striking jury-selection cases of the 1880's,¹⁰⁵ however, and the analogous early case of *Yick Wo v. Hopkins*,¹⁰⁶ the Supreme Court had done very little to further this purpose on the few occasions before 1910 that gave it an opportunity to do so.¹⁰⁷ The White years witnessed a modest improvement in this regard.¹⁰⁸

One of the things the Fuller Court had done was to uphold, as an exercise of Congress's power to enforce the thirteenth amendment, a statute making it a federal crime to return a person forcibly to a state of

seded by the view that this power, like the police power, could not be conveyed away. Contributors to the Pa. Hosp. v. City of Philadelphia, 245 U.S. 20, 23-24 (1917) (White, C.J.); see also Stone v. Mississippi, 101 U.S. 814, 817 (1879) (discussing police power), discussed in D. CURRIE, *supra* note 16, at 379-82. Decisions finding particular contracts impaired, however, were still to be found. E.g., Grand Trunk W. Ry. v. City of South Bend, 227 U.S. 544, 558-59 (1913) (Lamar, J.) (franchise to build tracks); Central of Ga. Ry. v. Wright, 248 U.S. 525 (1919) (Holmes, J.) (tax exemption); see also 9 A. BICKEL & B. SCHMIDT, *supra* note 17, at 300-05, 643-48 (finding the principal bite of the clause in public contract cases).

Police power considerations similar to those governing the due process decisions tended also to determine for the White Court the crucial distinction between regulation and the taking of property, for which, under decisions of the Fuller Court, see *Fuller I*, *supra* note 16, at 370-75, the fourteenth amendment required even the states to give compensation. On the one hand, for example, Hadacheck v. Sebastian, 239 U.S. 394 (1915) (McKenna, J.), relied on traditional nuisance principles to sustain zoning that kept a brickyard out of an urban area. On the other hand, the Court struck down as an uncompensated taking a requirement that unoccupied upper berths on trains be left closed, concluding that the rule was not a health measure but merely served to promote the convenience of passengers below. Chicago, M. & St. P.R.R. v. Wisconsin, 238 U.S. 491, 498 (1915) (Lamar, J., over dissents by Holmes and McKenna). Finally, the Court continued essentially to equate the implicit requirement that a taking be for a public use with a requirement that it serve a legitimate public purpose, thus adding to the trend of making as many constitutional questions as possible depend upon the flexible extraconstitutional notion of the police power. See, e.g., Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S. 30, 32 (1916) (Holmes, J.) (upholding condemnation by private company to generate electric power: "If that purpose is not public we should be at a loss to say what is. The inadequacy of use by the general public as a universal test is established."); Noble State Bank v. Haskell, 219 U.S. 104, 110 (1911) (Holmes, J.) (upholding assessment to set up fund for deposit insurance: "[I]t is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use.").

104. 83 U.S. (16 Wall.) 36, 70-72 (1873), discussed in D. CURRIE, *supra* note 16, at 342-43.

105. Neal v. Delaware, 103 U.S. 370 (1881); Strauder v. West Virginia, 100 U.S. 303 (1880).

106. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

107. See D. CURRIE, *supra* note 16, at 383-90, 393-402; see generally 9 A. BICKEL & B. SCHMIDT, *supra* note 17, at 729-990; *Fuller I*, *supra* note 3, at 369-70; Schmidt, *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia*, 61 TEX. L. REV. 1041 (1982).

108. See 9 A. BICKEL & B. SCHMIDT, *supra* note 17, at 725-27 (describing decisions of this period as "symbols of hope" and concluding that they "mark the first time . . . that the Supreme Court opened itself in more than a passing way to the promise of the Civil War amendments").

servitude.¹⁰⁹ In *Bailey v. Alabama*,¹¹⁰ in 1911, the Court went further in an opinion by Justice Hughes: the state could not make it a crime to break a contract to work.¹¹¹

The Fuller Court's decision had held it immaterial that the employee had agreed to work; what mattered was that he was compelled to do so against his will at the time of performance.¹¹² *Bailey* took the next step: "[T]he State could not avail itself of the sanction of the criminal law to supply the compulsion any more than it could use or authorize the use of physical force."¹¹³ That this was no foregone conclusion was brought home by Justice Holmes's dissenting observation that the decision seemed to outlaw all contracts for labor: "If the mere imposition of such consequences as tend to make a man keep to his promise is the creation of peonage when the contract happens to be for labor, I do not see why the allowance of a civil action is not, as well as an indictment ending in fine."¹¹⁴ The challenge Holmes posed was apt, even if his resolution left too much room for reinstating forced labor; yet the majority did not respond.¹¹⁵

109. *Clyatt v. United States*, 197 U.S. 207 (1905) (Brewer, J.).

110. 219 U.S. 219 (1911).

111. The statute nominally required a fraudulent intent at the time of the contract. However, because the mere fact of breach was made prima facie evidence of such intent and there was no practical way to rebut it, the Court treated the case as if the breach itself had been made criminal. *Id.* at 233-38.

112. *Clyatt v. United States*, 197 U.S. 207, 215 (1905); see also *id.* at 216: "This amendment denounces a status or condition, irrespective of the manner or authority by which it is created." The point was reiterated in *Bailey*, 219 U.S. at 242-43. To hold that individuals could sell themselves into slavery would seem to contradict the textual provision that slavery should not "exist within the United States," and "involuntary servitude" takes on color from the adjacent reference to slavery.

113. *Bailey*, 219 U.S. at 244.

114. *Id.* at 246 (Holmes, J., joined by Lurton, J., dissenting). There is an obvious connection between this reasoning and Holmes's bad-man theory of the law. See O.W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 173-75 (1920) (equating penalties with taxes and arguing that "[t]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else").

115. That damages for breach of a work contract were permissible was acknowledged in both cases. See *Bailey*, 219 U.S. at 242-43; *Clyatt v. United States*, 197 U.S. 207, 215 (1905); 9 A. BICKEL & B. SCHMIDT, *supra* note 17, at 869, 888-900 (finding Holmes oblivious here both to "the practical consequences" of equating criminal punishment with damages and to "questions of degree, which he liked to say were pretty much all of law," *id.* at 869, and finding support for the decision in the traditional reluctance to criminalize or prohibit the breach of a labor contract, *id.* at 888-900); see also *United States v. Reynolds*, 235 U.S. 133 (1914) (Day, J.) (invalidating use of forced labor to pay off debt incurred when employer paid criminal fine, despite amendment's exception for criminal sanctions).

Notwithstanding these decisions, the Court declined to apply the amendment literally to situations foreign to the purposes of its authors. First, in *Butler v. Perry*, 240 U.S. 328 (1916) (McReynolds, J.), partly on the basis of an effective survey of practices under the antislavery provisions of the Northwest Ordinance and of state constitutions, the Court unanimously upheld a requirement that able-bodied citizens perform road work, adding that "the term involuntary servitude was in-

The unanimous decision in *Guinn v. United States*,¹¹⁶ striking down as a proxy for racial qualifications a literacy test applicable only to those whose ancestors had been ineligible to vote in 1866, showed that the Court took the fifteenth amendment as seriously as it had taken the thirteenth in *Bailey*.¹¹⁷ More generally, *Guinn* ranks with the great test-oath cases of 1867¹¹⁸ as healthy evidence that, despite Marshall's understandable qualms about determining legislative motive,¹¹⁹ the Court will sometimes infer a forbidden purpose when it is unable to perceive a legitimate one—as it must if constitutional limitations are not to be evaded at pleasure.¹²⁰ More doctrinally interesting, however, was the 1917 case of *Buchanan v. Warley*, in which the Court gave surprisingly broad scope to the *fourteenth* amendment in this field by unanimously invalidating an ordinance requiring residential segregation by race.¹²¹

From the modern perspective, *Buchanan* was a peculiar case in two respects. First, the suit was brought not by a black person seeking to live in an area reserved for whites, but by a white landowner seeking to enforce a contract of sale against a recalcitrant black buyer who declined to perform in reliance on the ordinance.¹²² Second, the decision was based not on the equal protection clause but on substantive due process: the

tended to cover those forms of compulsory labor akin to African slavery . . . , and certainly was not intended to interdict enforcement of those duties which individuals owe to the State, such as services in the army, on the jury, etc." *Id.* at 332-33. As foreshadowed in the passage just quoted, two years later the Court without dissent rejected a thirteenth amendment attack on the military draft. *Selective Draft Law Cases*, 245 U.S. 366 (1918) (White, C.J.). Similar historical evidence was cited in connection with the distinct question whether the measure fell within the power to raise armies, but the servitude issue was treated as obvious, and the decisive precedent of the *Butler* case was not cited. *Id.* at 390.

116. 238 U.S. 347 (1915) (White, C.J.).

117. *Id.* at 363 (a statesmanlike opinion by a former Confederate soldier emphasizing that a contrary holding would make the amendment "wholly inoperative because susceptible of being rendered inapplicable by mere forms of expression . . . resting upon no discernible reason other than the purpose to disregard the prohibitions of the Amendment"). See generally 9 A. BICKEL & B. SCHMIDT, *supra* note 17, at 908-90 (showing, inter alia, how the Court strained to resolve a serious remedial question in a way that enabled it to reach the merits); Monnet, *The Latest Phase of Negro Disfranchisement*, 26 HARV. L. REV. 42 (1912) (previewing *Guinn*).

118. *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867), discussed in D. CURRIE, *supra* note 16, at 292-96; *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867), discussed in D. CURRIE, *supra* note 16, at 292-96.

119. See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 129-30, discussed in D. CURRIE, *supra* note 16, at 129.

120. For analogous inferences of impermissible *administrative* purposes, see *Neal v. Delaware*, 103 U.S. 370, 397 (1881) (uniform absence of blacks from juries), and *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (uniform denial of permits to Chinese), both discussed in D. CURRIE, *supra* note 16, at 386-87. Contrast the Court's reluctance to look behind a pretextual exercise of federal tax power in *United States v. Doremus*, 249 U.S. 86 (1919), discussed *supra* notes 65-71 and accompanying text.

121. *Buchanan v. Warley*, 245 U.S. 60 (1917) (Day, J.).

122. *Id.* at 72-73.

ordinance took property of the white landowner without due process of law.¹²³

At first glance one may be tempted to explain the invocation of due process as a clever means of circumventing the general rule forbidding a litigant to assert the constitutional rights of third parties, for it enabled Justice Day to reject an objection to standing on the express ground that the seller was asserting his own property rights and not the interests of potential black residents.¹²⁴ This did not explain, however, why the suit had been brought by a white property owner in the first place.

The fact that the defendant was black and the existence of a contractual provision releasing the buyer from his obligation if he could not occupy the premises suggest collusion to manufacture a case in which the defendant could be relied upon to take a dive.¹²⁵ An examination of the precedents, however, reveals an even more pressing reason for choosing such an unlikely plaintiff. Odd as it may seem in retrospect, the seller's chances of prevailing on the merits were substantially better than those of the immediate victims of racial discrimination. The ordinance did not impose disabilities on blacks alone; it forbade members of either race to move onto a block dominated by members of the other.¹²⁶ Comparable measures touching sexual relations and transportation having passed muster in the Supreme Court on the ground that they imposed equal disabilities on both races,¹²⁷ an equal protection challenge in *Buchanan* faced almost certain disaster on the rocks of the separate-but-equal doctrine.¹²⁸

123. *Id.* at 74-81.

124. *Id.* at 72-73.

125. *See id.* at 69-70; 9 A. BICKEL & B. SCHMIDT, *supra* note 17, at 789, 805 (giving additional facts bearing on this question). It was remarkable enough that the Justices did not throw the case out of court, as Holmes came close to suggesting in an undelivered dissent, *reprinted in id.* at folio following p. 592. *Cf.* *Lord v. Veazie*, 49 U.S. (8 How.) 251, 254-56 (1850) (dismissing collusive action brought by parties who had no real dispute and whose interests were adverse to others not parties to the suit), *discussed in* D. CURRIE, *supra* note 16, at 263 n.197. *But cf.* *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 147 (1810) (reaching decision on the merits, but suggesting that case may have been collusively brought), *discussed in* D. CURRIE, *supra* note 16, at 128-36.

126. *Buchanan*, 245 U.S. at 70-71.

127. *Plessy v. Ferguson*, 163 U.S. 537 (1896), *discussed in Fuller I*, *supra* note 16, at 369-70; *Pace v. Alabama*, 106 U.S. 583 (1883), *discussed in* D. CURRIE, *supra* note 16 at 387-90. Justice Day distinguished *Plessy* on the ground that the measure there involved had not deprived blacks of the right to transportation and had been upheld as separate but equal. *Buchanan*, 245 U.S. at 79.

128. *See* Hunting, *The Constitutionality of Race Distinctions and the Baltimore Negro Segregation Ordinance*, 11 COLUM. L. REV. 24 (1911); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 9-10 (1959). A few years before *Buchanan*, in *McCabe v. Atchison, T. & S.F. Ry.*, 235 U.S. 151, 161-63 (1914) (Hughes, J.), the Court had taken a step that Professor Schmidt views as a challenge to the whole structure of Jim Crow laws. 9 A. BICKEL & B. SCHMIDT, *supra* note 17, at 775-84. It did so by insisting, in a case ultimately dismissed for want of standing, that separate facilities in fact be equal: if luxury train facilities were

The due process attack, at the time, was far more promising. At least since the 1898 rate case of *Smyth v. Ames*,¹²⁹ it had been the law that any measure arbitrarily impairing property interests offended the due process clause.¹³⁰ The right to sell, as the *Buchanan* Court concluded, was a normal concomitant of property.¹³¹ It remained only to demonstrate that the segregation ordinance imposed a limitation on that right not justified by the ubiquitous police power.

A similar attack on a statute forbidding integrated teaching in private schools had failed in *Berea College v. Kentucky* in 1908.¹³² The reasoning of that opinion, however, seemed to encourage an attack on the residential segregation in *Buchanan*. The *Berea* Court had taken great care to explain that the complaining school was a corporation, that the state had reserved the right to revise its charter, and that the possible invalidity of the statute as applied to individuals was irrelevant. *Buchanan* emphasized all this in distinguishing *Berea*.¹³³

On the police power question Justice Day was brief. Though the city's professed goal of protecting the public peace by preventing racial conflicts was a legitimate one, it "cannot be promoted by depriving citizens of their constitutional rights and privileges."¹³⁴ This was circular; as the Court had often held, if the police power justification was adequate there was no deprivation of constitutional rights.¹³⁵ More to the point was the observation that the ordinance was not well tailored either to achieving racial peace or to preserving property values; it fell far short of forbidding blacks and whites to come into allegedly dangerous proxim-

provided for whites, they must be provided for blacks as well. *But see* *Cumming v. Richmond County Bd. of Educ.*, 175 U.S. 528 (1899) (Harlan, J.) (refusing to enjoin spending for white high school largely on remedial ground that injunction would not benefit black plaintiffs, but also expressing doubt whether equal protection required that blacks as well as whites have public high school). The argument has been made that *Buchanan* was distinguishable from *Pace v. Alabama*, 106 U.S. 583 (1883), and *Plessy v. Ferguson*, 163 U.S. 537 (1896), because segregation was more difficult to justify in the context of residence than in sexual relations or in transportation, *see* Note, 18 COLUM. L. REV. 147, 148-50 (1918); that analysis overlooks the fact that separation had been upheld because it was not inequality at all and thus required no justification.

129. 169 U.S. 466 (1898).

130. *See Fuller I, supra* note 16, at 374-75, 384.

131. *Buchanan*, 245 U.S. at 74.

132. 211 U.S. 45 (1908) (Brewer, J.).

133. *Buchanan*, 245 U.S. at 79. The essence of the *Berea* holding was thus that the right to teach white and black children together had never been among the corporation's property rights. *See* 9 A. BICKEL & B. SCHMIDT, *supra* note 17, at 731-32.

134. *Buchanan*, 245 U.S. at 80-81.

135. *See supra* text accompanying notes 87-103; *Fuller I, supra* note 16, at 378-82; D. CURRIE, *supra* note 16, at 369-78.

ity,¹³⁶ and it allowed property to be “acquired by undesirable white neighbors or put to disagreeable though lawful uses.”¹³⁷ In short, the Court seems to have held the ordinance invalid because it was a poorly designed means of achieving legitimate ends.¹³⁸

It is obvious that the Court indulged in far stricter scrutiny of the relation between ends and means in *Buchanan* than it had in most other substantive due process or equal protection cases, and that it did so without saying why.¹³⁹ It is remarkable that in 1917 it was prepared to do so unanimously, though obliquely, in the service of racial justice.¹⁴⁰

136. “[I]t is to be noted . . . that the employment of colored servants is permitted, and nearby residences of colored persons not coming within the blocks . . . are not prohibited.” *Buchanan*, 245 U.S. at 81.

137. *Id.* at 82.

138. This disposition raised the interesting question whether the segregation ordinance in *Plessy v. Ferguson*, 163 U.S. 537 (1896), would have survived attack on the ground that it took the railroad’s property without due process, but no such case reached the Supreme Court.

139. See *supra* text accompanying notes 89-103; *Fuller I*, *supra* note 16, at 378-82. The basis of Holmes’s aborted dissent, see 9 A. BICKEL & B. SCHMIDT, *supra* note 17, at folio following p. 592, was that the ordinance did not infringe the plaintiff’s property rights. See also *id.* at 815 (adding that Day himself had dissented from both *Lochner* and *Coppage*). This contrast seems to have escaped the notice of Professor Roche, who explained *Buchanan* on the basis that “entrepreneurial liberty was even more sacrosanct than racism.” Roche, *Civil Liberty in the Age of Enterprise*, 31 U. CHI. L. REV. 103, 123 (1963).

140. See 9 A. BICKEL & B. SCHMIDT, *supra* note 17, at 813-17 (arguing from the opinion’s pointed references to the racial purpose of the amendment that, whatever the technical basis of *Buchanan*, “it was the element of racial discrimination touching property rights and not a neutral conception of property rights that produced the decision”). See also *Truax v. Raich*, 239 U.S. 33 (1915) (Hughes, J.), which employed the equal protection clause for the first time to strike down discrimination against aliens as such—as contrasted with the narrower racial discrimination against Chinese in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). “The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself . . .” *Truax*, 239 U.S. at 41. The implication seemed to be that a simple preference for one group over another was an illegitimate goal under the clause. See Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1712-13 (1984). Later the same term, when a state was allowed to discriminate against aliens in public-works employment on the basis of a decision holding the *Lochner* rule against hour limitations inapplicable to such employees, *Truax* was not mentioned. *Heim v. McCall*, 239 U.S. 175 (1915) (McKenna, J.) (citing *Atkin v. Kansas*, 191 U.S. 207 (1903), discussed in *Fuller I*, *supra* note 16, at 380 n.334). For an early recognition that *Atkin* might not be on point see Powell, *Decisions of the Supreme Court of the United States on Constitutional Questions III, 1914-1917*, 12 AM. POL. SCI. REV. 640, 640-41 (1918) (doubting that the result would have been the same if the state had excluded Methodists or Republicans). *Truax* itself, moreover, had ignored a unanimous decision rendered earlier the same year dismissing as “frivolous” a fourteenth-amendment attack on a law forbidding aliens to own land. See *Toop v. Ulysses Land Co.*, 237 U.S. 580, 582-83 (1915) (White, C.J.). For less progressive approaches to civil rights in the area of race relations itself see the unanimous decision in *Jones v. Jones*, 234 U.S. 615, 616-19 (1914) (Lurton, J.) (conclusorily rejecting an equal protection challenge to a limitation on inheritance by former slaves, without identifying any justification for the rule), and see *infra* note 145 (discussing *South Covington & C.S. Ry. v. Kentucky*).

Cutting across both economic and civil liberty categories was the important decision in *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 288-89 (1913) (White, C.J.), which unanimously and painstakingly buried the recurrent notion that actions of state officials who misuse au-

thority granted to them by the state were not state action for fourteenth amendment purposes—without mentioning the unanimous and apparently contradictory fifth amendment holding in *Hooe v. United States*, 218 U.S. 322, 336 (1910) (Harlan, J.), that the unauthorized taking of private property by a federal officer “is not the act of the Government.”

In the field of procedural due process, the White Court for the first time held that a state could not delegate legislative authority to private individuals, *Eubank v. City of Richmond*, 226 U.S. 137, 142-45 (1912) (McKenna, J.) (invalidating authorization of two-thirds of property owners to set building line for entire block); *but cf.* *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526, 531 (1917) (Clarke, J.) (allowing neighbors to waive billboard ban and distinguishing *Eubank* by asserting distinction between imposing and removing restrictions), and struck down several criminal laws as so vague that they did not give fair warning of what they forbade, *e.g.*, *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89-93 (1921) (White, C.J.) (“unreasonable” prices); *International Harvester Co. v. Kentucky*, 234 U.S. 216, 221-24 (1914) (Holmes, J.) (sales above “real value”); *see also* *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 289 (1920) (McReynolds, J., with three Justices dissenting) (invoking inadequate precedents for otherwise-unexplained conclusion that due process required judicial review by court exercising “independent judgment as to both law and facts” of rate order challenged as confiscatory); *Dodge v. Osborn*, 240 U.S. 118, 122 (1916) (White, C.J.) (conclusory dismissing due process objection to ban on injunctions against collecting federal taxes); *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445-46 (1915) (Holmes, J.) (giving thoughtful explanation of why no hearing was required before general increase in property valuation). For discussions of *Ben Avon*, *see* 9 A. BICKEL & B. SCHMIDT, *supra* note 17, at 609-30 (pointing out that the rate had been set, *see Fuller I, supra* note 16, at 371-74 (discussing *Chicago, M. & St. P. Ry. v. Minnesota*, 134 U.S. 418 (1890)), without a full quasi-judicial hearing); L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 636-53 (1965) (noting that impact of *Ben Avon* has been greatly mitigated by later decisions); Brown, *The Functions of Courts and Commissions in Public Utility Rate Regulation*, 38 HARV. L. REV. 141, 148-49 (1924) (arguing that despite “legislative” effect of rates, administrative agency had afforded adequate quasi-judicial hearing); Freund, *The Right to a Judicial Review in Rate Controversies*, 27 W. VA. L.Q. & B. 207, 210-11 (1921) (arguing that *de novo* review entailed judicial assumption of administrative functions).

For the conflict of laws aspects of due process, *see* *International Harvester Co. v. Kentucky*, 234 U.S. 579, 582-83 (1914) (Day, J.), and the more elaborate *Riverside & Dan River Cotton Mills v. Menefee*, 237 U.S. 189, 194-95 (1915) (White, C.J.), both of which read into the due process clause, as a limitation on the personal jurisdiction of state courts over foreign corporations, the “doing business” requirement that had been developed in other contexts). *See also* *Flexner v. Farson*, 248 U.S. 289 (1919) (Holmes, J.) (holding that service on an individual’s former agent was inadequate and more questionably suggesting that an individual might never become suable simply by doing business in the state); *Kane v. New Jersey*, 242 U.S. 160, 167 (1916) (Brandeis, J.) (relying on a state’s interest in public safety to uphold a requirement that a nonresident motorist appoint a local agent to accept service of process); *United States v. Bennett*, 232 U.S. 299, 304-07 (1914) (White, C.J.) (unanimously holding territorial limit on taxation that fourteenth amendment imposes on the states, *see Fuller I, supra* note 16, at 378 n.317, inapplicable to United States despite indistinguishable terms of fifth amendment). Both *New York Life Ins. Co. v. Head*, 234 U.S. 149, 162-65 (1914) (White, C.J.), and *New York Life Ins. Co. v. Dodge*, 246 U.S. 357, 373-77 (1918) (McReynolds, J., over a powerful Brandeis dissent for four Justices), applied the territorialist doctrine of *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), *discussed in Fuller I, supra* note 16, at 375-78, to strike down the application of Missouri law to contracts that the Court found had been made in New York. In sharp and unexplained contrast with the decisions just noted, and with the Court’s unexplained and confusing use of the full faith and credit clause as a limitation on choice of law in *Supreme Council of Royal Arcanum v. Green*, 237 U.S. 531, 541-46 (1915) (White, C.J.) (power of fraternal insurance society to raise rates was governed solely by law of its state of incorporation), the Court in *Kryger v. Wilson*, 242 U.S. 171, 176 (1916) (Brandeis, J., for a unanimous Court), flatly stated that a possibly “inistaken application of doctrines of the conflict of laws in deciding that the cancellation of a land contract is governed by the law of the *situs* instead of the place of making and performance” was “purely a question of local common law . . . with which this court is not concerned.” *See* Dodd,

B. *Admiralty and Commerce.*

In *Southern Pacific Co. v. Jensen*,¹⁴¹ over four vehement dissents, the Court held that a state workmen's compensation law could not constitutionally be applied to a longshoreman who had met his death while unloading an interstate ship on navigable waters.¹⁴² "If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute," wrote Justice McReynolds, "other States may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded."¹⁴³

The stress on uniformity in *Jensen* is highly reminiscent of the *Cooley* doctrine, which the Court had recently wakened from a twenty-year slumber¹⁴⁴ as a test for the validity of state laws that arguably infringed Congress's authority to regulate interstate commerce.¹⁴⁵ The Court based its decision, however, not on the commerce clause but on article

The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws, 39 HARV. L. REV. 533, 556, 560 (1926) (conceding that "it certainly cannot be said there are as yet any settled and sharply defined doctrines as to the relation between constitutional law and conflicts," but adding that the Court had "committed itself to . . . making itself, to some extent, a tribunal for bringing about uniformity in the field of conflicts"). For an excellent discussion of the history of personal jurisdiction over foreign corporations down to the *Riverside* decision see G. HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW 77-87 (1918). For refutation of *Flexner's* suggestion that the power to exclude was the sole basis of a state's power over corporations engaged in business within their borders, see *id.* and Scott, *Jurisdiction over Nonresidents Doing Business Within a State*, 32 HARV. L. REV. 871 (1919), both pointing to decisions involving corporations engaged solely in interstate commerce.

141. 244 U.S. 205 (1917).

142. *Id.* at 217-18; see also *id.* at 218-55 (Holmes and Pitney, JJ., joined by Brandeis and Clarke, JJ., dissenting).

143. *Id.* at 217.

144. See *Fuller I*, *supra* note 16, at 364-69 (noting the demise during the Fuller years (1889-1910) of the *Cooley* "uniformity test").

145. See, for example, *Port Richmond & B.P. Ferry Co. v. Board of Chosen Freeholders*, 234 U.S. 317 (1914) (Hughes, J.), in which the Court equated the test laid down in *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1852) (Curtis, J.) (upholding local pilotage rules because subject did not require uniformity), discussed in D. CURRIE, *supra* note 16, at 230-34, with the common distinction between direct and indirect burdens on commerce. Unlike "those subjects which require a general system or uniformity of regulation," the Court held, the question of ferry rates from one state to another "presents a situation essentially local requiring regulation according to local conditions." *Port Richmond*, 234 U.S. at 330, 332. For other examples of similar reasoning, see *The Minnesota Rate Cases*, 230 U.S. 352, 399-403 (1913) (Hughes, J.) (upholding local railroad rates that arguably diverted interstate traffic), and *Pennsylvania Gas Co. v. Public Serv. Comm'n*, 252 U.S. 23, 29-31 (1920) (Day, J.) (upholding state regulation of rates charged for gas in interstate sale to ultimate consumer). With the *Port Richmond* case, compare *City of Sault Ste. Marie v. International Transit Co.*, 234 U.S. 333 (1914), also announced by Justice Hughes the same day, which struck down a sanction for operating a ferry across international waters without a license, not be-

III's provision extending federal judicial power to "all Cases of admiralty and maritime Jurisdiction."¹⁴⁶ Under that clause, said McReynolds, "no [state] legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations."¹⁴⁷

cause the Court found any difference between foreign and interstate commerce, but because it considered prohibition a more severe burden on commerce than mere rate regulation.

The police power, not surprisingly, also continued to play a prominent part in the more than one hundred decisions of the White period respecting the negative effect of the commerce clause upon state laws. For example, in a third case decided on the same day as *Port Richmond* and *City of Sault Ste. Marie*, Justice Hughes spoke essentially in police power terms when he upheld a state law requiring that locomotives be equipped with electric headlights; Hughes rested his decision on "the settled principle that . . . the States are not denied the exercise of their power to secure safety in the physical operation of railroad trains . . . , even though such trains are used in interstate commerce." *Atlantic Coast Line R.R. v. Georgia*, 234 U.S. 280, 291 (1914); see also *Hendrick v. Maryland*, 235 U.S. 610, 622-24 (1915) (McReynolds, J.) (invoking police power and need for road repair in concluding that requirement of vehicle registration and the attendant fee were not "direct" burdens on commerce). That the police power was not an invariable trump, however, was confirmed when—over three pointed dissents seeming to argue just that—the Court struck down a state safety law that would allegedly have required that an interstate train stop at 124 grade crossings in 123 miles, which would have more than doubled the time of the journey. *Seaboard Air Line Ry. v. Blackwell*, 244 U.S. 310, 312-13 (1917) (McKenna, J.) (once again terming the burden on commerce "direct"). This decision had been foreshadowed when the Fuller Court dismissed a previous attack on the same law for want of sufficient specificity as to the burden on commerce. *Southern Ry. v. King*, 217 U.S. 524, 533-34, 537 (1910), discussed in *Fuller I*, *supra* note 16, at 367-68; see also *South Covington & C.S. Ry. v. City of Covington*, 235 U.S. 537, 547-49 (1915) (Day, J.) (upholding certain safety regulations as applied to interstate streetcars but finding others to be "unreasonable" and thus "direct" burdens); *South Covington & C.S. Ry. v. Kentucky*, 252 U.S. 399, 403-04 (1920) (McKenna, J.) (requirement that same streetcars be segregated by race was "not a regulation of interstate commerce" because the law applied only to the in-state portion of the journey—which had been equally true, as Day observed in dissent, in the earlier case). In neither of the *South Covington & C.S. Ry.* cases did the Court discuss whether the regulation of an interstate streetcar serving a single metropolitan area was "local" within the principle of the *Port Richmond* case, see *Port Richmond*, 234 U.S. at 330, 332.

A similar understanding of what made a burden on commerce "direct" was suggested by Justice Pitney outside the police power context in *United States Glue Co. v. Town of Oak Creek*, 247 U.S. 321, 329 (1918), holding that an apportioned and nondiscriminatory income tax imposed a less direct burden on commerce than did the comparable gross-receipts taxes, see, e.g., *Meyer v. Wells, Fargo & Co.*, 223 U.S. 298, 302 (1912) (Holmes, J.), that the Court had previously struck down; the latter more seriously deterred commerce because they "affect[] each transaction in proportion to its magnitude and irrespective of whether it is profitable." *United States Glue*, 247 U.S. at 329. Compare the analogous decision that a nondiscriminatory income tax could be applied to the export business without infringing the prohibition of export taxes in article I, section 9. *William E. Peck & Co. v. Lowe*, 247 U.S. 165, 173 (1918) (Van Devanter, J.) (distinguishing nondiscriminatory tax reaching marine insurance for exported goods as "'so directly and closely' bear[ing] on the 'process of exporting' as to be in substance a tax on the exportation") (citing *Thames & Mersey Ins. Co. v. United States*, 237 U.S. 19, 25 (1915) (Hughes, J.)).

146. U.S. CONST. art. III, § 2, cl. 1.

147. *Jensen*, 244 U.S. at 216.

Jensen was not the first opinion to suggest that the admiralty clause had a limiting effect on state laws. Justice Bradley had laid the foundation for such a conclusion in an 1875 decision—holding that maritime law did not provide a lien for services rendered in a vessel's home port—by announcing that the governing case law was federal:

The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction."

. . . It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.¹⁴⁸

Though Bradley had not cited it, there was evidence to support the common-sense inference that uniform laws had been among the goals of the admiralty clause,¹⁴⁹ and the federal courts had looked to international customs in deciding maritime cases since the beginning.¹⁵⁰ Bradley had conceded, however, that there was "quite an extensive field of border legislation on commercial subjects (generally local in character) which may be regulated by State laws until Congress interposes,"¹⁵¹ including pilotage laws, such as that upheld against commerce clause attack in *Cooley*,¹⁵² and the home-port liens that were implicated in the case before him.¹⁵³

Under Chief Justice Fuller, the Court had begun to flesh out Bradley's vision, upholding in admiralty suits state wrongful death statutes but not state laws denying municipal tort liability or creating liens for

148. *The Lottawanna*, 88 U.S. (21 Wall.) 558, 574-75 (1875), discussed in D. CURRIE, *supra* note 16, at 404, 428.

149. Though Hamilton had explained only that maritime cases "so generally depend on the law of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace," THE FEDERALIST NO. 80 (A. Hamilton), Madison and Randolph had both referred to the need for uniformity of decision, 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 532, 571 (J. Elliot 2d ed. 1836), if only in the context of foreign relations.

150. *E.g.*, *The General Smith*, 17 U.S. (4 Wheat.) 438 (1819), cited in *The Lottawanna*, 88 U.S. (21 Wall.) at 571; see G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 45-46 (2d ed. 1975).

151. *The Lottawanna*, 88 U.S. (21 Wall.) at 581.

152. *Cooley*, 53 U.S. (12 How.) at 315-21.

153. In *The Lottawanna*, Bradley held that there was no lien as a matter of state law. *The Lottawanna*, 88 U.S. (21 Wall.) at 578-79.

services rendered to a foreign vessel's independent contractor.¹⁵⁴ Once it was accepted that there was a federal common law of the sea, the last two decisions were easy to explain: in both the Court had found that the state law conflicted with federal law.¹⁵⁵ Thus McReynolds was on familiar ground when he declared in *Jensen* that state laws could not "contravene[] the essential purpose expressed by an act of Congress or work[] material prejudice to the characteristic features of the general maritime law."¹⁵⁶ As the dissenters observed, however, the Court had never before followed the logic of Justice Bradley's position to the extent of holding that state law could not be applied to maritime cases brought in state tribunals.¹⁵⁷ Perhaps more important, McReynolds made no attempt to show that workers' compensation contradicted any policy of the maritime law.¹⁵⁸ Rather, he based his conclusion squarely upon the third branch of his test: the state law "interfere[d] with the proper harmony and uniformity of [maritime] law in its international and interstate relations."¹⁵⁹

Originally suggested by Justice Bradley's 1875 dictum, the uniformity criterion of the test applied in *Jensen* had been an alternative basis for

154. *The Hamilton*, 207 U.S. 398, 403-05 (1907) (Holmes, J.) (wrongful death statute); *The Roanoke*, 189 U.S. 185, 194-99 (1903) (Brown, J.) (liens on foreign vessel); *Workman v. New York City*, 179 U.S. 552, 557-63 (1900) (White, J.); see *Fuller I*, *supra* note 16, at 364 n.245.

155. See *The Roanoke*, 189 U.S. 185, 196 (1903); *Workman v. New York City*, 179 U.S. 552, 558, 563 (1900); cf. G. GILMORE & C. BLACK, *supra* note 150, at 48 ("[S]tate legislation is clearly invalid where it actually conflicts with the established general maritime law or federal statutes.") The supremacy clause speaks only of the Constitution, treaties, and statutes, not of federal common law. If article III provided for a supreme federal law, however, a contrary state rule would arguably offend the Constitution itself, or the statute granting admiralty jurisdiction. This same principle explains the White Court's later conclusions that state law could neither abolish limitations on maritime personal injury liability, *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 382 (1918) (McReynolds, J.), nor contradict the maritime rule that oral contracts were enforceable, *Union Fish Co. v. Erickson*, 248 U.S. 308, 312-14 (1919) (Day, J.). In both cases, however, the Court unnecessarily invoked *Jensen's* uniformity doctrine as well. See *Union Fish Co.*, 248 U.S. at 313; *Chelentis*, 247 U.S. at 382.

156. *Jensen*, 244 U.S. at 216.

157. *Id.* at 222, 239 (Holmes and Pitney, JJ., dissenting). See authorities cited in Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 SUP. CT. REV. 158, 161 n.14; see generally Dodd, *The New Doctrine of the Supremacy of Admiralty over the Common Law*, 21 COLUM. L. REV. 647 (1921) (arguing against *Jensen* on essentially the same ground as the dissenters). Nevertheless, the purpose of uniformity that underlay the Court's conclusion that article III envisioned a federal common law demanded the application of that body of law in state courts as well. See Currie, *supra* at 180-85.

158. Compare *The Hamilton*, 207 U.S. 398 (1907), where the Court had allowed a state wrongful death statute to be applied in admiralty after having held that the creation of such a remedy was beyond judicial competence in *The Harrisburg*, 119 U.S. 199, 213 (1886). Although McReynolds did not do so, he might have argued, by analogy to *Chelentis v. Luckenbaeh S.S. Co.*, 247 U.S. 372 (1918), that in limiting recovery for personal injury maritime law adhered to a policy that would be contradicted by allowing workers' compensation in a maritime death case.

159. *Jensen*, 244 U.S. at 216.

each of the Fuller Court's two decisions adverse to state law.¹⁶⁰ Textually it was more difficult to infer such preemption from a provision granting judicial power than to hold an express grant of lawmaking power exclusive. In terms of the Framers' purposes, however, it followed as easily as the comparable principle derived from the commerce clause.¹⁶¹ The primary difficulty in *Jensen* was in applying the uniformity principle.

To begin with, McReynolds had to acknowledge precedent establishing that uniformity was not unduly disrupted by "the right given to recover in death cases,"¹⁶² and *Jensen* itself was a death case. This difficulty was arguably more semantic than real, since the death law previously sustained had merely given an additional remedy for violation of duties already existing; the compensation law, imposing liability without violation of duty, arguably placed the shipowner at a greater disadvantage in planning his conduct. The more serious obstacle was that numerous state laws imposing additional primary duties in the interest of safety had been upheld against challenges based upon the analogous principle of the commerce clause. Most striking of all was the fact that, on the very day *Jensen* was decided, Justice McReynolds had also written for an undivided Court in rejecting a commerce clause objection to applying a state workmen's compensation law to a seaman's shipboard injury: "In the absence of congressional legislation the settled general rule is that without violating the Commerce Clause the States may legislate concerning relative rights and duties of employers and employees while within their borders although engaged in interstate commerce."¹⁶³ Justices Holmes and Pitney, in their separate *Jensen* dissents, found it impossible to explain why the admiralty clause should have a greater preclusive effect than the commerce clause, since both were said to have the same purpose; and Justice McReynolds did not bother to tell them.¹⁶⁴

160. *The Roanoke*, 189 U.S. 185, 195 (1903); *Workman v. New York City*, 179 U.S. 552, 558 (1900).

161. See G. GILMORE & C. BLACK, *supra* note 150, at 48, 406 (arguing that, although McReynolds had taken the *Lottawanna* quotation out of context, "[i]f there is any sense at all in making maritime law a federal subject, then there must be some limit set to the power of the states to interfere in the field of its working"); Morrison, *Workmen's Compensation and the Maritime Law*, 38 YALE L.J. 472, 476 (1929) (finding difficulties of administering *Jensen* test "offset by the logical and practical advantage of having the rights of the parties . . . determinable by a single standard").

162. *Jensen*, 244 U.S. at 216 (citing *The Hamilton*, 207 U.S. 398 (1907)).

163. *Valley S.S. Co. v. Wattawa*, 244 U.S. 202, 204 (1917) (citations omitted); *cf.*, e.g., *Atlantic Coast Line R.R. v. Georgia*, 234 U.S. 280 (1914) (upholding state law requiring locomotive headlights); *Smith v. Alabama*, 124 U.S. 465 (1888) (upholding state engineer-licensing law as applied to interstate trains). The admiralty clause had not been properly invoked by the employer in *Wattawa*. See *Jensen*, 244 U.S. at 204-05.

164. McReynolds might have argued that the availability of a federal forum empowered to apply federal common law in maritime cases made the consequences of preemption less intolerable in admiralty than in commerce, an area where—even before *Erie R.R. v. Tompkins*, 304 U.S. 64

The contrast was accentuated three years later in *Knickerbocker Ice Co. v. Stewart*,¹⁶⁵ when the Court held, over the same four dissents, that a state could not give compensation in maritime cases even with congressional consent.¹⁶⁶ In the commerce clause context the Court had held that the constitutional purposes were satisfied by a congressional determination that the subject did not require uniformity.¹⁶⁷ Evidently uni-

(1938)—the federal courts could make law only if the parties were of diverse citizenship. Instead he made the apparent inconsistency all the more glaring by invoking the commerce clause precedents to demonstrate the necessity for finding a similar limitation in the admiralty clause, by “the same character of reasoning.” *Jensen*, 244 U.S. at 217.

165. 253 U.S. 149 (1920).

166. *Id.* at 154-55; see also *id.* at 166-70 (Holmes, Pitney, Brandeis, and Clarke, JJ., dissenting).

167. *In re Rahrer*, 140 U.S. 545 (1891) (upholding federal statute allowing states to prohibit sale of liquor in original package after Court had barred states from doing so on commerce clause grounds), discussed in *Fuller I*, *supra* note 16, at 361-62. McReynolds had the temerity to cite this decision for the proposition that “Congress cannot transfer its legislative power to the States,” *Knickerbocker*, 253 U.S. at 164, as if it supported him. He made no effort to distinguish its holding. See also *Clark Distilling Co. v. Western Md. Ry.*, 242 U.S. 311 (1917) (White, C.J., over unexplained dissents by Holmes and Van Devanter) (upholding federal statute forbidding shipment of liquor into state for use in violation of state law). Since the federal statute in *Clark* made the breach of state law unlawful as a matter of federal law, it raised an issue of delegation not settled by *Rahrer*, which had only recognized Congress’s authority to remove a constitutional barrier to the effectiveness of state law as such. It was an issue, moreover, that could not be resolved, as more typical delegation questions could, by finding interstitial lawmaking power inherent in the President’s executive power. See *United States v. Grimaud*, 220 U.S. 506 (1911) (Lamar, J.) (upholding authority to adopt regulations “to preserve the [national] forests from destruction”); *Buttfield v. Stranaham*, 192 U.S. 420 (1904) (upholding federal statute authorizing Secretary of Treasury to make regulations to effectuate exclusion of low-grade teas), discussed in *Fuller I*, *supra* note 16, at 339-43; *Field v. Clark*, 143 U.S. 649 (1892) (upholding federal statute that allowed President to suspend statutory provisions relating to free introduction of sugar), discussed in *Fuller I*, *supra* note 16, at 339-43. No doubt because the case had grown out of a state’s attempt to enforce its own law—the federal statute oddly having provided for no penalties—the Court in *Clark* found *Rahrer* indistinguishable. See also *United States v. Hill*, 248 U.S. 420 (1919) (Day, J.) (relying on *Clark Distilling* to settle the validity of a federal prosecution under a later and more stringent provision, over a dissent by McReynolds and Clarke suggesting that a different question was presented). In *Knickerbocker*, McReynolds, who had concurred in the result in *Clark* without explanation, *Clark*, 242 U.S. at 332 (McReynolds, J. concurring), chose to emphasize passages in the earlier opinion stressing that Congress could have banned the shipment of liquor altogether and declared that the admiralty clause was different. Except for the unexplained fact that in admiralty there was a federal common law, the reasons he gave were equally applicable to the commerce clause. *Knickerbocker*, 253 U.S. at 165-66. For early appreciation of the inconsistency, see Corwin, *Constitutional Law in 1919-1920* (pt. 2), 15 AM. POL. SCI. REV. 52, 55-56 (1921). For criticism of *Knickerbocker*, see Morrison, *supra* note 161, at 480 (“The fairer conclusion would seem to be that paramount power to fix and determine the maritime law includes the power to determine the extent to which uniformity of rule is needed.”); Currie, *supra* note 157, at 191 (“It is difficult to understand why the federal interest in a free commerce, whether land or sea, is in need of protection from the action of the very body to whose care it is intrusted.”). The abundant commentary on the problems raised by *Clark Distilling* and *Hill* includes Cushman, *supra* note 62, at 409-12 (criticizing *Hill* on distinct ground that statute in question was not legitimate regulation of commerce because Congress had neither determined for itself that liquor was harmful nor limited its action to reinforcing state policy); Orth, *The Webb-Kenyon Law Decision*, 2 CORNELL L.Q. 283 (1917); Rogers, *The Constitutionality of the Webb-Kenyon Bill*, 1 CALIF. L. REV. 499 (1913) (noting that President Taft had vetoed the bill on constitutional grounds).

formity was more important in admiralty than in commerce, but nobody had ever explained why.

C. *Freedom of Expression.*

1. *Schenck v. United States.* Alleged to have helped circulate to draftees a document encouraging them to assert their right to oppose conscription, Schenck and a fellow defendant were found guilty of conspiring to cause insubordination and to obstruct recruiting, in violation of the Espionage Act of 1917. In an opinion whose reasoning occupied less than two pages, Justice Holmes concluded for a unanimous Court that the convictions did not offend the first amendment.¹⁶⁸

Contrary to popular rumor, *Schenck* was not the first freedom of expression case decided by the Supreme Court. *Ex parte Jackson*¹⁶⁹ and *In re Rapier*¹⁷⁰ had held that Congress could exclude lottery materials from the mails. *United States ex rel. Turner v. Williams*¹⁷¹ had allowed Congress to keep an alien anarchist from entering the country. *Patterson v. Colorado*,¹⁷² assuming without deciding that first amendment principles applied to the states, had upheld a contempt citation for publications interfering with judicial proceedings. *Gompers v. Bucks Stove & Range Co.*¹⁷³ had permitted punishment of a labor leader for exhorting his comrades to a boycott. *Mutual Film Corp. v. Industrial Commission*,¹⁷⁴ interpreting a state constitution, had upheld movie censorship on the unimaginative ground that motion pictures were not speech. *Fox v. Washington*¹⁷⁵ had upheld a conviction for publishing an article announcing a boycott of those who reported public nudity. Decisions upholding additional measures without even advertng to freedom of expression might also be thought to have cast light upon what the amendment was understood to mean.¹⁷⁶

168. 249 U.S. 47, 51-52 (1919).

169. 96 U.S. 727, 736-37 (1878) (Field, J.).

170. 143 U.S. 110, 135 (1892) (Fuller, C.J.).

171. 194 U.S. 279, 292 (1904) (Fuller, C.J.).

172. 205 U.S. 454, 462 (1907) (Holmes, J.).

173. 221 U.S. 418, 439 (1911) (Lamar, J.).

174. 236 U.S. 230, 244 (1915) (McKenna, J.).

175. 236 U.S. 273, 277-78 (1915) (Holmes, J.).

176. See D. CURRIE, *supra* note 16, at 442-44; *Fuller II, supra* note 16, at 870-72; see also *Toledo Newspaper Co. v. United States*, 247 U.S. 402, 410-11 (1918) (White, C.J.) (applying *Patterson's* conclusion to federal contempt citation); *Goldman v. United States*, 245 U.S. 474 (1918) (upholding conviction for conspiracy to obstruct the draft without discussing first amendment questions); *Weber v. Freed*, 239 U.S. 325 (1915) (upholding ban on importation of prizefight films without discussing first amendment questions); *Lewis Publishing Co. v. Morgan*, 229 U.S. 288, 314-15 (1913) (White, C.J.) (allowing Congress to condition second class mail privileges on the disclosure of the identity of owners of periodicals and the identification within the periodical of materials that are advertisements); *Davis v. Massachusetts*, 167 U.S. 43 (1897) (upholding standardless permit requirement to

The precedents had two interesting features in common: none had upheld a freedom of expression claim, and all had dealt rather cavalierly with the question. Thus, it was poetic justice that Holmes dealt cavalierly with *them*. He cited *Patterson* only to cast doubt on one of its more general conclusions, *Gompers* only to show that one could prohibit "words that may have all the effect of force,"¹⁷⁷ and the other precedents not at all. He seemed to place most reliance on a decision upholding an earlier conviction for conspiracy to obstruct the draft, in which, as he admitted, the first amendment issue had not been discussed.¹⁷⁸

It was not as if the precedents had held little value for the case at hand. At the very least they had established, as the citation of *Gompers* showed, that the first amendment did not preclude every federal law limiting speech. But they arguably stood for a great deal more. In upholding the exclusion of anarchist aliens, *Turner* had stressed the dangerous "tendency" of anarchist views and added that governments "cannot be denied the power of self-preservation."¹⁷⁹ *Patterson* had affirmed the power to punish even true statements "tending toward" interference with judicial proceedings.¹⁸⁰ *Fox* had allowed punishment of an author who urged a boycott on the ground that there was no right to encourage violation of state laws.¹⁸¹ Technically, all of the precedents could have been distinguished.¹⁸² Nevertheless, they strongly suggested that speech could

speak in public park without discussing freedom of expression after Holmes, on the court below, 162 Mass. 510, 511 (1895), had said there was no constitutional right to speak on public property), discussed in *Fuller II*, *supra* note 16, at 870 n.25; *Ex parte Curtis*, 106 U.S. 371, 375 (1882) (upholding ban on political contributions between federal employees over dissent based on freedom of expression), discussed in D. CURRIE, *supra* note 16, at 443-44. For fuller treatment of the pre-*Schenck* precedents, see Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514 (1981). Compare *Mutual Film*, 236 U.S. 230, 243-44 (1915) (motion pictures not speech), with *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 56-58 (1884) (photograph is a "Writing[...]" under copyright clause), and *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U.S. 1, 8-10 (1878) (telegraphic communication is within commerce clause). See D. CURRIE, *supra* note 16, at 429-30.

177. *Schenck*, 249 U.S. at 52.

178. *Id.* (discussing *Goldman v. United States*, 245 U.S. 474 (1918)).

179. *Turner*, 194 U.S. at 294.

180. *Patterson*, 205 U.S. at 462-63.

181. *Fox*, 236 U.S. at 277-78.

182. In several of the prior cases, as noted, the speech issue had not been raised. Others rested in part on the ground that the complaining party was claiming a privilege that the government was not obligated to afford to anybody. *Jackson*, 96 U.S. at 732; *Rapier*, 143 U.S. at 133; *Turner*, 194 U.S. at 289-90; see also *id.* at 292 (suggesting that first amendment did not apply to an alien outside the country). Two cases indicated that the words in question did not qualify as speech at all. *Gompers*, 221 U.S. at 439; *Mutual Film*, 236 U.S. at 244. *Fox* and *Patterson*, two of the cases most nearly factually on point, had involved state rather than federal action, see *Fox*, 236 U.S. at 275; *Patterson*, 205 U.S. at 459, and the Court had not yet held that the fourteenth amendment made the first amendment applicable to the states. *Toledo Newspaper Co.*, which had reaffirmed *Patterson* in the federal context, had involved judicial interference with expression, *Toledo Newspaper Co.*, 247 U.S. at 410-11; the amendment on its face limits only Congress.

be prohibited if it tended to cause harm or encouraged violations of the law. And that, as Holmes interpreted the facts, was what Schenck and his codefendant had done.¹⁸³

Nor did Holmes make use of readily available historical sources that would have helped to sustain the convictions. In *Patterson*, with some force, he had invoked Blackstone's assertion that the freedom of the press was nothing more than freedom from "previous restraints" such as censorship.¹⁸⁴ The technique of looking to tradition to define constitutional terms was almost as old as the document itself,¹⁸⁵ and there was plenty of other evidence to support Blackstone's view.¹⁸⁶ Yet not only did Holmes in *Schenck* decline to repeat his earlier argument; he went out of his way to repudiate it, without giving any of the available reasons: "It well may be that the prohibition . . . is not confined to previous restraints, although to prevent them may have been the main purpose, as intimated in *Patterson v. Colorado*."¹⁸⁷

183. "Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out." *Schenck*, 249 U.S. at 51.

184. *Patterson*, 205 U.S. at 462 (emphasis in original); see 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 151 (4th ed. 1770).

185. See, e.g., *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 389 (1798) (relying on a less conclusive passage from Blackstone as one source for narrow reading of ex post facto clause), discussed in D. CURRIE, *supra* note 16, at 41-48; *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 180-81 (1796) (Justice Paterson powerfully, if selectively, invoking Adam Smith's understanding of the term "direct tax"), discussed in D. CURRIE, *supra* note 16, at 31-37.

186. See generally L. LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION (1960) (finding evidence to this effect overwhelming, and citing, inter alia, Milton, Locke, James Wilson's statements in the federal convention, and later views of Story and of many state judges). It is not clear whether state constitutions explicitly providing that the abuse of speech was punishable are evidence of something implicit in the principle itself or of an intention to qualify it. Cf. D. CURRIE, *supra* note 16, at 127-59, 439-42 (discussing analogous histories of contract and free exercise clauses).

187. *Schenck*, 249 U.S. at 51-52. Apart from the question whether the prior restraint doctrine developed in the press context applied to the newly minted freedom of speech as well, see T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION *421-22—and whether the circular in *Schenck* involved freedom of speech or of the press—there was a powerful argument to be made for repudiating the *Patterson* conclusion: it was difficult to see why anyone desiring to protect freedom of expression would have wanted to allow subsequent punishment of all speech that displeased the government, even though the prohibition of prior restraints did mean the interposition of a jury. Gallatin had made this argument in the Sedition Act debates, 8 ANNALS OF CONG. 2159-60 (1798), and it had been picked up in the major treatises of Thomas Cooley and Ernst Freund. E.g., T. COOLEY, *supra*, at *421 ("[T]he liberty of the press might be rendered a mockery and a delusion . . . if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications."); E. FREUND, THE POLICE POWER §§ 474-475 (1904). As Professor Chafee observed in embracing the Gallatin position, by 1919 numerous state decisions had also gone beyond protecting against previous restraints. Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 11 & n.15 (1941). For a more extensive review of the early state cases, see Anderson, *The Formative Period of First Amendment Theory, 1870-1915*, 24 AM. J. LEGAL HIST. 56

Holmes relied principally on the time-honored argument of absurdity so intimately associated with Marshall: "The most stringent protection of free speech," he wrote in one of the most familiar passages in the reports, "would not protect a man in falsely shouting fire in a theatre and causing a panic."¹⁸⁸ Those who wrote the amendment, he seemed to be saying, were too reasonable to have disabled society from protecting itself against speech that all would agree ought to be prohibited.¹⁸⁹

This argument is less persuasive than it may seem at first glance. As we know from Marshall's unimpeachable decision in *Barron v. Mayor of Baltimore*,¹⁹⁰ nothing in the Bill of Rights was meant to limit the power of state governments to outlaw speech harmful to the public welfare.¹⁹¹ It is not so difficult to believe that the framers of the amendment meant to keep Congress entirely out of the field. In fact, the history of the amendment lends considerable support to that conclusion. The standard argument of the defenders of the Constitution had been that a bill of rights was unnecessary because the document itself gave the central government no authority to regulate such matters as expression; and the first amendment, as the ninth confirms, gave Congress no additional powers.¹⁹² Disdaining available replies to this line of reasoning,¹⁹³ Holmes

(1980). For early explanations of the reasons free expression was desirable see, e.g., the references to Locke, Milton, and Cato in L. LEVY, *supra* note 186, at 88-125, invoking the search for truth, the improvement of government, the preservation of domestic peace, and the promotion of individual autonomy.

188. *Schenck*, 249 U.S. at 52.

189. Holmes repeated this argument with an even better example in *Frohwerk v. United States*, 249 U.S. 204 (1919), discussed *infra* text accompanying notes 202-07: "We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech." *Frohwerk*, 249 U.S. at 206. Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (Marshall, C.J.) (judicial review is implicit, because otherwise the limitations on Congress could be evaded at pleasure—a result so absurd that it could not have been intended), discussed in D. CURRIE, *supra* note 16, at 66-74; *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821) (Marshall, C.J.) (United States Supreme Court may review the judgments of state courts; contrary decision would leave limits on states unenforceable), discussed in D. CURRIE, *supra* note 16, at 96-102.

190. 32 U.S. (7 Pet.) 243 (1833), discussed in D. CURRIE, *supra* note 16, at 189-93.

191. See *Barron*, 33 U.S. (7 Pet.) at 247-49 (fifth amendment prohibition of taking without compensation is inapplicable to states).

192. See, e.g., 2 M. FARRAND, *supra* note 84, at 617, 618 (Mr. Sherman, opposing a motion proposed by Mr. Pinkney and Mr. Gerry to provide "that the liberty of the Press should be inviolably observed," stated: "It is unnecessary—the power of Congress does not extend to the Press . . ."); THE FEDERALIST NO. 84 (A. Hamilton). For the development of this argument, see Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 119-21 (1984). Justice Story, who thought that state free speech guarantees forbade only prior restraints, see *supra* note 186, left open the possibility that the federal government was excluded from the field entirely. 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1874-1886 (1833). On the ninth amendment, see D. CURRIE, *supra* note 16, 41-49 (discussing *Calder v. Bull*).

stated his argument so sketchily as to invite easy rebuttal.

From the premise that complete protection of speech would be absurd, Holmes jumped without explanation to the famous conclusion that the constitutional test was "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."¹⁹⁴ This was by no means the only permissible conclusion. Lower courts, for example, had recently enunciated two quite different standards for determining the punishability of statements under the Espionage Act, one requiring only that the words have a natural and probable tendency to bring about the substantive evil, the other requiring a more or less explicit incitement.¹⁹⁵ Holmes neither explained how his test differed from these nor revealed why it was more appropriate. As Justice Curtis had done in the *Cooley* case,¹⁹⁶ Holmes laid down his test as a matter of mere fiat.¹⁹⁷

Furthermore, the test was so cryptic as to invite a variety of interpretations. Perhaps in requiring that the danger be "clear and present" Holmes meant that that evil be likely to occur in the near future, but that was not the only possible reading.¹⁹⁸ Worse, again following the *Cooley*

193. For example, no state had power to make laws for the District of Columbia; it would be odd to expect states to protect the exercise of federal powers by the military or the federal courts from interference; the copyright clause clearly authorized limitation of speaking and publishing; and the language used in the amendment paralleled that employed by states in which libel laws continued to be enforced. The passage of the Sedition Act in 1798, on the other hand, was so controversial that it arguably should not be taken, like many other actions of early Congresses, see *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), discussed in D. CURRIE, *supra* note 16, at 91-96, as evidence of contemporaneous understanding of the amendment's meaning. But see *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 402 (1819) (controversial nature of enactment of national bank strengthened its value as precedent by showing that the question had not passed unnoticed), discussed in D. CURRIE, *supra* note 16, at 60-68. It is noteworthy in any event that Holmes did not refer to the debates on the Sedition Act, in which interesting arguments had been made. See 8 ANNALS OF CONG. 2093-2171 (1798).

194. *Schenck*, 249 U.S. at 52.

195. *Shaffer v. United States*, 255 F. 886, 889 (9th Cir. 1919) (intention to cause "natural and probable consequences" presumed), cert. denied, 251 U.S. 552 (1919); *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y.) (L. Hand, J.) (incitement), rev'd, 246 F. 24 (2d Cir. 1917) (natural and reasonable effect plus intent). Apparently it did not occur to Holmes to interpret the statute itself narrowly, as Hand had done, in order to avoid the constitutional question.

196. See *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 316 (1852), discussed in D. CURRIE, *supra* note 16, at 230-34.

197. See Corwin, *Constitutional Law in 1919-1920*, 14 AM. POL. SCI. REV. 635, 657 (1920) (Holmes's clear-and-present-danger test was "apparently made up out of whole cloth").

198. Professor Chafec said Holmes's test, although lacking the "administrative advantage" of requiring that the utterance "satisfy an objective standard," lent "much support to the views of Judge Learned Hand [in laying down the incitement standard] in the *Masses* case." Z. CHAFEE, *supra* note 187, at 82. Professors Gunther and Rabban, the former with the benefit of correspondence between Hand and Holmes, equate the *Schenck* standard with the natural-and-probable-tendency test used by other lower courts. Gunther, *Learned Hand and the Origins of Modern First*

example, he made no attempt to show how his test applied to the facts of the case. Had he explained that the power to raise and support armies authorized Congress to protect against the immediate impairment of national defense threatened by Schenck's scarcely veiled invitation to evade the draft, he would have helped both to elucidate his test and to justify his conclusion.¹⁹⁹

Most sobering of all, perhaps, were the implications of the clear-and-present-danger test for future cases in light of the policies underlying the first amendment. It was reasonable enough to conclude that the authors of that provision had not meant to leave the federal government defenseless against outright incitement to the commission of federal crimes. Unlike Learned Hand's almost contemporaneous formulation,²⁰⁰ however, Holmes's standard required nothing resembling express incitement; it apparently would suffice that the speaker had made the crime sufficiently probable, and that could be said of many who merely criticized the war.²⁰¹ It was difficult to reconcile such a conclusion with any conceivable reason for protecting free expression. On the other hand, as the Second Circuit had intimated in overruling Hand's incitement test, to require express incitement would deny the state any real protection; any clever inciter could escape punishment by avoiding the magic words.²⁰²

Amendment Doctrine: Some Fragments of History, 27 STAN. L. REV. 719, 720-21 (1975); Rabban, *supra* note 176, at 589-91; see also Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1207-08 (1983) (concluding that Holmes's treatment of free speech claims in *Schenck* and its companion cases essentially extended pre-war tradition of "judicial hostility" and neglect). The latter inference is strengthened by the interesting fact that Holmes affirmed the conviction rather than remanding the case for a new trial in which the lower court would apply what appears to have been a brand new test.

199. See Z. CHAFEE, *supra* note 187, at 81 (adding that *Schenck* "was one of the few reported prosecutions under the Act where there clearly was incitement to resist the draft").

200. *Masses Publishing Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917).

201. See *Gilbert v. Minnesota*, 254 U.S. 325, 332-33 (1920) (McKenna, J.); *Schaefer v. United States*, 251 U.S. 466, 478-81 (1920) (McKenna, J., over dissents by Brandeis and Holmes, JJ., and by Clarke, J.); *Pierce v. United States*, 252 U.S. 239, 245-49 (1920) (Pitney, J., over dissents by Brandeis and Holmes, JJ.) (affirming convictions for essentially mere criticism). For similar decisions in the lower federal courts, see Z. CHAFEE, *supra* note 187, at 51-60. Justice Brandeis's lone dissent in *Gilbert*, while based on state interference with federal functions, is noteworthy for the first appearance of his argument that freedom of expression was within the "liberty" protected from state infringement by the fourteenth amendment's due process clause: "I cannot believe that the liberty guaranteed by the Fourteenth Amendment includes only liberty to acquire and to enjoy property." *Gilbert*, 254 U.S. at 343 (Brandeis, J., dissenting).

202. *Masses Publishing Co. v. Patten*, 246 F. 24, 38 (2d Cir. 1917) ("[T]he Beatitudes have for some centuries been considered highly hortatory, though they do not contain the injunction, 'Go thou and do likewise.'"); see also Hall, *Free Speech in War Time*, 21 COLUM. L. REV. 526, 531-32 (1921) (spelling out consequences of an incitement test); Z. CHAFEE, *supra* note 187, at 49-50 (Judge Hand "regarded Mark Antony's funeral oration . . . as having counseled violence while it expressly discountenanced it").

Holmes gave no indication that he was aware of this tension.

In short, while *Schenck* gave us the enduring test of clear and present danger, the opinion was a disappointment in virtually every respect. Holmes paid little attention to the text of the first amendment, to the history of its adoption, to the established common law meaning of its terms, or to the rich collection of judicial precedents. He did not explain how the test he articulated followed from his premises, what it meant, how it applied to the case, or how it could be squared with the purposes of the amendment.

2. *Later cases.* Two other Holmes decisions, both rendered a week after *Schenck*, suggest how far the Court was prepared to go in permitting the suppression of speech that threatened to endanger the war effort. They also increased the already considerable doctrinal uncertainty.

In *Frohwerk v. United States*,²⁰³ in which a war critic had suggested that no one would blame draft resisters, the Court affirmed a conviction without mentioning the clear-and-present-danger test, admitting that the case was closer than *Schenck* because there had been no "special effort to reach men who were subject to the draft," but nonetheless finding it reasonable to conclude "that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out."²⁰⁴ For the first time, Justice Holmes displayed an awareness that one must be careful not to extend this reasoning too far: "We do not lose our right to condemn either measures or men because the Country is at war."²⁰⁵ Indeed, he restated the holding of *Schenck* in terms that resemble Hand's incitement test more than that of clear and present danger: "[W]e have decided in *Schenck* . . . that a person may be convicted of a conspiracy to obstruct recruiting by words of persuasion."²⁰⁶ This was a fair characterization of the facts of both *Schenck* and *Frohwerk* if one was prepared not to require express words of incitement.²⁰⁷

The companion case was *Debs v. United States*,²⁰⁸ which affirmed the conviction of the well-known labor politician for a speech criticizing the war and praising individuals who had been convicted of obstructing the draft. Once again, although *Schenck* was cited as dispositive, clear

203. 249 U.S. 204 (1919).

204. *Id.* at 208-09.

205. *Id.* at 208.

206. *Id.* at 206.

207. See *Schenck*, 249 U.S. at 51. Professor Chafee blamed the *Frohwerk* decision on the failure of counsel adequately to present the facts. Z. CHAFEE, *supra* note 187, at 82-83.

208. 249 U.S. 211, 216 (1919).

and present danger was not mentioned. As in *Frohwerk*, moreover, it might have been difficult to show that the danger was either clear or present. At one point, as in *Frohwerk*, Holmes virtually parroted Hand's incitement test: "[I]f a part or the manifest intent of the more general utterances was to encourage those present to obstruct the recruiting service and if in passages such encouragement was directly given, the imminence of the general theme may not be enough to protect the speech."²⁰⁹ Further on, however, he seemed to approve yet a third standard in noting with approval that the jury had been instructed that they could not convict unless "the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service, and unless the defendant had the specific intent to do so."²¹⁰ It was thus evident that Holmes did not set much store by the particular formulation; he seemed to think that there was no significant difference between natural and probable tendency, clear and present danger, and encouragement and persuasion. But he was willing to give juries considerable latitude to infer both the speaker's intention and the likelihood of bringing about a result that had not been expressly urged.²¹¹

The next term, however, when the Court affirmed yet another Espionage Act conviction in *Abrams v. United States*,²¹² Holmes and Brandeis dissented.²¹³ The specific ground of their disagreement was narrow: charged under a statute requiring an intent to interfere with the war against Germany, the defendants had tried only to impede efforts to suppress the Russian Revolution.²¹⁴ What was significant was that Holmes went on both to make intention a part of his constitutional test and to redefine what constituted a sufficient danger.

On the facts, Holmes argued, "nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so."²¹⁵ At the same time that he wrote this, Holmes firmly proclaimed

209. *Debs*, 249 U.S. at 212-13.

210. *Id.* at 216. Compare the cases cited *supra* note 195.

211. See Z. CHAFEE, *supra* note 187, at 84 (arguing that "Debs's utterances are hard to reconcile with the Supreme Court test of 'clear and present danger'").

212. 250 U.S. 616, 619 (1919).

213. *Id.* at 624-31 (Holmes, J., dissenting); see generally Z. CHAFEE, *supra* note 187, at 108-40 (discussing *Abrams*).

214. See *Abrams*, 250 U.S. at 628: "An intent to prevent interference with the revolution in Russia might have been satisfied without any hindrance to carrying on the war in which we were engaged."

215. *Id.*; see also *id.* at 629 (characterizing the defendants or their pamphlets, or both, as "poor and puny anonymities").

his continued adherence to *Schenck*, *Frohwerk*, and *Debs*,²¹⁶ although the publications in the first two cases were equally easy to characterize as “silly leaflet[s] by . . . unknown [inen]” and unlikely to impede the war. Reconciliation is not impossible: Debs was more dangerous because he was famous and influential; Schenck, because he had sent his message directly to draftees; and all three, because they had come closer than Abrams to expressly encouraging obstruction of the war. “Publishing [Abrams’s] opinions for the very purpose of obstructing,” as Holmes argued, “might indicate a greater danger.”²¹⁷

Unwilling to rest solely on the greater danger of deliberate incitement, however, Holmes reformulated his test to suggest that, if the requisite intent were present, no actual danger had to be shown: “I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces *or is intended to produce* a clear and imminent danger”²¹⁸ He thus seemed to be saying that the clear-and-present-danger standard had given too much protection to speech of the kind he thought had been at issue in *Schenck*.

One hint as to why he thought so may be found in his observation that intentional encouragement “would have the quality of an attempt.”²¹⁹ The suggestion seems to be that the amendment did not disturb the common law of attempted crime. Three pages later, however, on the basis of reactions to the 1798 Sedition Act, he flatly rejected the argument “that the First Amendment left the common law as to seditious libel in force.”²²⁰ If attempts could still be punished, it was not because the common law as such was undisturbed.

Greater light on Holmes’s distinction may be cast by an example he offered to illustrate the importance of an intention to bring about the substantive evil: “A patriot might think that we were wasting money on aeroplanes . . . and might advocate curtailment with success, yet even if it turned out that the curtailment hindered and was thought by other minds to have been obviously likely to hinder the United States in the

216. *Id.* at 627.

217. *Id.* at 628.

218. *Id.* at 627 (emphasis added). This passage helps to resolve the question “whether Holmes meant that specific intent to hinder the war effort and a high risk of injurious consequences were alternative bases of criminal liability, or rather that both elements had to be shown.” L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 611 n.16 (1978); see also *id.* at 610 (appearing to favor the latter interpretation).

219. *Abrams*, 250 U.S. at 628.

220. *Id.* at 630. For a contemporaneous rejection of this conclusion and a defense of the majority decision in *Abrams*, see Corwin, *Freedom of Speech and Press under the First Amendment: A Resumé*, 30 *YALE L.J.* 48, 53-55 (1920).

prosecution of the war, no one would hold such conduct a crime."²²¹ To punish all speech that endangered the war effort, he seemed at last to be saying, would cut deeply into the values the first amendment was designed to protect.

Holmes then attempted to identify these values for the first time:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market That at any rate is the theory of our Constitution.²²²

Holmes cited none of the available evidence to support this important conclusion, but he was nonetheless on firm ground.²²³ He proceeded to deduce from this purpose a new version of the test applicable to "expressions of opinion and exhortations":

While [the first amendment] is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. . . . Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time war-rants making any exception to the sweeping command, "Congress shall make no law . . . abridging the freedom of speech."²²⁴

In other words, although the *Schenck* formulation had been too protective of incitement, it had not been protective enough of opinions, which were too valuable to be suppressed except on rare occasions of overwhelming need. In addition to placing new emphasis on the time element by rephrasing a "present" danger as an "immediate" or "imminent" one, Holmes added what appears to have been an entirely new requirement of gravity: apart from intentional encouragement constituting an attempted crime, speech may be punished only where necessary "to save the country."²²⁵

221. *Abrams*, 250 U.S. at 627.

222. *Id.* at 630.

223. *See supra* note 187.

224. *Abrams*, 250 U.S. at 630-31. Holmes's choice of words in the last sentence quoted was unfortunate. Adherence to the judge's oath would forbid making *any* exceptions to the constitutional command, but Holmes himself had demonstrated in his earlier opinions that "the freedom of speech" was a term of art that reasonable people could not have meant to equate with freedom to say whatever one pleased. Even in *Abrams*, Holmes did not explicitly refute Blackstone's position that freedom of expression meant only freedom from previous restraints, but that position was clearly inconsistent with his stated views as to the purpose of the amendment.

225. *See also Abrams*, 250 U.S. at 627 (insisting that the danger or intended danger be that the evil occur "forthwith"). Immediacy thus seems to have been part of his test of an "attempt" as well. Near the end of his opinion Holmes added, without explanation, the novel and interesting notion that the first amendment also limited the punishment that could be imposed even for speech not

Was Holmes taking advantage of the freedom of a dissenter to develop an idea he had been able only to hint at without losing his majority in *Schenck*, or had he experienced a conversion not less remarkable than that of Saul of Tarsus?²²⁶ In either event, although he still answered neither Blackstone nor Hand, he vigorously proclaimed the aspirations of the expression clauses and began the long battle to rescue them from the obscurity to which his earlier opinions had helped to consign them.²²⁷

wholly protected: "Even if I am technically wrong and enough can be squeezed from these poor and puny anonymities to turn the color of legal litmus paper; . . . even if what I think the necessary intent were shown; the most nominal punishment seems to me all that possibly could be inflicted . . ." *Id.* at 629. See Van Alstyne, *First Amendment Limitations on Recovery from the Press—An Extended Comment on "The Anderson Solution,"* 25 WM. & MARY L. REV. 793, 802 (1984). For an additional indication of the development of more liberal notions of freedom of expression during the White period, see *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U.S. 407, 430-31 (1921) (Brandeis, J., dissenting) (disagreeing with the prevailing notion that use of the mails was a privilege whose regulation was not subject to the restraints applicable to criminal laws: "Congress may not through its postal police power put limitations upon the freedom of the press which if directly attempted would be unconstitutional."). Cf. Z. CHAFEE, *supra* note 187, at 99 ("[E]xclusion from the mails practically destroys the circulation of a book or periodical . . .").

226. See F. FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 52 (1938) (*Schenck* had "laid down cautionary limits against inroads upon freedom of speech not actually embarrassing the nation's safety"); P. MCCLOSKEY, THE AMERICAN SUPREME COURT 172 (1960) (*Schenck* "had committed the Court to an essentially libertarian formula for determining when speech may be abridged"); Gunther, *supra* note 198, at 741-45 (taking a more skeptical view after reviewing Holmes's correspondence and noting, among other things, the initial appearance of Zechariah Chafee's powerful commentary, Z. CHAFEE, *supra* note 187, between *Schenck* and *Abrams*). For evidence that Holmes's noble sentiments in *Abrams* did not meet with universal approbation, see Wigmore, *Abrams v. United States: Freedom of Speech and Freedom of Thuggery in War-Time and Peace-Time*, 14 ILL. L. REV. 539, 545, 552 (1920) (calling dissent "shocking in its obtuse indifference to the vital issue at stake in August, 1918," and suggesting that "all principles of normal internal order may be suspended" during war).

227. Other Bill of Rights decisions of the period include *Holt v. United States*, 218 U.S. 245, 252-53 (1910) (Holmes, J.) (curtly allowing defendant to be required to model a shirt because fifth amendment's self-incrimination provision "is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence"); *Wilson v. United States*, 221 U.S. 361 (1911) (Hughes, J.) (relying on property concepts to uphold an order requiring corporate officer to produce corporation's papers that would incriminate him, over a good dissent by McKenna); *National Safe Deposit Co. v. Stead*, 232 U.S. 58, 71 (1914) (Lamar, J.) (holding fourth amendment's unreasonable-search principle inapplicable to states); *Weeks v. United States*, 232 U.S. 383, 393-98 (1914) (Day, J., for a unanimous Court) (distinguishing, on grounds of judicial administration, decisions refusing to investigate source of evidence when offered at trial—including the same Justice's decision, again for a unanimous Court, in *Adams v. New York*, 192 U.S. 585 (1904)—in holding that Constitution required return of property unlawfully seized upon timely application: "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 391-92 (1920) (Holmes, J.) (holding that to allow government after returning property unlawfully seized to reclaim it by subpoena on basis of knowledge gained in the unlawful seizure would "reduce[] the Fourth Amendment to a form of words"); *Gouled v. United States*, 255 U.S. 298, 305-13 (1921) (Clarke, J.) (holding entry by imposture to be unreasonable search, reaffirm-

III. CONCLUSION

It is not easy, without prolixity, to give a comprehensive picture of a period in which over six hundred constitutional cases were decided. It helps that, in those days before the modern expansion of certiorari jurisdiction, the great bulk of the cases required only the application of settled principles. It remains true that even these cases add to our understanding of the Court's approach to constitutional decisionmaking and of the judicial personalities of its members. Moreover, as the voluminous footnotes designed to flesh out the bare bones of the main story indicate, there are quite a number of significant constitutional decisions that cannot be discussed at length without running the risk of losing sight of the larger picture. One can only hope that the highly restrictive and idiosyncratic process of selection has produced a series of snapshots that not only explore those aspects of the White years that one observer finds most interesting but also indicate something about the period as a whole.

In numerical terms, by far the greater part of the Court's constitutional docket consisted, as in the preceding period, of attacks on state action under four provisions: the due process, equal protection, contract, and commerce clauses. Encouraged by the Court's position that the fourteenth amendment made it the ultimate judge of the reasonableness of official action, litigants seemed willing to ask the Court to overturn just about anything a state might try to do—and state governments were very active during the period. Except in the commerce clause cases,

ing conclusions of *Boyd v. United States*, 116 U.S. 616 (1886), discussed in D. CURRIE, *supra* note 16, at 444-47, that warrant may not issue for mere evidence and that introduction of illegally seized papers offends self-incrimination ban, and extending *Weeks* to require exclusion of unlawfully obtained evidence because "a rule of practice must not be allowed for any technical reason to prevail over a constitutional right"); and *Burdeau v. McDowell*, 256 U.S. 465, 476 (1921) (Day, J.) (following logic of *Weeks* in refusing to require government to return property taken by private individuals because fourth and fifth amendments not violated by private action). See also *Minneapolis & St. L. R.R. v. Boonbols*, 241 U.S. 211, 217 (1916) (White, C.J.) (holding seventh amendment requirement of civil jury inapplicable to state court enforcing federal law); *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 380 (1913) (Van Devanter, J.) (exhaustively reviewing the precedents in concluding, over an equally detailed Hughes dissent for four Justices, *id.* at 400-28, that judgment n.o.v. offended seventh amendment provision that "no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law," see U.S. CONST. amend. VII).

Holt is defended, and *Gouled* criticized, in 8 J. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2264 n.4, § 2265 & n.7 (J. McNaughton rev. ed. 1961), on the appealing ground that only compulsory testimony implicates the fundamental policies underlying the self-incrimination provision since only in that situation are "the oath and private thoughts and beliefs of the individual . . . involved." *Id.* § 2263. For a serious defense of *Slocum* on historical grounds, see generally Schofield, *New Trials and the Seventh Amendment—Slocum v. New York Life Ins. Co.*, 8 ILL. L. REV. 287, 381, 465 (1913-14). But see 9 A. BICKEL & B. SCHMIDT, *supra* note 17, at 312-14 (arguing, in view of similarity between judgment n.o.v. and accepted directed-verdict practice, that *Slocum* typified "fundamental conservatism" of White Court).

however, the challengers were usually disappointed. The Court went through enormous efforts, with very little direct impact on the world around it, and in none of these areas did the White period produce important doctrinal developments.

Far more interesting were developments in two other areas in which the numbers of cases were far smaller: the extent of enumerated congressional powers, and the restraints of the first amendment. The first category presented the Court with the continuing challenge of measuring the deeds of an increasingly active Congress against a Constitution framed under strikingly different conditions. The second demonstrated the stress placed upon first amendment values by a wartime emergency. These pressures posed the critical intellectual challenges to the Court during the White period.

I do not think it can be said that the Court responded heroically to these demands. Its decisions on the scope of enumerated powers reveal an awareness of the tension between the necessary and proper clause and the principle of limited powers, but seem wholly capricious in attempting to resolve it. The cases on freedom of expression seem to reflect an extreme insensitivity to the values underlying the amendment, in the face of an eloquent, if belated, appeal by Holmes and Brandeis.

Like the Waite period,²²⁸ this era was characterized by short opinions. No doubt in both periods this was attributable in part to docket pressures; the Court had a great many cases to decide. In the early years of the White Court, moreover, there was a high degree of unanimity—perhaps in part because there were not many important new issues of principle.²²⁹ Dissents, like important new issues, became much more frequent after 1916—and after Wilson's appointments of McReynolds, Brandeis, and Clarke. Concurring opinions were rare throughout the period. Inconsistency and inadequate explanation, as usual, were not.

Individual Justices, on the other hand, were often highly predictable. Lurton, during his brief stay, tended toward narrow construction of federal powers and of civil rights.²³⁰ White, Van Devanter, and Mc-

228. For a discussion of the Waite Court (1874-1888), see D. CURRIE, *supra* note 16, at 361-452.

229. See also M. PUSEY, *supra* note 4, at 282, 293 (describing early White years as era of good feeling within Court despite Chief Justice's lack of leadership qualities, and noting Hughes's belief that dissent should rarely be expressed); M. KLINKHAMER, *supra* note 17, at 61 ("When White was first made Chief Justice, he was reported to have said that he was 'going to stop this dissenting business,' and it was further alleged that he had stopped it except for Mr. Justice Harlan.").

230. His two most important opinions for the Court were *Coyle v. Smith*, 221 U.S. 559, 565 (1911) (Congress could not forbid a new state to move its capital), and *Jones v. Jones*, 234 U.S. 615, 618-19 (1914) (equal protection did not require state to allow former slaves to inherit property). He dissented from the invalidation of peonage in *Bailey v. Alabama* and the upholding of congressional power in *Shreveport*. See *supra* notes 46-52, 110-15 and accompanying text; see also 9 A. BICKEL & B. SCHMIDT, *supra* note 17, at 74-80, 335-40 (noting that Lurton had not been operating at peak

Reynolds often dissented from decisions upholding federal authority or rejecting due process claims.²³¹ Holmes, Brandeis, Hughes, and Clarke were more likely than their colleagues to uphold both state and federal authority,²³² except that the first two developed a heightened sensitivity to first amendment claims after Hughes's departure,²³³ and that Clarke displayed a marked antipathy to measures of all kinds that interfered with the market for alcoholic beverages.²³⁴ McKenna was somewhat more inclined than the majority to invoke substantive due process but took a rather broad view of congressional powers.²³⁵ Pitney, whose ideas of federal authority were narrower, joined Holmes, Brandeis, and Clarke in opposition to the aggressive doctrine of admiralty preemption.²³⁶ Day, who seldom dissented in constitutional cases, was most representative of the position of the White Court in this field.²³⁷

Like his immediate predecessor, Chief Justice White played a relatively modest role in speaking for the Court, and, though he dissented

energy during his brief tenure, and concluding that "his main career had been as a federal circuit judge").

231. All three dissented, for example, from *Doremus*, *Mountain Timber*, *Bunting*, the *Arizona Employers' Liability Cases*, and *Block*. See *supra* notes 66-71, 102 and accompanying text. The Chief Justice, however, also dissented from the denial of congressional power over primary elections in *Newberry*, and argued in *Gilbert* that federal authority to prevent interference with the war effort was exclusive. See *supra* notes 88, 201. Van Devanter had begun by writing two opinions broadly construing the power to regulate matters affecting interstate commerce; in later years he proved hostile to the use of federal powers for police purposes, though he had gone along with the Court's opinion in the white-slave case. See *supra* text accompanying notes 39-88.

232. Holmes and Hughes dissented from the invalidation of the yellow dog law; Holmes, Brandeis, and Clarke dissented from the invalidation of the employment agency and child labor laws and of the tax on stock dividends. See *supra* notes 57-64, 71, 89-96 and accompanying text. Brandeis and Clarke, but not Holmes, dissented from invalidation of the federal primary election law in *Newberry* as well. See *supra* note 88; see also M. PUSEY, *supra* note 17, at 289 (describing Holmes and Hughes as the "two leading liberals" of the early White years).

233. See *supra* note 201 and text accompanying notes 212-27 (discussing *Abrams*, *Pierce*, *Schaefer*, and *Gilbert*). Brandeis dissented in all of these cases; Holmes, in all but *Gilbert*. Clarke joined them only in *Schaefer* and wrote for the Court to uphold the conviction in *Abrams*. See *supra* note 212.

234. See *National Prohibition Cases*, 253 U.S. 350, 407-11 (1920) (Clarke, J., dissenting from broad construction of the eighteenth amendment); *Jacob Ruppert v. Caffey*, 251 U.S. 264, 310 (1920) (Clarke, J., dissenting from decision upholding congressional power to ban nonintoxicating beer); *United States v. Hill*, 248 U.S. 420, 428 (1919) (Clarke, J., joining in dissent of McReynolds, J., from decision upholding statute forbidding bringing liquor into state whose law forbade sale).

235. McKenna dissented in *Hammer*, *Block*, the *Arizona Employers' Liability Cases*, and *Mountain Timber*. See *supra* note 96 and text accompanying notes 57-64.

236. Pitney dissented from the upholding of federal authority in *Shreveport* and *Holland*, but also from the denial of federal power in *Newberry*. See *supra* notes 46-52, 80-88 and accompanying text. For his dissenting votes in the admiralty cases of *Jensen*, *Chelentis*, and *Knickerbocker*, see *supra* notes 141-67 and accompanying text.

237. Day did dissent both from *Coppage v. Kansas* and from *Eisner v. Macomber*. See *supra* notes 71, 94; see also J. McLEAN, *supra* note 17, at 65, 116 (describing Day as strict in his construction of federal authority but tolerant of state police-power measures).

often, almost never wrote a dissenting opinion. Following longstanding tradition, he did use the prestige of his office to good advantage in reserving to himself several of the most politically sensitive controversies: the grandfather clause, the income tax, the military draft, and wartime measures that interfered with private interests in order to assure essential services.²³⁸ His opinion style was generally impenetrable, and there was little evidence during this period of the originality that had characterized his earlier opinions on insular possessions and full faith and credit.²³⁹ Yet he marshalled history effectively in the draft case, and his emphatic application of the fifteenth amendment against the grandfather clause was an impressive achievement.

McKenna, the senior Associate Justice, was again given little of importance to write, and justified the low expectations of two Chief Justices by having little of interest to say. Most of his opinions that are not completely forgotten applied settled law without flair,²⁴⁰ and his most significant departure—in upholding overtime legislation in *Bunting*²⁴¹—failed both to distinguish the precedents and to explain the reasonableness of the law.²⁴² Day, on the other hand, seemed to get more than his share of important opinions to write, including *Muskraat*, *Hammer*, *Doremus*, and *Buchanan*—although, as his opinions in those cases suggest, he was not among the more impressive craftsmen on the bench.²⁴³

238. See *supra* notes 49, 71, 79, 97, 115-17 (discussing *Guinn*, *Brushaber*, *Selective Draft Law Cases*, *Wilson v. New*, and *Dakota Cent. Tel.*); see also *Virginia v. West Virginia*, 246 U.S. 565, 591 (1918) (upholding judicial authority to enforce judgment against state); *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 283-84 (1913) (holding abuse of state authority to be state action within the fourteenth amendment).

239. See *Fuller II*, *supra* note 16, at 873-80, 883-89, 894-97 (discussing the insular cases, *Clarke v. Clarke*, 178 U.S. 186 (1900), *Fauntleroy v. Lum*, 210 U.S. 230 (1908), and *Haddock v. Haddock*, 201 U.S. 562 (1906)); M. KLINKHAMER, *supra* note 17, at 234 (“The repetitious prolixity just noted is perhaps the most outstanding quality of a style not intrinsically appealing.”).

240. See *supra* notes 103, 145 and text accompanying note 53 (discussing *Hadaeheck*, *Blaekwell*, and *Hoke*).

241. 243 U.S. 426, 438 (1917), discussed *supra* text accompanying notes 97-101.

242. He also authored two pedestrian opinions allowing the punishment of war critics—*Gilbert v. Minnesota*, 254 U.S. 325 (1920), and *Schaefer v. United States*, 251 U.S. 466 (1920)—and originated the novel but ill-explained use of due process to strike down a delegation of power to private property owners in *Eubank v. Richmond*, 226 U.S. 137, 143-44 (1912). Perhaps his best opinion was a dissent, in *Wilson v. United States*, 221 U.S. 361, 386-94 (1911) (McKenna, J., dissenting), from the Court’s narrow reliance on property concepts to define self-incrimination.

243. See *supra* text accompanying notes 20-37, 57-71, 121-40. He deserves credit, however, for having anchored what later became the exclusionary rule in the need to enforce the fourth amendment, *Weeks v. United States*, 232 U.S. 383 (1914), and for having balked at the Court’s willingness to apply more lenient commerce clause standards to a state segregation law than to other police power regulations affecting the same streetcars. See *supra* note 145 (discussing the two *South Covington* cases).

Of the five Justices appointed by Taft around the time of White's elevation, Lurton and Lamar made little impression, while the other three showed significant abilities.²⁴⁴ Hughes was unusually prominent for a newcomer, becoming the Court's leading spokesman on civil rights as well as on the positive and negative aspects of the commerce clause before he left the bench to run for President in 1916.²⁴⁵ Van Devanter, who had played a rather substantial role at the outset, ended up producing very little; his few significant opinions suggested that he was a thorough and careful thinker, if a narrowly literal one.²⁴⁶ Pitney, the author of *Coppage*, wrote effectively to sustain a state income tax against commerce clause attack, to strike down a federal tax on stock dividends, and to protest both the extension of maritime uniformity and the denial of federal power over primary elections.²⁴⁷

Wilson's three appointees were a mixed bag in terms not only of outlook, as already indicated, but of craftsmanship as well. Except for his vote, Clarke was not much of a factor.²⁴⁸ McReynolds wrote surprisingly little beyond his firm, if one-sided, opinions striking down state

244. Lamar sat as long as Hughes but wrote fewer than half as many constitutional opinions. His most significant efforts entailed the application of settled principles, *see, e.g.*, *Atchison, T. & S.F. Ry. v. Sowers*, 213 U.S. 55 (1909), to strike down a provision seeking to localize a transitory cause of action in *Tennessee Coal, Iron & R.R. v. George*, 233 U.S. 354, 359 (1914), and the more adventurous extension of precedents, *see* *Buttfield v. Stranahan*, 192 U.S. 470 (1904); *Field v. Clark*, 143 U.S. 649 (1892); *see also* 9 A. BICKEL & B. SCHMIDT, *supra* note 17, at 664-65; Foster, *The Delegation of Legislative Power to Administrative Officers*, 7 ILL. L. REV. 397, 403-05 (1913), to uphold a delegation of rulemaking power to protect national forests in *United States v. Grimaud*, 220 U.S. 506 (1911). Justice Harlan died before having the time to contribute significantly to the work of the White years. For a discussion of Lurton, *see supra* note 230 and accompanying text. For a favorable view of all five appointments, *see generally* 9 A. BICKEL & B. SCHMIDT, *supra* note 17, at 3-85; for an assessment of Lamar's achievements, *see id.* at 357-66.

245. *See supra* notes 128, 140 and text accompanying notes 109-15 (discussing *Bailey v. Alabama, Truax v. Raich*, and *McCabe v. Atchison, T. & S.F. Ry.*); *supra* text accompanying notes 42-52 (discussing the *Shreveport Rate Case* and *Baltimore & O.R.R. v. ICC*); *supra* note 145 (discussing the *Minnesota Rate Cases*, *Atlantic Coast Line*, *Port Richmond*, and *Sault Ste. Marie*); 9 A. BICKEL & B. SCHMIDT, *supra* note 17, at 392-406 (calling him one of the few Justices ever to make a significant mark in such a short time); M. PUSEY, *supra* note 17, at 303, 314 (praising Hughes's work and concluding that his "greatest contribution to judicial thinking in this period came in the adaptation of law to the control of national economic policy").

246. *See supra* notes 37, 227 (discussing *Dillon v. Gloss, Evans, and Slocum*); *supra* text accompanying notes 44-45 (discussing *Southern Ry. v. United States* and the *Second Employers' Liability Cases*); M. PUSEY, *supra* note 17, at 284 (noting that Van Devanter added a great deal in conference but was already showing signs of what Justice Sutherland later called "pen paralysis").

247. *See supra* notes 71, 88, 145 and text accompanying notes 141-67 (discussing *United States Glue, Eisner, Jensen, and Newberry*); *see also* M. PUSEY, *supra* note 17, at 284 (stating that Pitney was highly regarded by his brethren). For *Coppage*, *see supra* text accompanying notes 93-94.

248. His most important opinions were his uninspiring limitation of speech in *Abrams*, his ill-justified allowance of private lawmaking in *Cusack*, and his vigorous discarding of precedent to extend the remedies for unreasonable seizures in *Gouled v. United States*. *See supra* notes 140, 227 and text accompanying notes 212-27.

laws affecting the admiralty.²⁴⁹ Brandeis wrote even less for the Court in constitutional matters, but displayed his strength both in his learned dissents from decisions hostile to regulation and taxes and in his impassioned pleas for free expression.²⁵⁰

That leaves Holmes. To posterity, and to many contemporaries, he was the dominant figure of the day. This is partly because of his felicitous way with words and partly because his positions are appealing to the late twentieth-century mind.²⁵¹ Though he was a workhorse who wrote more majority opinions in constitutional matters than any of his colleagues, what he wrote for the Court was not uniformly impressive. In *Missouri v. Holland* he was careless as to the scope of the treaty power; in *Fox, Schenck, Frohwerk*, and *Debs* he was cavalier, superficial, and inattentive to the values of free expression.²⁵² As during the Fuller years, it was chiefly in dissent that Holmes made his mark. His name is associated with articulate protests against most of the White Court's illiberal decisions, including *Coppage*, *Hammer*, *Jensen*, the tax case of *Eisner v. Macomber*,²⁵³ and, most important of all, *Abrams v. United States*.²⁵⁴

249. See *supra* note 155 and text accompanying notes 141-67 (discussing *Jensen*, *Chelentis*, and *Knickerbocker*). He wrote effectively to sustain compulsory road work in *Butler*, and ineffectively to require de novo review of administratively set rates in *Ben Avon*, and wrote to deny federal power over primary elections in *Newberry*. See *supra* notes 88, 115, 140. For a fascinating portrait of this Justice—whom Professor Bickel described as very likely “the most difficult man ever to serve” on the Court—see 9 A. BICKEL & B. SCHMIDT, *supra* note 17, at 341-57 (adding that, though able, McReynolds gave little attention to the writing of opinions, “being affected by a curious notion that opinions were essentially superfluities anyway”).

250. See *supra* notes 71, 140, 201, 224 (discussing *Ben Avon*, *Eisner*, *Pierce*, *Schaefer*, *Gilbert*, and *Milwaukee Publishing Co.*). His only important constitutional opinion for the Court was in upholding wartime liquor prohibition in *Hamilton*. See *supra* text accompanying notes 72-79; see also 9 A. BICKEL & B. SCHMIDT, *supra* note 17, at 367-68 (describing Brandeis as the first Justice representative of a new way of thinking and the celebrated fight over his appointment as one “for the soul of the Supreme Court”: “In his opinions would be glimpsed the second half of the twentieth century.”).

251. Compare Felix Frankfurter's contemporaneous paean: “It makes all the difference in the world whether the Constitution is treated primarily as a text for interpretation or as an instrument of government.” Frankfurter, *Twenty Years of Mr. Justice Holmes' Constitutional Opinions*, 36 HARV. L. REV. 909, 920 (1923).

252. See *supra* text accompanying notes 80-87, 168-211. More admirable were several of his less celebrated opinions, e.g., his interesting insights into the differences between legislative and judicial procedures in *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 444-45 (1915), his indignant prevention of an end run around the fourth amendment in *Silverthorne v. United States*, 251 U.S. 385, 391-92 (1920), and his persuasive use of precedent and other arguments to sustain rent control in *Block v. Hirsh*, 256 U.S. 135, 155-58 (1921). See M. PUSEY, *supra* note 17, at 285-86 (describing Holmes's opinions as “short and pungent but sometimes lacking in body and clarity”).

253. See *supra* note 71 and text accompanying notes 55-64, 93-94, 141-64 (discussing *Eisner*, *Hammer*, *Coppage*, and *Jensen*).

254. See *supra* text accompanying notes 212-27. See also *Frank v. Mangum*, 237 U.S. 309, 347 (1915) (Holmes, J., joined by Hughes, J., dissenting) (protesting that mob domination rendered trial a deprivation of liberty without due process); *Evans v. Gore*, 253 U.S. 245, 265-66 (1920) (Holmes,

If he had done nothing else in these eleven years, Holmes would still be justly celebrated for the *Abrams* dissent, not least because it suggests an astonishing capacity for growth in a man nearly eighty years old. For nobility of aspiration this opinion ranks with the racial justice of *Bailey*, *Guinn*, and *Buchanan*; for sheer eloquence and creativity it outshines them all. It took a long time for Holmes's message to sink in. In the long run, however, it effected a profound and lasting change in the country's perception of freedom of expression. The *Abrams* dissent was the supreme achievement of an otherwise largely uninspiring period.

J., dissenting) (taking functional view of protection of judicial compensation in article III); and the less liberal, though challenging, dissent from the invalidation of criminal penalties for quitting work in *Bailey v. Alabama*, discussed *supra* text accompanying notes 110-15.