Book Reviews

The Cultural Crises of the Fuller Court

Troubled Beginnings of the Modern State, 1888–1910. By Owen M. Fiss.*
New York: Macmillan Reference, 1994. Pp. xix, 420. \$75.00.

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Volume VIII of the *Holmes Devise History of the Supreme Court of the United States* covers the period (1888–1910) during which Melville Weston Fuller was Chief Justice. Owen Fiss' book begins with candor. By all accounts, Fuller's Court "ranks among the worst" in Supreme Court history.¹ This was the Court that gave us *Lochner v. New York*² and the development of substantive due process,³ paranoid hostility toward government regulation of business,⁴ and condemnation of the federal income tax.⁵ The same Court's opinions interpreted free speech narrowly⁶ and fueled the antilabor movement by furnishing the federal government with expansive power to break strikes and by interpreting the antitrust laws to reach and condemn the organization of labor.⁷ The Fuller Court contributed the racism of the Chinese exclusion

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1. OWEN M. FISS, *TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910*, at 3 (The Oliver Wendell Holmes Devise History of the Supreme Court of the United States vol. 8, Stanley N. Katz gen. ed., 1993).

2. 198 U.S. 45 (1905).

3. FISS, *supra* note 1, at 155–84.

4. *Id.* at 185–221.

5. *Id.* at 75–100.

6. *Id.* at 323–51.

7. *Id.* at 53–74.

cases, which denied resident Chinese the opportunity to become U.S. citizens,⁸ and, worst of all, it wrote *Plessy v. Ferguson*,⁹ which gave constitutional legitimacy to a "separate but equal" segregation statute.¹⁰ The Fuller Court's legacy was an unmatched record of reactionary, bigoted, and rejected precedents, with few brilliant, prophetic decisions thrown in to right the balance.

The Fuller Court represented (until the election of Warren Harding in 1920) the last stand of orthodoxy in the face of the Progressive revolution. Fuller's misfortune was that he and most of his colleagues followed a political ideology that had fallen out of favor, just as the revolution was occurring. Somebody has to end an era. Even so, the Fuller Court gave nineteenth-century legal orthodoxy an ungraceful exit. The problem was not so much that its members were predominantly committed to the common law, suspicious of regulation and the welfare state, and influenced by numerous racial prejudices. All these things could be said equally of Justice Holmes, its most illustrious dissenter. The central problem of the Fuller Court was that it united its prejudices with an expansive and ill-considered conception of judicial power that enabled the Justices to strike down all manner of legislation by employing highly creative interpretations of the Constitution. Then it used that power selectively. For example, "due process" was given a broad and unprecedented meaning in *Lochner*, but "equal protection" was constrained to its narrowest possible meaning in *Plessy*.

Fiss' presentation of the Fuller Court is balanced and more sophisticated and theoretical than many of the volumes in the *Holmes Devise*. It is not very chronological, and that may disturb some readers. *Plessy* (1896) comes in the very last chapter, while *Lochner* (1905) is treated mainly in the first two-hundred pages. Fiss chose, I believe correctly, to organize the Fuller Court analytically rather than chronologically. However, a few things become lost in this organization. For example, *Plessy* was part of the road to substantive due process, not simply tacked on at the end. Both substantive due process and *Plessy* were part of the historical development of judicial analysis of the Fourteenth Amendment. Why was it that the Court was so tolerant of state regulatory intervention in race relations but so intolerant of regulatory intervention in the economy? Sticking *Plessy* in the last chapter, removed from the substantive due process debate, does not serve to cast light on this question.

The Fuller Court dealt with three major legal/intellectual debates that dominated the two-decade period falling just before and just after the turn of the century. These concerned the Progressive welfare agenda, the antitrust and

8. *Id.* at 298-322.

9. 163 U.S. 537 (1896).

10. FISS, *supra* note 1, at 352-85.

regulated industries movement, and the first major debate since the Civil War over the scope of federal protection for civil and political rights. Fiss' book handles these issues with skill, focusing somewhat less on the language of the judicial decisions than earlier *Holmes Devise* volumes, and somewhat more on the political and social history of the times. At the same time, however, Fiss' treatment presents its own ambiguities and problems of perspective.

I. CONTRACTARIANISM AND THE PROGRESSIVE POLICY AGENDA

Fiss argues that the Fuller Court thwarted Progressive reform legislation by subjecting it to a contractarian analysis that the Court found justified mainly by the Fourteenth Amendment. The result was substantive due process—the notion that the Fourteenth Amendment's Due Process Clause can be used to strike down the substance of state legislation rather than simply as a guarantee of procedural fairness¹¹—identified today mainly with the Court's decision in *Lochner v. New York*.

The group of academics and politicians we call the Progressives held views at odds with nineteenth-century orthodoxy in several ways. In economics they were neoclassicists rather than classicists.¹² As such, they had less faith than their predecessors in the robustness of markets, and correspondingly more faith in the usefulness of state intervention. The Progressives were more committed than their predecessors to state regulation of business and to state policymaking concerning the distribution of wealth. They tended to see the common law as ineffective for achieving the state's "public" policy goals, or even as affirmatively harmful.¹³

Progressive intellectuals, although not necessarily Progressive politicians, were also by and large Darwinians. Darwinism entailed accommodation of the social sciences,¹⁴ but it also had powerful if controversial implications for determining the role of the state in issues of welfare and human development. To the extent Progressives were influenced by Darwin, they were "Reform" Darwinists rather than "Social" Darwinists. Social Darwinists and Reform Darwinists had radically different views about the respective roles of state and market. Social Darwinists believed that the state should let social conditions and the market take care of themselves, thus permitting the evolutionary process to run its course. By contrast, Reform Darwinists emphasized that while all organisms are subject to evolutionary processes, human beings are

11. On the nature of due process during the Fuller era, see HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW 1836–1937*, at 171 (1991) [hereinafter HOVENKAMP, *ENTERPRISE*].

12. On the differences between these two schools, see Herbert Hovenkamp, *The First Great Law & Economics Movement*, 42 STAN. L. REV. 993 (1990); Herbert Hovenkamp, *The Marginalist Revolution in Legal Thought*, 46 VAND. L. REV. 305 (1993).

13. See, e.g., 2 RICHARD T. ELY, *PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH* 690 (1914).

14. See generally DOROTHY ROSS, *THE ORIGINS OF AMERICAN SOCIAL SCIENCE* (1991).

different in that they are *aware* of the evolutionary process and thus able to direct it and use it to best advantage.¹⁵ Thus, Reform Darwinists were statist, and a few were even radical statist.

The substantive due process ideology of the Fuller Court was also radical, but in different ways. First, during the substantive due process era the Supreme Court seemed to give government regulation much closer scrutiny, striking down many more statutes than it had in the past. Second, the justifications on which the Court relied to strike down legislation were either poorly articulated in the constitutional text or not articulated at all; they were also largely absent from the debates of the Constitution's drafters.

Fiss quite properly notes that the latter point should not be pushed too far. Constitutional interpretation in the nineteenth century was based on fairly broad principles and was "not an exercise in clause-parsing,"¹⁶ as it has often become today. Nevertheless, the mode of constitutional analysis that characterized substantive due process was unprecedented, particularly the Justices' willingness to strike down both state and federal statutes that were not obviously in conflict with any specific constitutional provision. Nearly every historian who has written about the subject has felt obliged to produce some explanation, or model, for making sense out of what looks very much like Justices simply writing down their political views and calling it constitutional adjudication.¹⁷

Fiss' own explanation is that the defining ideology of the Fuller Court toward welfare legislation was contractarianism.¹⁸ The Justices believed that the Constitution was a social compact in the Lockean sense, and that reaching ultimate constitutional values meant not simply looking at the text of the Constitution but also putting oneself in place of the original contracting parties. Since a contract requires unanimous consent, the constitutional interpreter must ask what kinds of state actions would have received such consent.¹⁹

Clearly, state-forced wealth transfers would not have received unanimous consent, for losers would never have agreed; likewise, the original contractors would not have given up their future economic liberty of contract without a very good reason. Fiss believes that even though the conservative Justices were naturally attracted to this idea by their own political ideology, they found it already well established in nineteenth-century constitutional theory. They also found support in the Social Darwinism that permeated elite thinking during the

15. See Herbert Hovenkamp, *Evolutionary Models in Jurisprudence*, 64 TEX. L. REV. 645, 654-55 (1985).

16. FISS, *supra* note 1, at 85.

17. See *infra* text accompanying note 30.

18. See FISS, *supra* note 1, at 45-49, 81-83, 158-59, 176-77, 186-87, 389-95.

19. Cf. JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* at vii (1962) ("[A Constitution is] a set of rules that is agreed upon in advance and within which subsequent action will be conducted."). See generally DENNIS C. MUELLER, *PUBLIC CHOICE II* (1989).

1880's and 1890's.²⁰ This contractarian theory guided not only explicit substantive due process decisions such as *Lochner* but also the decisions that invalidated the federal income tax,²¹ that authorized federal intervention in labor disputes,²² and that limited the rights of resident aliens and citizens of U.S. territories, on the premise that these people had not been participants in the formation of the contract.²³

Fiss concludes that "[t]he theory of the social contract prevalent in the nineteenth century defined the bargaining relationship among the founders in such a way as to deny government the power to redistribute wealth."²⁴ Further, this social contract ideology differed from Rawlsian ideology in that the constitutional social contract of the nineteenth century was not negotiated behind a "veil of ignorance."²⁵ The bargainers knew what they had and what they wanted. The wealthy would never have assented to a contract bargaining away their wealth. "Accordingly, they conditioned their consent, so the story went, on an assurance that their holdings would not be taken by the newly established government for the purpose of altering the distribution of wealth."²⁶

Fiss argues that the contractarianism of the Fuller Court entailed a sharp distinction between the social and the political. In cases of conflict, social interests took priority over political ones.²⁷ Although much less formal, Fuller-era contractarianism nevertheless has much in common with modern contractarianism.²⁸ Principally, it viewed markets as the product of private, social orderings, not as creatures of state policy. The priority given to social over political orderings meant that the state's appropriate role was to act as market facilitator, rather than market substitute. Second, Fuller-era contractarianism judged legislation by considering what kind of program would

20. FISS, *supra* note 1, at 47; see also RICHARD HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* (rev. ed. 1959). For a critical review of scholarship on Social Darwinism, see ROBERT C. BANNISTER, *SOCIAL DARWINISM* (1979).

21. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895); see FISS, *supra* note 1, at 81-83. For a recent argument that the federal income tax was hardly progressive and was largely the work of centrist political forces, see ROBERT STANLEY, *DIMENSIONS OF LAW IN THE SERVICE OF ORDER: ORIGINS OF THE FEDERAL INCOME TAX, 1861-1913* (1993).

22. See FISS, *supra* note 1, at 65 (relating social contract to *In re Debs*, 158 U.S. 564 (1895)).

23. *Id.* at 229 ("The social contract . . . made the legitimacy of government depend on the consent of its citizenry . . . But there was nothing consensual about American dominion over the Philippines and Puerto Rico."); see also *id.* at 298-322 (discussing cases denying citizenship to resident Chinese on theory that social contract never included them). See generally *id.* at 225-56 (discussing civil rights in U.S. territories).

24. *Id.* at 82.

25. JOHN RAWLS, *A THEORY OF JUSTICE* 19 (1971), quoted in FISS, *supra* note 1, at 82.

26. FISS, *supra* note 1, at 82.

27. *Id.* at 46-47.

28. See, e.g., JAMES M. BUCHANAN, *THE LIMITS OF LIBERTY* (1975); James M. Buchanan, *The Contractarian Logic of Classical Liberalism*, in *LIBERTY, PROPERTY, AND THE FUTURE OF CONSTITUTIONAL DEVELOPMENT* 9 (Ellen F. Paul & Howard Dickman eds., 1990) [hereinafter Buchanan, *Contractarian Logic*].

have achieved the requisite unanimous consent at the time the social compact was formed.

This contractarianism also led the Fuller court to a very rigid conception of social rights. Fiss observes:

[T]echniques had to be found that simultaneously placed limits on the power of the state and that were consistent with the democratic aspiration that made the consent of the people the source of state authority. The solution lay in the idea of contract. Consent may be the ultimate source of legitimacy for the state, but that to which the people gave their consent—a contract—is not open to constant revision. It is fixed once and for all. Naturally enough, the Constitution became this contract, and it was the Constitution that the Fuller Court drew upon in defining the bounds of the modern state.²⁹

The idea that substantive due process and the Supreme Court's more general hostility toward wealth transfers were constitutionalized contractualism is both simple and attractive. It also faces formidable conceptual and historical problems, however, that require more analysis than Fiss provides. Although he asserts his thesis repeatedly and in the context of several different constitutional doctrines, he gives little support for it from the Fuller Court's judicial opinions or the biographies of the Fuller Justices. To be sure, he does note that many of the Fuller Court's decisions about economic regulation and wealth transfers were consistent with a contractarian ideology. However, alternative accountings are equally consistent.³⁰

A more elaborate inquiry into the relation between contractarian political ideology and Gilded Age constitutional theory must account for the following problems. First, although some contemporary critics of the Fuller Court agreed that social contract theory guided the Court's hostility toward economic and welfare legislation, the number of such critics was small, and contractarianism was by no means a dominant target of the Progressive critique. Second, the social contract did not play a significant role in classical political economy, whether English or American. Third, no case can be made from the Fuller Court's opinions that substantive due process reflected a form of constitutional contractualism. To the contrary, that Court very largely *abandoned* contractarian language that was quite common in earlier decisions discussing *ex post facto* legislation, impairments of the obligation of contract, and, in a few instances, forcible wealth transfers. Fourth, any notion that the Social

29. FISS, *supra* note 1, at 49.

30. See Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293 (1985); Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379 (1988); Charles W. McCurdy, *The Roots of "Liberty of Contract": Reconsidered: Major Premises in the Law of Employment, 1867-1937*, 1984 SUP. CT. HIST. SOC'Y Y.B. 20; William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974).

Darwinists were social contractarians is historically wrong, although the substantive due process Justices may incorrectly have read the Social Darwinist literature that way.

A. Contemporary Critics

Fiss describes the Fuller Court and substantive due process as contractarian, but he does not cite to contemporary literature making that claim, a curious omission given that the Gilded Age Supreme Court had an unprecedented number of intellectual critics. For example, James B. Thayer blasted the Court for abandoning traditional judicial reticence to declare statutes unconstitutional.³¹ Roscoe Pound accused the Court of developing a “mechanical” jurisprudence of conceptions, rather than a truly scientific jurisprudence, and of adhering to outmoded concepts of individual rights at a time when social rights were moving to the fore.³² Justice Holmes accused the Court of being paranoid about what it perceived as growing socialism.³³

The idea that substantive due process was an expression of contractarian ideology did appear occasionally. For example, Princeton University’s great constitutional scholar Edward S. Corwin argued that substantive due process expressed a working out of contractarian ideology that was thought by judges to be rooted in the Constitution.³⁴ Corwin found plenty of evidence that late-eighteenth-century political thought was contractarian,³⁵ but little evidence that contractarian ideology dominated the thought of substantive due process judges.³⁶

Corwin aside, Progressive critiques did not see contractarianism as the root of substantive due process ideology. They were much more inclined to see it as an expression of legal “formalism,” as an excessive concern with classification rather than policy, or simply as paranoia about a feared social revolution. Otherwise they blamed it on rigid adherence to outmoded ideas of classical political economy.³⁷ Even Roscoe Pound’s famous essay on “liberty

31. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 148–49 (1893).

32. Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

33. See Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 467–68 (1897); see also Richard C. McMurtrie, *The Jurisdiction To Declare Void Acts of Legislation—When Is It Legitimate and When Mere Usurpation of Sovereignty?*, 32 AM. L. REG. 1093 (1893) (criticizing Fuller Court).

34. Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247, 250–54 (1914).

35. For example, Corwin cited Justice Paterson’s opinion in *Vanhorne’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (C.C.D. Pa. 1795) (holding that fundamental principle of social compact is that each person has right to property and cannot be called upon to surrender all of it for public good without compensation), as an early (but not the earliest) example. Corwin, *supra* note 34, at 255–56.

36. See Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366 (1911).

37. HOVENKAMP, *ENTERPRISE*, *supra* note 11, at 171–92.

of contract" speaks not of social contractualism, but of the undue emphasis placed on private contracting.³⁸ In sum, contemporary critics of the Fuller Court simply did not give voice to any general theory that the Court had become dominated by a reinvigorated contractarian ideology.

B. *Classical Political Economy and Contractarian Thought*

Classical political economy placed great faith in the market. A powerful political philosophy of state nonintervention dominates the writings of Adam Smith, David Ricardo, Thomas Malthus, and John Stuart Mill in Scotland and England; Francis Wayland and Henry Carey in the United States; and dozens of less prominent figures.

Classical political economy and Lockean social contract theory also share one important premise: Starting from complete economic self-interest, both proceed to a theory of market and state in which private ordering is given the highest priority. This places classical political economy and social contract theory in sharp contrast to the competing republican vision, which emphasizes virtue and representation rather than self-interest and individual self-determination.³⁹ It also tends to place the classical political economists in the Lockean camp with respect to such things as rights in private property.

However, the classical political economists were not contractarians. The formal union of contractarian ideology and political economy is very largely a twentieth-century invention.⁴⁰ Adam Smith himself explicitly rejected Lockean contractarianism as the justification for government.⁴¹ Later political economists generally ignored the social contract. Their theories of state nonintervention were not based on notions of contractual autonomy but rather on economic efficiency. To be sure, the jump from one ideology to the other need not be very far. Efficiency is nothing more than the ability of a given amount of resources to satisfy the maximum number of desires. Nonetheless, the classical political economists ignored Locke, Hume, and Rousseau on the social contract. Malthus and Ricardo, for example, had virtually nothing to say

38. See Pound, *Liberty of Contract*, *supra* note 32, at 454–62.

39. On the comparison between social contract theory and republicanism, see generally THOMAS L. PANGLE, *THE SPIRIT OF MODERN REPUBLICANISM: THE MORAL VISION OF THE AMERICAN FOUNDERS AND THE PHILOSOPHY OF LOCKE* (1988); J.G.A. Pocock, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975); GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* (1992). A good brief account of social contract theory in England can be found in P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 39–60 (1979). Atiyah concludes that social contract thought largely lost its influence in England after 1770. *Id.* at 60.

40. See, e.g., BUCHANAN & TULLOCK, *supra* note 19; DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 12–33 (1991); MUELLER, *supra* note 19, at 2–6 (giving brief history).

41. ADAM SMITH, *LECTURES ON JUSTICE, POLICE, REVENUE AND ARMS* (1896), *reprinted in* ADAM SMITH'S *MORAL AND POLITICAL PHILOSOPHY* 279, 287–90 (Herbert W. Schneider ed., 1948).

on the subject.⁴² John Stuart Mill's *Principles of Political Economy* contained a long defense of laissez-faire, based on several independent grounds, but the social contract was not among them.⁴³ The story of American political economists is very much the same. Francis Wayland, Henry Carey, and Thomas Cooper never discussed the social contract.⁴⁴ Even Jacksonians such as Henry Vethake, whose thought contributed heavily to substantive due process, said nothing. Vethake did write at some length on laissez-faire and the duty of government not to interfere with the workings of the market. But his rationales were all related to traditional economic concerns for market efficiency and did not mention the social contract.⁴⁵

C. *The Social Contract in Supreme Court Opinions*

When Fuller became Chief Justice, contractarian arguments and rhetoric were hardly new to the Supreme Court. Throughout the nineteenth century and even back into the eighteenth,⁴⁶ the Court had commonly expressed its

42. See THOMAS R. MALTHUS, *PRINCIPLES OF POLITICAL ECONOMY* (W.J. Ashley ed., Longmans, Green & Co. 1923) (1848); DAVID RICARDO, *THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION* (1817), reprinted in *1 THE WORKS AND CORRESPONDENCE OF DAVID RICARDO* 1 (Piero Sraffa ed., Cambridge Univ. Press 1951) (1817).

43. JOHN S. MILL, *PRINCIPLES OF POLITICAL ECONOMY* 941-79 (William J. Ashley ed., 1976) (7th ed. 1871).

44. See H.C. CAREY, *PRINCIPLES OF POLITICAL ECONOMY* (Philadelphia, Carey, Lea & Blunckard 1837); H.C. CAREY, *PRINCIPLES OF SOCIAL SCIENCE* (Philadelphia, J.B. Lippincott & Co. 1859); THOMAS COOPER, *LECTURES ON THE ELEMENTS OF POLITICAL ECONOMY* (Columbia, S.C., M. Morris & Wilson, 2d ed. 1831); FRANCIS WAYLAND, *THE ELEMENTS OF POLITICAL ECONOMY* (Boston, Gould, Kendall & Lincoln 1847). Other 19th-century American economists also fail to discuss the social contract or a contractarian theory of government. See, e.g., SAMUEL P. NEWMAN, *ELEMENTS OF POLITICAL ECONOMY* (Andover, Mass., Gould & Newman 1835); WILLARD PHILLIPS, *MANUAL OF POLITICAL ECONOMY* (Boston, Hillard, Gray, Little, & Wilkins 1828); AMASA WALKER, *THE SCIENCE OF WEALTH: A MANUAL OF POLITICAL ECONOMY* (Boston, Little, Brown, & Co. 1866).

45. HENRY VETHAKE, *THE PRINCIPLES OF POLITICAL ECONOMY* (Philadelphia, P.H. Nicklin & T. Johnson 1838).

46. The important 18th-century decisions included *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), in which Justice Chase spoke of *ex post facto* legislation in contractarian terms:

An ACT of the Legislature (for I cannot call it a law) contrary to the *great first principles* of the *social compact*, cannot be considered a *rightful exercise* of legislative authority. The obligation of a law in governments established on *express compact*, and on *republican principles*, must be determined by the *nature* of the *power*, on which it is founded. A few instances will suffice to explain what I mean. A law that punished a citizen for an *innocent* action, or, in other words, for an act, which, when done, was in violation of no *existing* law; a law that destroys, or impairs, the *lawful private* contracts of citizens; a law that makes a man *a Judge in his own cause*; or a law that takes *property* from A. and gives it to B.: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it.

Id. at 388; see also *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14, 19 (1800) (Paterson, J.) (concluding that Georgia legislature's power to confiscate property and banish individual "grows out of the very nature of the social compact, which must reside somewhere, and which is so inherent in the legislature, that it cannot be divested, or transferred, without an express provision of the constitution"); *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 139 (1795) ("The right of expatriation is antecedent and superior to the law of society. It is implied, likewise, in the nature and object of the social compact, which was formed to shield the weakness, and to supply the wants of individuals Whenever these purposes fail, either the whole society is dissolved, or the suffering individuals are permitted to withdraw from it.").

approval or disapproval for certain types of legislation by alluding to basic principles of the social contract.⁴⁷ The Supreme Court continued to use such language, although far less frequently, after the end of the Fuller period.⁴⁸ Although the federal Constitution did not explicitly refer to the social contract, many early state constitutions did, and Supreme Court decisions sometimes construed these provisions as well.⁴⁹

The nineteenth-century Supreme Court frequently referred to social contract theory as its rationale for striking down ex post facto legislation, state impairments of contractual obligations, or state attempts to tax citizens in order to provide business subsidies. These decisions were all thought to involve a status or expectation that had become "vested," and that the state subsequently modified or took away. A basic principle of the social contract, the Justices wrote, was that the state could not interfere with previously made contracts,

47. *In re Sinking-Fund Cases*, 99 U.S. 700, 765 (1878) (Waite, J., dissenting) (finding modification akin to ex post facto law, which violates social compact); *Munn v. Illinois*, 94 U.S. 113, 124-26 (1876) (describing social contract foundation of government and upholding power of state to regulate rates of unincorporated business affected with public interest); *West Wis. Ry. v. Board of Supervisors*, 93 U.S. 595, 597 (1876) (citing *Tucker v. Ferguson*, 89 U.S. (22 Wall.) 527 (1874), as controlling); *Tucker v. Ferguson*, 89 U.S. (22 Wall.) 527, 575 (1874) (holding that Texas statute creating tax exemption for railroad could be repealed because taxing power is essential part of social compact and may be restrained "by contract in special cases for the public good, where such contracts are not forbidden"); *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655, 663-65 (1874) (stating social contract implies reservations of individual rights and holding that taxation must be for public purpose); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 129 (1872) (Swayne, J., dissenting) (arguing that Fourteenth Amendment secures for all citizens rights and privileges according to "reason and justice and the fundamental principles of the social compact"); *Gunn v. Barry*, 82 U.S. (15 Wall.) 610, 622-23 (1872) (holding that Contract Clause prohibits Georgia statute exempting 50 acres of land plus improvements from execution by creditors and stating that statute "is in effect taking one person's property and giving it to another without compensation. This is contrary to reason and justice, and to the fundamental principles of the social compact."); *Osborn v. Nicholson*, 80 U.S. (13 Wall.) 654, 662 (1871) (holding that seller had right to enforce contract for purchase price of slave sold shortly before the Thirteenth Amendment came into effect because buyer's interest had vested prior to emancipation and stating that contrary reading would upset all vested rights, which is "forbidden by the fundamental principles of the social compact, and . . . beyond the sphere of the legislative authority both of the States and the Nation"); *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 581-82 (Chase, C.J., dissenting) (1870) (arguing that statute making U.S. notes payable for debts incurred before statute was passed violated social compact, notwithstanding that Contract Clause itself applies only to states); *McVeigh v. United States*, 78 U.S. (11 Wall.) 259, 267 (1870) (holding that denying Confederate defendant notice and opportunity to answer and counterclaim violated social compact); *Planters' Bank v. Sharp*, 47 U.S. (6 How.) 301 (1848) (striking down statute regulating promissory notes and bills of exchange under Contract Clause and explaining concepts of vested rights and social compact as background to analysis); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 303-04, 319 (1827) (noting that social contract would prevent ex post facto laws and describing scope of contract law as it would exist in state of nature).

48. See *Shwab v. Doyle*, 258 U.S. 529, 534 (1922) (refusing to apply federal tax statute to transfers or trusts created before statute was passed because retroactive statutes violate social compact); *Chicago v. Sturges*, 222 U.S. 313, 322 (1911) (upholding statute making municipality liable for property damage caused by riot, reasoning that social compact requires governments to protect life, liberty, and property against private conduct).

49. See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905) (discussing social compact provision in 1780 Massachusetts Constitution); *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (C.C.D. Pa. 1795) (interpreting Pennsylvania Constitution as incorporating social compact right to preservation of property). On the place of the social compact in early state constitutions, see DONALD S. LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 110-24 (1988).

renege on its own bargains, or apply legislation to events that had occurred before the legislation was passed.⁵⁰

In sum, the nineteenth-century Supreme Court had a well-defined concept of the social contract, which often became an artifice for condemning statutes where the constitutional language was inapplicable or ambiguous. For example, although the Constitution does not explicitly forbid a state from taking property from one person and giving it to another, as in debtor-relief legislation, the social contract did. Or, alternatively, although the federal Constitution's Contract Clause does not apply to the federal government, it would violate the principles of the social compact not to impose a similar obligation on all governmental levels.⁵¹ But the Court used the rhetoric of social contract only to speak of "vested" rights—that is, settled expectations or previous obligations that the state had created and then attempted to change. The Court ventured further only in a few decisions dealing with taxation for private purposes or rate regulation.⁵²

Contractarian language in nineteenth-century judicial opinions was largely the work of Federalists and, later, anti-Jacksonians. Its main use was in opposition to debtor-relief legislation and Jacksonian attempts to amend corporate charters retroactively.⁵³ The Jacksonian agenda in such cases was generally to eliminate the state-created privileges of entrepreneurial interests, like tax relief, monopoly grants, and other special advantages. The opposition then protested that undoing these previous commitments violated the social contract. Debtor-relief legislation was a similarly popular agenda item for Jacksonian state legislatures. When Federalist and Whig Justices struck down that legislation, or dissented from decisions refusing to strike it down, they used contractarian language.⁵⁴

Substantive due process, by contrast, was a uniquely Jacksonian tool.⁵⁵ Its fierce commitment to state noninterference in business grew out of a Jacksonian disdain for the special privileges accorded to entrepreneurs with established wealth or social position.⁵⁶ In sum, social contract language was

50. See sources cited *supra* note 47.

51. An important point of James B. Thayer's critique of judicial review, written in the 1890's before *Lochner* was decided, was to prevent this type of judicial activism when the express constitutional language seemed to permit judgment either way. See Thayer, *supra* note 31, at 155–56.

52. See *Munn v. Illinois*, 94 U.S. 113, 124–26 (1876); *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655, 663–65 (1874).

53. For the Jacksonian position on these issues, see HOVENKAMP, ENTERPRISE, *supra* note 11, at 17–41.

54. See *id.* at 17–35.

55. Its principal intellectual protagonists were all Westerners: Thomas M. Cooley (Michigan), John F. Dillon (Iowa), Christopher G. Tiedeman (Missouri). On Cooley's Jacksonian roots, see Alan Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration*, 53 J. AM. HIST. 751 (1967); see also Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations*, 61 J. AM. HIST. 970 (1975) (detailing Jacksonian roots of Justice Field's substantive due process doctrine).

56. See HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 19–60* (1993) (tracing Jacksonian roots of substantive due process doctrine). See generally CHARLES SELLERS, *THE MARKET REVOLUTION: JACKSONIAN AMERICA 1815–1846*

an anti-Jacksonian tool in the nineteenth century, while substantive due process was a distinctly Jacksonian phenomenon. As a result, any historical interpretation attributing *Lochner* to contractarianism faces a formidable historical obstacle of misplaced pedigree.

While Federalist constitutional law scholars such as Joseph Story used contractualist arguments to explain what was wrong with state attempts to upset vested rights,⁵⁷ the Jacksonian treatise writers whose work gave us substantive due process more or less ignored such rationales. For example, Thomas M. Cooley's sustained argument for state nonintervention in his *Treatise on Constitutional Limitations*, which probably contributed more to substantive due process doctrine than any other volume, can hardly be characterized as contractualism. Even Cooley's treatment of ex post facto laws⁵⁸ and the Contract Clause⁵⁹—the two constitutional areas that most frequently occasioned contractarian analysis—avoids discussion of the social contract. Indeed, one of Cooley's most important goals was to limit the scope of the Contract Clause, particularly to the set of rules holding that once rights were bestowed on corporations through their charters, these rights could not be taken back.⁶⁰

The current, more technical contractarianism that we identify with James Buchanan, Gordon Tullock, and Richard Epstein on the right,⁶¹ or with John Rawls on the left,⁶² simply has no analogue in nineteenth- or early-twentieth-century legal thought. Under the modern view, one looks at the full social ordering that the contracting individuals might have contemplated, and tries to determine the limits of state power to interfere in markets under such a system. Depending on one's ideology, this leads either to the libertarian view that only economic or regulatory policies that would have been supported by unanimous

(1991) (discussing importance of unregulated market in Jacksonian political theory).

57. See, e.g., 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 501-02 (Boston, Little, Brown, & Co., 3d ed. 1858) (1833).

58. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 318-28 (Boston, Little, Brown, & Co., 6th ed. 1890). The Sixth Edition was the first to be published during the Fuller period.

59. *Id.* at 328-58.

60. In speaking of the *Dartmouth College* case, which held, inter alia, that a corporate charter is a contract, Cooley stated:

It is under the protection of the decision in the *Dartmouth College Case* that the most enormous and threatening powers in our country have been created; some of the great and wealthy corporations actually having greater influence in the country at large, and upon the legislation of the country, than the States to which they owe their corporate existence. Every privilege granted or right conferred—no matter by what means or on what pretence—being made inviolable by the Constitution, the government is frequently found stripped of its authority in very important particulars, by unwise, careless, or corrupt legislation; and a clause of the federal Constitution, whose purpose was to preclude the repudiation of debts and just contracts, protects and perpetuates the evil.

Id. at 335 n.1.

61. See BUCHANAN & TULLOCK, *supra* note 19, at 6-8; RICHARD A. EPSTEIN, TAKINGS 3-8 (1985).

62. RAWLS, *supra* note 25, at 175-78; see Herbert Hovenkamp, *The Limits of Preference-Based Legal Policy*, 89 NW. U. L. REV. 4, 71-74 (1994).

consent are "constitutional,"⁶³ or to the position that a sovereign's interference in the market or a forcible wealth transfer constitutes a "taking" unless every affected person either benefits in proportion to his existing wealth or receives compensation.⁶⁴ By contrast, leftist contractarian political reasoning leads to a state obligation to create policy priorities that equalize wealth or bring the worst-off individuals up to some higher level. This approach to the social contract, by contrast, permits a great deal of market interference as well as outright wealth transfer.⁶⁵

Contractarian discourse in the pre-New Deal Supreme Court virtually never broke from the "vested rights" framework into which it was originally cast. As the Court moved from a vested rights model emphasizing previous commitments to a model emphasizing substantive state noninterference, it simply stopped using contractarian language altogether. So *Lochner*, *Pollock*, and other Fuller-era economic regulation decisions are hardly contractarian. Rather, they stood firmly in a Jacksonian tradition that eschewed contractualist rhetoric. When the Court turned from vested to substantive rights, it abandoned a well-developed tradition of using social contract rhetoric that initially had been applied in vested rights cases.

Indeed, the Fuller Court even abandoned contractarian language in areas where it had been previously used. Only five Fuller Court opinions contain any reference to the social contract or compact, and three of those were written by Justice Harlan, who commonly dissented from substantive due process decisions or other decisions striking down Progressive welfare legislation. Further, in most of these decisions the social contract language was used to justify, rather than strike down, the statute at issue.⁶⁶ The Contract Clause and other vested rights decisions of the Fuller Court make no reference to the social contract or the political obligations that it entails. Nor was contractarian language applied in the substantive due process cases attacking protective labor legislation. This omission is important, because Fiss' own argument is that the nineteenth-century mode of constitutional interpretation depended not so much on technical analysis of the text, but on the application of general underlying principles. This contractarian principle was never generalized. Considering the three dozen or so cases using contractarian language earlier in the nineteenth

63. BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 26-42 (1980); Buchanan, *Contractarian Logic*, *supra* note 28, at 12, 19-21.

64. EPSTEIN, *supra* note 61, at 4-5.

65. See, e.g., Hovenkamp, *supra* note 62, at 71-74; RAWLS, *supra* note 25, at 95-98.

66. See *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905) (upholding compulsory vaccination for smallpox notwithstanding objection of religious groups, reasoning that social compact embodied in Massachusetts Constitution required Commonwealth to make some decisions for benefit of all); *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 237 (1897) (applying Takings Clause to state but assessing only nominal damages; quoting social compact language from *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655, 663 (1874)); *Leisy v. Hardin*, 135 U.S. 100, 145 (1890) (Gray, J., dissenting) (arguing that social compact permits laws protecting health, quoting *Thurlow v. Massachusetts*, 46 U.S. (5 How.) 504, 632 (1847)).

century, the Fuller Court appears *less* contractarian than its predecessors. Indeed, during the Fuller period contractarian language largely disappears from the rhetoric of the Justices, never to return.⁶⁷ Perhaps the most important exceptions are some ambiguous references in *Pollock*, the income tax case.⁶⁸ Writing for the Court, Chief Justice Fuller laboriously reconstructed the intent of the Constitution's Framers regarding the relationship between taxation and representation. The intent behind the constitutional requirement that direct taxes be apportioned according to population was "that the consent of those who were expected to pay it was essential to the validity of any tax."⁶⁹ In *Pollock*, the Chief Justice's analysis was very specific to a single clause in the Constitution, and none of this spilled over into the substantive due process decisions.

The social contract thesis also fails to account for the fact that the substantive due process Court had a well-developed theory of externalities. An externality is an effect on a party who cannot practicably be brought into the bargaining relationship because rights or entitlements have not been suitably defined, or because the third party has not been identified or perhaps is not yet born at the time of bargaining. Externalities can also occur simply because the transaction costs of including third parties is too high, for example, when there are many such persons.

By the Fuller period, the emergent view of political economists was that a robust externality justified state interference.⁷⁰ An example used by Cambridge economist Arthur C. Pigou during the Progressive era was the contract to build in a high-density urban area. The landowner and the architect/builder would contract to maximize their joint wealth, but they would not account for the impact of the building on access to sunlight, use of public utilities, police and fire protection, and other problems relating to urban density. The rights of others with respect to these effects are difficult to identify, and the costs of identifying those affected make their inclusion in the original bargain impossible. Instead, the government must intervene by passing land use legislation that regulates building heights, density, and the like.⁷¹

For the social contractarian, the problem of externalities is far more difficult. Political economists saw the appropriateness of state intervention as

67. The only recent exception is *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994), holding that Title VII amendments expanding plaintiffs' procedural rights and remedies do not apply to cases pending on appeal at time statute was enacted. Justice Stevens, speaking for the Court, quoted *THE FEDERALIST* No. 44 (James Madison) for the proposition that *ex post facto* laws are "contrary to the first principles of the social compact." *Id.* at 1498 n.20 (quoting *THE FEDERALIST* No. 44, at 301 (Jacob E. Cooke ed., 1961)).

68. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895).

69. *Id.* at 556. Later in the opinion he noted, "Nothing can be clearer than that what the Constitution intended to guard against was the exercise by the general government of the power of directly taxing persons and property within any State through a majority made up from the other States." *Id.* at 582.

70. See HOVENKAMP, *ENTERPRISE*, *supra* note 11, at 199-204.

71. A.C. PIGOU, *THE ECONOMICS OF WELFARE* 192-96 (4th ed. 1948); see also A.C. PIGOU, *WEALTH AND WELFARE* 160-64 (1912).

presenting a simple question of efficiency, in which one must merely determine the measure of intervention to correct the market failure. By contrast, if the standard for intervention is contractarianism's unanimous consent, even legislation narrowly defined simply to correct the externality falls short; it will not receive the consent of either the landowner or the builder, both of whom are made worse off. As a result, contractarian political ideology is even more radical in its laissez-faire philosophy than is the ideology of the classical political economists.⁷²

The Fuller Court, as well as later substantive due process Courts, took a position on externalities that was much closer to the position of the political economists than to any notion of contractarianism. For example, when Justice Peckham looked for a justification for the bakers' hours law in *Lochner*, he proclaimed that he could find no relationship between the hours that bakers worked and the healthful quality of their bread.⁷³ The implication was that, had such a relationship existed, the statute would have been approved. Healthful bread was an externality; the cost of identifying bread customers, defining their rights, and letting them participate in the employment bargain would be too high. Four years later, in *Welch v. Swasey*, Justice Peckham wrote the opinion for the Court upholding an ordinance limiting the heights of buildings, citing the same externalities Pigou discussed.⁷⁴ In that case, the contractual relationship did have the requisite effects on third parties to justify state intervention. Likewise, in the waning years of substantive due process, long after Fuller was gone, Justice Sutherland wrote opinions for the Court striking down a minimum wage statute for women⁷⁵ but upholding comprehensive land use planning, once again referring to a list of externalities.⁷⁶ The most important externalities decision of the Fuller era was *Muller v. Oregon*, where the Supreme Court upheld a maximum hours statute applied to women, noting the importance of women in the birthing and rearing of children, and the impact that excessive fatigue could therefore have on the health of future generations.⁷⁷ It thus seems that a better case can be made that the Fuller Court was adopting a particular theory of political economy than a particular theory of social contract.

72. See Herbert Hovenkamp, *Rationality in Law & Economics*, 60 GEO. WASH. L. REV. 293, 333–37 (1992).

73. *Lochner v. New York*, 198 U.S. 45, 62 (1905) ("In our judgment it is not possible in fact to discover the connection between the number of hours a baker may work in the bakery and the healthful quality of the bread made by the workman.").

74. 214 U.S. 91, 107–08 (1909).

75. *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923).

76. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 391–95 (1926).

77. 208 U.S. 412, 421–22 (1908).

D. *Social Darwinism and the Social Contract*

Fiss argues that the Fuller Court's contractarianism was reinforced by the Social Darwinist ideology that prevailed during the Gilded Age.⁷⁸ The argument that the Supreme Court in the substantive due process era was Social Darwinist developed mainly in the early 1940's, as historians were conducting the first of many autopsies of *Lochner*. Edward S. Corwin, probably the most famous constitutional scholar of his generation, first analyzed the substantive due process era and claimed to discover the presence of Social Darwinism in 1941.⁷⁹ But Corwin's evidence was sparse. Indeed, his explicit evidence was no more than Justice Holmes' tart criticism in *Lochner* about the Fourteenth Amendment and Herbert Spencer's *Social Statics*. The remainder of Corwin's analysis consisted of illustrations of Supreme Court substantive due process decisions with outcomes that would have been to Herbert Spencer's liking.⁸⁰

Other Fuller Court judicial opinions provide little basis for thinking that the Justices were Social Darwinists. To be sure, the attitude toward state welfarism exhibited in *Lochner* and its progeny is consistent with Social Darwinism, but the only explicit reference to Social Darwinism in the *United States Reports* is the famous line in Justice Holmes's *Lochner* dissent that the Fourteenth Amendment "does not enact Mr. Herbert Spencer's Social Statics."⁸¹ One might speculate about whether Holmes believed that his colleagues were really Social Darwinists, or whether he was simply engaging in rhetorical flourish. But the supporting evidence that Social Darwinism permeated the thinking of the Supreme Court is extremely thin. It is doubtful that many members of the Court were Social Darwinists, except Holmes himself or perhaps George Sutherland, or even that they believed in the Darwinian theory of evolution.⁸² The equivalent of substantive due process

78. FISS, *supra* note 1, at 47-49.

79. EDWARD CORWIN, *CONSTITUTIONAL REVOLUTION*, LTD 82-90 (1941). Corwin concluded that although the primary cause of substantive due process jurisprudence was classical political economy, for which he quoted mainly from John Stuart Mill, a secondary cause was Social Darwinism. He rather confusingly mixed the two, as if Adam Smith and Darwin somehow had a common origin. Finally, he cited several substantive due process decisions as being consistent with both classical political economy and Social Darwinism. Corwin relied in part on the doctrinal dissertation of one of his students, Benjamin Twiss, published that same year as B. TWISS, *LAWYERS AND THE CONSTITUTION* (1941).

80. CORWIN, *supra* note 79, at 86-87.

81. *Lochner v. New York*, 198 U.S. 45, 75 (1909).

82. See, e.g., WILLARD L. KING, *MELVILLE WESTON FULLER* (1950); Richard Skolnik, *Rufus Peckham*, in 3 *THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969*, at 1685 (Leon Friedman & Fred L. Israel eds., 1969) [hereinafter *THE JUSTICES*]; James F. Watts, Jr., *Edward Douglass White*, in 3 *THE JUSTICES*, *supra*, at 1633.

The most likely candidate for Social Darwinist among the Supreme Court's substantive due process Justices is George Sutherland. See JOEL F. PASCHAL, *MR. JUSTICE SUTHERLAND* 8-15 (1951), who notes Sutherland's early interest in Herbert Spencer. Sutherland's commitment to Social Darwinism has more recently been called into question. See HADLEY ARKES, *THE RETURN OF GEORGE SUTHERLAND* 42-43 (1994). In any event, Justice Sutherland did not join the Court until President Harding appointed him in 1922.

in the state courts long antedated Darwin and is best associated with the Jacksonian movement.⁸³

Whether or not substantive due process was constitutionalized Darwinism, any contractarian ideology on the Fuller Court almost certainly did not come from Social Darwinism. Superficially, Social Darwinism and contractualism both supported a minimalist state and abhorred forced redistribution of wealth or opportunity—but Social Darwinism and contractualism arrived at that position from quite different starting points. The social contract was based on a cooperative strategy that was inimical to Social Darwinism's basic idea that the human species and its institutions developed out of conflict. To be sure, this does not mean that Fiss' conclusion is incorrect. The intellectualism of lawyers is often parasitic and superficial. They may have seen something in Social Darwinism that reinforced their contractarian ideology, notwithstanding the fundamental antinomies between the "social contract," in Lockean liberal terms, and "the struggle for existence," in the quite illiberal paradigm of Social Darwinism.

Social Darwinists believed that all human institutions, including the State, were the product of a long period of natural selection—that is, of struggle, trial, and error in which the "fittest" practices and policies tended to survive (or enabled the societies that developed them to survive) while the less fit practices did not. Nothing as rational and optimistic as a social compact ever emerged from this process. Furthermore, the institutions themselves changed as the status of civilization changed. For example, common property prevailed as long as people were wandering nomads, but then gave way to private property as people became more settled and agrarian.⁸⁴ This theory led Herbert Spencer, the intellectual leader of the Social Darwinists, to categorically reject the conception that there is a single, static nature of the state that a social contract might produce.⁸⁵ Initially, political arrangements were determined by inherited hierarchies. Spencer believed that only relatively late in civilization did this "status" conception of social organization give way to a more "contractual" notion of organization.⁸⁶ But even this contractual conception was nothing more than a slowly evolving device for maximizing the freedom of individual organisms to further their own chances for survival.⁸⁷ From that point, Spencer developed his own theory of the state with no reference whatsoever to any kind of social compact. The state in Spencer's conception was designed to enable the evolutionary process to run

83. See GILLMAN, *supra* note 56.

84. See, e.g., 2 HERBERT SPENCER, THE PRINCIPLES OF ETHICS 111–13 (Tibor R. Machan ed., Liberty Classics 1978) (1891).

85. *Id.* at 202.

86. *Id.* at 203.

87. *Id.* at 426.

its course to the best advantage of its members; it was not in any way designed to reflect the preferences of a group of citizens bargaining together.

Contractarianism assumes human actors with free will, a well-formed set of preferences that are exogenous to the environment, and a desire to maximize their individual positions given the positions of others. Within this model, the social contract is an ahistorical act that creates institutions that are either permanent or else can be changed only by unanimous consent. This assumption could not be more contrary to the Spencer/Darwin view that human beings are biological products of natural selection, that they have characteristics and tastes predetermined by ancestry, and that human governmental institutions continually evolve just as much as human physical characteristics. Within this paradigm, human beings are hardly autonomous; they are the pawns of nature. Further, governmental obligations do not arise out of a single ahistorical agreement. Rather, they are the product of centuries of trial and error, from which the fittest forms of social organization survive. In Social Darwinism, the state's duty of noninterference does not arise out of any kind of express or implied social contract; it arises out of the perception that a more activist welfare state would prevent the evolutionary process from running its course. When the state intervenes to aid the weak, it permits them to survive and procreate, and burdens others with their care. The result is a loss of absolute progress for civilization as a whole, or else that a particular society falls behind in the worldwide struggle for existence, victimized by its own poor and unproductive members.

Spencer thus rejected contractarianism's assumption that human beings have free will and are able to maximize utility through cooperation. Rather, the rules by which states developed were external to human inventiveness and were part of the natural developmental process.⁸⁸ A "social contract" to explain human organization was no more rational to the Social Darwinist than was a social contract theory to explain the high level of social organization that can be observed among bees or beavers, or the herding instincts of cows or geese.

The closest Spencer came to espousing any notion of social contract was in *The Man Versus the State*, first published in 1884. Speaking as an evolutionist, he concluded that the entire "hypothesis" of a social contract was "baseless." Such a contract could never bind succeeding generations; the natural selection process might drive any subsequent social group to abrogate it. However, Spencer did consider what the state would be like if it were the product of an agreement produced by the unanimous consent of its citizens.⁸⁹ He then concluded that these citizens would in fact agree about very little,

88. See HERBERT SPENCER, *SOCIAL STATICS* 22-27 (New York, D. Appleton & Co. 1872) (1850).

89. HERBERT SPENCER, *THE MAN VERSUS THE STATE* 159 (Donald MacRae ed., Penguin Books 1969) (1884).

except perhaps the public defense and some principles of criminal law.⁹⁰ Much more important for Spencer was the private contract. Indeed, he believed that the state's only legitimate function was to enforce the mutual obligations of citizens.⁹¹

Other evolutionists, such as the great English legal historian Sir Henry Maine, absolutely rejected the social contract theory as inconsistent with the historical development of political institutions, and as something cooked up by lawyers to serve their own political ends.⁹² A central point of Maine's most important work, *Ancient Law*, was that notions of legal obligation and rights had evolved gradually, passing first through a long period when legal relationships were based on status or the family into which one was born. Contract ideas of social obligation were a recent development in this historical evolution, and were used entirely by philosophers to justify their own notions of the state as it existed. Thus, the Lockean social contract was "only the dress by which the ancient views were rendered more attractive to a particular generation of the moderns."⁹³

William Graham Sumner, America's leading Social Darwinist intellectual, was even more skeptical of the social contract than Spencer and Maine. He regarded political theories as nothing more than a few of the many "folkways," or customs that have evolved slowly in organized human society.⁹⁴ Under this theory, the doctrine of social compact was nothing more than rationalization used by those who wished to be free of the more hierarchical medieval rationalizations.⁹⁵

The idea that a contractarian ideology explains the Fuller Court's hostility to regulation and welfarism is thought-provoking. Fiss does not adequately support this idea, however, and there are many reasons for thinking it is wrong.

90. *Id.*

91. *Id.* at 181. Spencer then ends this chapter with these words: "The function of Liberalism in the past was that of putting a limit to the powers of kings. The function of true Liberalism in the future will be that of putting a limit to the powers of Parliaments." *Id.* at 183.

92. HENRY S. MAINE, *ANCIENT LAW* 299-301 (Beacon Series in Classics of the Law 1963) (1861).

93. *Id.* at 110; see also *id.* at 299-300, 333.

94. See, e.g., William G. Sumner, *The Mores of the Present and the Future*, 13 *YALE REV.* 233 (1909), reprinted in 1 *ESSAYS OF WILLIAM GRAHAM SUMNER* 86 (A. Keller & M. Davie eds., 1934):

When the Americans, in 1776, revolted against the colonial policy of England, they found a great number of principles afloat The first paragraph of the Declaration of Independence contains a number of these great principles which were supposed to be axioms of political philosophy. In 1898, when we forced our rule on the Philippine Islands, some of these principles were very inconvenient. In time we shall have to drop others of them. There are no dogmatic propositions of political philosophy which are universally and always true; there are views which prevail, at a time, for a while, and then fade away and give place to other views.

95. *Id.*

II. PROGRESSIVE BUSINESS REGULATION AND THE FULLER COURT

A. *The Antitrust Movement*

A sizable part of the Fuller Court's agenda concerned the respective roles of the market, sovereign oversight of competition, and sovereign displacement of competition with alternative regulatory regimes. Fiss' book handles these issues thoughtfully but provokes some questions about two areas in particular: the antitrust movement and the appropriate constitutional limits on state power to regulate rates.

The antitrust movement provided conservatives and Progressives with common ground. On the one hand, antitrust reflected the classical preference for the market's allocation of resources. On the other, it appealed to the Progressive belief that markets are fragile and sometimes require state intervention. Mainstream Progressives were not socialists, but neither did they share the Jacksonian view that governmental intervention in the marketplace was an inherently bad thing. As a result, conservatives such as Taft and Peckham and Progressive liberals such as Theodore Roosevelt and Brandeis could all support antitrust.

Fiss' treatment notes the broad, essentially "constitutional" nature of the Court's antitrust analysis during these formative years.⁹⁶ The Fuller Court did not view antitrust in "technocratic" terms.⁹⁷ Its principal concerns were not with defining monopoly in terms of effect on price and output, nor with determining precisely which practices ought to be condemned and which approved. Rather, the important issues concerned the relationship between federal and state power under the Commerce Clause, between federal antitrust and state corporate law, between federal antitrust and the common law of trade restraints, and between constitutionally protected contractual freedom and any possible right to make anticompetitive contracts. Entering into this territory for the first time, the Court necessarily painted with a broad brush. In particular, the new federal antitrust statute forced federal judges to consider the appropriate relationship between state and federal power to regulate business that, to an increasing degree, was engaged in interstate commerce. They also considered the proper scope of the nation's commitment to the market and its strictly collateral and subservient commitment to liberty of contract. The Supreme Court protected liberty of contract when it viewed its own role as that of market facilitator but stepped back from liberty of contract when the contract at issue became a threat to the market itself—as, for example, in the case of price-fixing agreements.⁹⁸

96. FISS, *supra* note 1, at 107.

97. *Id.*

98. See the lengthy analysis contrasting contracts in restraint of trade and liberty of contract in *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 571–73 (1898).

1. *The Relation Between Federal Antitrust and State Common and Corporate Law*

The strength of Fiss' treatment is his recognition and analysis of the "constitutional" issues that confronted the Fuller Court in the antitrust cases. Its weakness is his failure to relate the Court's more technical decision making to the substantive problems it was confronting. The issues he describes as merely "technocratic," such as the difference between cartels and mergers, were hardly peripheral to the development of antitrust policy even in the Fuller period. Rather, they were central to the neoclassical economic concept of the firm and defined the domain of the common law long before the Sherman Act was passed.

The practices challenged under the Sherman Act were extremely diverse. For example, *E.C. Knight*⁹⁹ and *Northern Securities*¹⁰⁰ were merger cases. *Trans-Missouri*,¹⁰¹ *Joint Traffic*,¹⁰² and *Addyston Pipe*¹⁰³ were price-fixing cases. *Standard Oil*¹⁰⁴ and *American Tobacco*,¹⁰⁵ decided the year after the Fuller term ended, involved exclusionary practices by dominant firms. Thanks to a century of development of more "technocratic" antitrust rules, today these practices are regarded as categorically different and are subjected to different modes of analysis.¹⁰⁶ Many of the Fuller Court Justices were sufficiently sensitive to technical issues to see important differences between naked price fixing or boycotts, and more efficient integrations of productive capacity such as mergers. Although the members of the Fuller Court did not articulate these differences in modern terms,¹⁰⁷ they perceived them, and their perceptions account for much of the Court's apparent lack of direction.

At the same time, the more "constitutional" issues such as Commerce Clause doctrine effectively enabled the Court to evade the substantive issues. For example, a merger among manufacturers was a combination that pertained to manufacturing, and, within the ruling model of Commerce Clause jurisprudence, manufacturing was not commerce, even if the goods were intended to be sold across state lines. By contrast, a cartel existed only to sell,

99. *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

100. *Northern Sec. Co. v. United States*, 193 U.S. 197 (1904).

101. *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897).

102. *Joint Traffic*, 171 U.S. at 505.

103. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *modified*, 175 U.S. 211 (1899).

104. *Standard Oil Co. v. New Jersey*, 221 U.S. 1 (1911).

105. *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

106. See HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY* chs. 4-5 (1994) (cartels); *id.* chs. 8-10 (monopolization); *id.* chs. 12-13 (mergers).

107. For example, cartel agreements between independent firms were treated as contracts in restraint of trade at common law. By contrast, a merger, which involved one firm's purchase of all the assets or shares of another, was treated as a simple transfer or acquisition of property, something that the common law hardly viewed with suspicion. See, e.g., *Northern Sec. Co. v. United States*, 193 U.S. 197, 360-63 (1904) (Brewer, J., concurring); *id.* at 364-74 (White, J., dissenting).

and a sale from someone in one state to someone in a different state was within Congress' common law reach.¹⁰⁸ As initially developed, then, this model enabled the Court to evade difficult questions concerning the legality of mergers under the Sherman Act. The Court avoided the issue in its first antitrust decision, *E.C. Knight*, by resting strictly on the Commerce Clause.¹⁰⁹ A decade later, however, the *Northern Securities* case made the question unavoidable because it involved a merger among interstate railroads where federal jurisdiction could not be doubted.¹¹⁰

Although traditionalists and Progressives found some common ground in antitrust, they hardly had the same ideas about the substantive course that antitrust should take. Their differences went straight to underlying political ideologies. For example, Progressives believed that labor unions, or "combinations of labor," should be exempt from antitrust prosecution. By contrast, the treatise writers who represented the elite corporate profession believed that combinations of labor and combinations of capital were no different from one another. What was sauce for the gander was sauce for the goose.¹¹¹ In fact, one of the most important battlegrounds over antitrust's agenda concerned its use as an antilabor device. During the Fuller period the traditionalists largely won: The Sherman Act was used to break up combinations of labor more often than combinations of capital.¹¹²

Traditionalists and Progressives also differed on the range of business activities that federal antitrust should condemn. The orthodox position, to which Holmes subscribed, was that antitrust should concern itself mainly with combinations in restraint of trade, which had always been the concern of the common law. Chief among these offenses were boycotts¹¹³ and covenants not to compete. Price fixing was a little more problematic, because consumers were free to walk away—that is, no one was being coerced.¹¹⁴ However, price-fixing agreements were unenforceable at common law even though they were probably not substantively illegal.¹¹⁵ In cases that the Supreme Court

108. See *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 298 (6th Cir. 1898), *modified*, 175 U.S. 211 (1899); FISS, *supra* note 1, at 125–26.

109. *United States v. E.C. Knight Co.*, 156 U.S. 1, 12–13 (1895) (finding that "manufacturing" is not "commerce"); see FISS, *supra* note 1, at 111–17.

110. *Northern Sec.*, 193 U.S. at 197.

111. E.g., FREDERICK H. COOKE, *THE LAW OF COMBINATIONS, MONOPOLIES AND LABOR UNIONS* (2d. ed. 1909); ARTHUR EDDY, *THE LAW OF COMBINATIONS, EMBRACING MONOPOLIES, TRUSTS, AND COMBINATIONS OF LABOR AND CAPITAL* (1901).

112. E.g., *Loewe v. Lawlor*, 208 U.S. 274 (1908); *In re Debs*, 158 U.S. 564 (1895); see HOVENKAMP, *ENTERPRISE*, *supra* note 11, at 207–25, 229 (noting decision of 12 cases against labor but only one against capitalists).

113. E.g., *Montague & Co. v. Lowry*, 193 U.S. 38 (1904).

114. See *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 409–13 (1911) (Holmes, J., dissenting); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 343 (1897) (White, J., dissenting).

115. On the common law, see HOVENKAMP, *ENTERPRISE*, *supra* note 11, at 268–95. Holmes was not on the Fuller Court when its price-fixing cases (*Trans-Missouri*, *Joint Traffic*, *Addyston Pipe*) were decided. However, he apparently agreed with the rule of per se illegality for price fixing. See, e.g., *United States*

identified as price fixing, the majority consistently condemned the activity.¹¹⁶ Resale price maintenance, or vertical price fixing, had a similarly ambiguous common law legacy, but the Supreme Court condemned it as well.¹¹⁷ At common law, each of these offenses involved agreements between distinct firms. That is, they were "loose" agreements among firms rather than "tighter" unions, such as mergers, that substantially reorganized the firms and unified their operations.

The principal problem facing the Fuller Court was how to define the scope of antitrust in those areas where the common law had been ambiguous or had refused to condemn the practice in question. Although the common law had been concerned about *conduct*, such as boycotts and price fixing, it had virtually nothing to say about *structure*. There was no common law merger policy. Existing state merger policy did not develop out of the common law at all, but rather out of state corporate law—principally, through state incorporation statutes that limited the scope of a corporation's business activities. The state-instigated merger cases of the Gilded Age were not based on allegations that mergers were contracts or combinations in restraint of trade, but on claims that the merging firms had violated one or more provisions in their corporate charters.¹¹⁸ By contrast, the Sherman Act was based on the common law of trade restraints and said nothing at all about state corporate law. Neither was it in any sense a federal law of corporations. The Fuller Court, interpreting the Sherman Act for the first time, naturally found merger cases much more difficult than cartel cases.

The common law had taken no position on mergers or other structural offenses, mainly because it developed during a period when there were only a few big corporations, most of which were heavily regulated through their charters. "Monopoly" in the common law lexicon referred not to big corporations generally, but to corporations that had franchises from the sovereign giving them exclusive rights.¹¹⁹ On the one hand, the merger was a "combination" that could restrain trade by permitting former rivals to fix prices or avoid competition with each other. On the other hand, the merger was hardly a cartel; it united firms into one, and any "price fixing" that occurred happened only *after* the firms had become a single entity.

The initial result of these ambiguities was *E.C. Knight*,¹²⁰ which held that the Sherman Act did not reach a merger among sugar refiners. Fiss'

v. Trenton Potteries Co., 273 U.S. 392 (1927).

116. E.g., *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899); *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898); *Trans-Missouri*, 166 U.S. at 290.

117. See *Dr. Miles Medical Co.*, 220 U.S. at 409–13 (Holmes, J., dissenting); HOVENKAMP, ENTERPRISE, *supra* note 11, at 340–46.

118. See HOVENKAMP, ENTERPRISE, *supra* note 11, at 245–49.

119. Cf. WILLIAM LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA* 18–32 (1965) (discussing English common law limitations on monopolies created by Crown).

120. *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

excellent treatment of the Commerce Clause issues in that case is compromised only by his failure to read between the lines—a hazardous activity and perhaps one that the historian should avoid in any event. The Commerce Clause analysis, which was orthodox, enabled the Court to evade the more difficult substantive question of whether the Sherman Act reached a firm's purchase of plants from another firm when the common law had never condemned such transactions. Further, state corporate law seemed to provide adequate tools for dealing with the substantive question. State corporate law could limit the types of business corporations could conduct, forbid them from buying assets located in a different state, and even dissolve them if necessary. Later, however, the *Northern Securities*¹²¹ case failed to provide the Court with such an easy escape. That decision involved a stock acquisition through a holding company that was legal under state corporate law.¹²² In addition, the merger involved railroads that carried goods across state lines, and by 1904 it was clear that the Sherman Act reached interstate movement. As a result, *Northern Securities* forced a decision on the merits; even then, fourteen years after the Sherman Act was passed, the Supreme Court was deeply divided on the question. Harlan and three other Justices signed the opinion of the Court condemning the merger, theorizing that it created a monopoly. Brewer concurred, and Holmes, Fuller, White, and Peckham dissented.

Holmes concluded that elimination of competition by merger was not within the scope of the Sherman Act. Fiss suggests that this conclusion was purportedly based on the statute's "plain language."¹²³ The statute, after all, says nothing about competition. But Holmes indicated that his views came from the common law, and the common law had never concerned itself with the voluntary elimination of competition by merger. If one firm purchased another firm's plant, the transaction was simply a transfer of property—hardly a contract in restraint of trade. Holmes' position was amply supported by the legislative history of the Sherman Act. Many of its proponents recited their purpose as federalizing the common law because multistate businesses had grown so large as to exceed the jurisdictional limits of state courts.¹²⁴ To be sure, as Fiss notes, Justice Peckham had appeared to separate the common law and the Sherman Act in *Trans-Missouri*,¹²⁵ by holding that price-fixing agreements were illegal without inquiry into their reasonableness.¹²⁶ The

121. *Northern Sec. Co. v. United States*, 193 U.S. 197 (1904).

122. In the meantime, New Jersey had amended its corporate laws to permit one corporation to own shares in another corporation—something that 19th-century corporate law had generally forbidden. HOVENKAMP, ENTERPRISE, *supra* note 11, at 257–58.

123. FISS, *supra* note 1, at 138–39.

124. *See, e.g.*, 20 CONG. REC. 1167 (1889) (statement of Sen. Sherman); HOVENKAMP, *supra* note 106, § 2.1b.

125. FISS, *supra* note 1, at 140.

126. However, even this conclusion cannot be pushed too far. At common law, price-fixing agreements were not illegal, but they were *unenforceable* among the parties, and nothing in the common law decisions suggests that only "unreasonable" price-fixing agreements would be denied enforcement. *See* HOVENKAMP,

difficulty presented by the embryonic per se rule of the early price-fixing cases, however, was that it would have made every merger unlawful, just as it made every cartel unlawful. No one sitting on the bench when *Northern Securities* was decided wanted that, including Peckham, who dissented with Holmes in *Northern Securities*.¹²⁷ In merger cases, unlike collusion cases, some rule had to be developed for separating the sheep from the goats, and the question was where to look. Holmes' search through the common law was hardly an irrational starting point, although Holmes' particular interpretation did not prove to be very credible. The "rule of reason" that eventually developed proved more helpful, but it was at best superficially tied to the common law.¹²⁸

Probably the most important of the "constitutional" antitrust issues confronting the Fuller Court, as Fiss describes them, concerned the power of the federal government to regulate practices that did not immediately involve the movement of goods across state lines. The Court's first, tentative answer in *E.C. Knight* in 1895 was to limit that power and leave the matter to the states.¹²⁹ On this question, Fiss agrees with Progressive "class justice" critiques,¹³⁰ which note that just as the Court was rejecting the federal government's attempt to break up the interstate sugar monopoly, it was also approving the aggressive Sherman Act campaign against Eugene Debs and the Pullman strike.¹³¹ Fiss tries to minimize the damage caused by this critique by observing that the juxtaposition was probably just a "fluke of the adjudicatory process."¹³²

But there is a better critique of the Progressive position: It ignores the fact that only a year later, in 1896, the Court condemned an interstate railroad cartel under the Sherman Act in *Trans-Missouri*, with no serious discussion of Commerce Clause limitations on federal power.¹³³ In *E.C. Knight*, the Court could not find any qualifying interstate movement that, under the prevailing interpretations of the Commerce Clause, would have entitled the federal government to act;¹³⁴ and further, the Court perceived that state corporate

ENTERPRISE, *supra* note 11, at 282–85. That is, just as Sherman Act cartels were illegal per se, common law cartels were unenforceable per se.

127. *Northern Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

128. As Fiss observes, Justice Brewer, the swing voter in *Northern Securities*, would have applied a rule of reason more closely, and in the process, would have reconnected the Sherman Act to the common law. See FISS, *supra* note 1, at 141.

129. *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

130. See, e.g., ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887–1895 (1960); Alan F. Westin, *The Supreme Court, the Populist Movement, and the Campaign of 1896*, 15 J. POL. 3 (1953).

131. *In re Debs*, 158 U.S. 564 (1895); see FISS, *supra* note 1, at 112–13.

132. FISS, *supra* note 1, at 112.

133. *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897).

134. See FISS, *supra* note 1, at 119 (noting difference).

law was quite up to the problem of dealing with corporate asset acquisitions.¹³⁵ By contrast, both *Debs* and *Trans-Missouri* involved restraints on the interstate movement of railroad cargo and passengers—an activity that was outside the jurisdictional reach of any single state, and clearly within the federal commerce power as historically defined.

Even more important, *E.C. Knight* involved a merger, and the common law, which was the established repository of antitrust substance, had nothing to say about mergers. By contrast, *Trans-Missouri* involved a cartel, and the *Debs* Pullman strike involved both a boycott and a cartel. In sum, the Court treated cartels consistently by always condemning them (*Debs*, *Trans-Missouri*, *Joint Traffic*, *Addyston Pipe*). It had a much more difficult time with mergers (*E.C. Knight*, *Northern Securities*), where efficiency was potentially present and the common law had nothing to say. To be sure, concerns for class justice may have been present, but it is hardly inescapable that it drove the differing outcomes in *E.C. Knight* and *Debs*.

2. *The Relation Between Federal Antitrust and Constitutional Liberty of Contract*

The second major constitutional issue confronting the Fuller Court in Sherman Act cases concerned the relationship between “liberty of contract” and the clear limitation on contracts among business firms that the Sherman Act threatened to impose. The Supreme Court’s leader through this disputed territory was Justice Peckham, one of the Court’s strongest advocates of a constitutionally protected liberty of contract,¹³⁶ who nonetheless believed that the Sherman Act placed perfectly appropriate limits on contracts that threatened to injure competition.¹³⁷

Justice Peckham developed this paradigm with great confidence when the practice at issue was price fixing—something that he saw as a private attempt to regulate interstate commerce, a power the Constitution had clearly given to Congress.¹³⁸ But he refused to push the point so far as to reach a merger, which was (1) not a violation of the common law and (2) an acquisition or sale of property, not simply a contract eliminating competition. He was one of the dissenters in the *Northern Securities* merger case.

The ambiguity left by *Northern Securities* was that it appeared to condemn all mergers, just as *Trans-Missouri* and the other decisions of the late 1890’s

135. See HOVENKAMP, ENTERPRISE, *supra* note 11, at 241–67; Charles W. McCurdy, *The Knight Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869–1903*, 53 BUS. HIST. REV. 304 (1979).

136. E.g., *Lochner v. New York*, 198 U.S. 45, 52–65 (1905) (Peckham, J.); see FISS, *supra* note 1, at 118–19, 159–65.

137. See *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899); *United States v. Joint Traffic Ass’n*, 171 U.S. 505 (1898); *Trans-Missouri*, 166 U.S. at 290.

138. See, e.g., *Addyston Pipe*, 175 U.S. at 226–30.

appeared to condemn all price fixing. As Fiss notes, the year after Fuller retired, the new Chief Justice, White, used the common law "rule of reason" formulation to bring common sense to the Sherman Act and, in the process, to restore its constitutionality under liberty-of-contract doctrine.¹³⁹ A statute that prevented "every" contract or combination in restraint of trade would interfere with constitutional liberty of contract, certainly if every merger, no matter how slight, was to be considered a contract in restraint of trade. By reading the word "unreasonable" into the statute, Chief Justice White made clear that the only restraints that it condemned were those that constitutional liberty of contract never would have protected in the first place.

While this reading is a historically sensible attempt to harmonize *Lochner*-style liberty of contract with the contractual restrictiveness of the Sherman Act, it robs the Sherman Act of its independent policy role. Fiss' reading of the rule of reason implies one of two things. First, the Sherman Act had nothing to do with market competitiveness and simply condemned every contract in restraint of trade that the Constitution did not protect. Second, and alternatively, inherent within the doctrine of substantive due process was some notion of competitiveness that protected contracts that did not injure competition, while refusing to protect contracts that did. In that case, the concern with competitiveness was there, but it lay in substantive due process doctrine rather than in the Sherman Act itself.

B. *Rate Regulation and the Judicial Assault on Munn v. Illinois*

Fiss describes the Fuller Court's position on the rise of modern price-regulated industry¹⁴⁰ as an assault on the doctrine of *Munn v. Illinois*.¹⁴¹ *Munn* held that an unincorporated business firm could be price-regulated if it operated in a part of the market thought to be "affected with the public interest."¹⁴² *Munn* thus permitted states to regulate the rates of firms that had not initially agreed to rate regulation as a condition of receiving a corporate charter. For firms with such charters, the state's power to regulate rates was clear, as long as the state adhered to the charter's terms. Charter-based regulation was never a challenge to constitutional liberty of contract. On the contrary, it was nothing more than enforcement of a contract, the corporate charter, which even the most committed Jacksonian could support.

Power to regulate by statute meant that a state could regulate prices at its whim, even when the firm had never agreed to a corporate charter permitting

139. See FISS, *supra* note 1, at 148–50.

140. By modern price regulation, I mean a regime in which firms are price-regulated by statute and not by provisions contained in their corporate charters. On the important policy and constitutional differences, see HOVENKAMP, ENTERPRISE, *supra* note 11, at 125–30.

141. 94 U.S. 113 (1877); see FISS, *supra* note 1, at 185–89.

142. 94 U.S. at 126.

regulation or, indeed, when it had no corporate charter at all. This power was awesome, both because it lacked any substantive limit and because of its *ex post facto* nature: The firm was made subject to price regulation *after* it had made its investment in the market.

The significance of *Munn* is that it approved statutory price regulation in principle. *Munn* itself did not resolve some important questions: (1) To which industries may statutory price regulation be applied? (2) What are the substantive limits on the sovereign's power to reduce a firm's prices? (3) To what extent may a state regulate prices in interstate commerce? A better title for Fiss' thoughtful chapter on price regulation would describe the Court's treatment of *Munn* not as an assault, but as an attempt to define appropriate limits for a doctrine that was universally acknowledged to require some kind of substantive limitations, even by the *Munn* opinion itself.¹⁴³

But as Fiss makes clear, the Fuller Court's decisions on rate regulation cannot be characterized simply as good faith efforts to adhere to *Munn*, but rather as attempts to define its inherent limitations. Some of the Justices, most notably Brewer, were completely hostile to the very concept of rate regulation and wished to overrule *Munn* altogether.¹⁴⁴ In the final analysis the moderates won out, however, and *Munn* was never limited much beyond its own explicit restrictions and the limits imposed on extraterritorial regulation by the Commerce Clause.¹⁴⁵

Fiss reads the Fuller Court's position as more restrictive of *Munn* than it was in fact. *Munn* had never been intended to permit price regulation of any business that the state might wish to regulate. Rather, regulation was limited to those firms that were "affected with the public interest." That terminology had a fairly technical meaning and referred to the seventeenth-century English concept of "prerogatives of the Crown"—i.e., businesses that could not be practiced by anyone who wished, but that required the Crown's permission. This language gave way to the somewhat more technical conception of "public service corporations" in the 1890's treatise literature, and then to the modern conception of "utilities." Railroads clearly fell into this conception; grain elevators like the one at issue in *Munn* did not. Even Justice Brewer's opinion for the Court in *Reagan*,¹⁴⁶ which held that a rate regulation must permit a fair return on the entrepreneur's investment, was in no sense an assault on *Munn* or a limit on its intended domain, unless one believes that *Munn* would have approved rates conceded to deny the firm an appropriate return on its

143. The *Munn* opinion limited its holding to businesses "affected with a public interest" without defining precisely what this meant. In subsequent years, the Court was hard put to identify precisely what affected a business with the public interest. See HOVENKAMP, ENTERPRISE, *supra* note 11, at 199–204.

144. See FISS, *supra* note 1, at 190–93.

145. See *Wabash, St. Louis & Pac. Ry. v. Illinois*, 118 U.S. 557 (1886) (holding that, under Commerce Clause, state has no power to regulate even intrastate portion of interstate railway shipment).

146. *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362 (1894), followed by *Smyth v. Ames*, 169 U.S. 466 (1898); see FISS, *supra* note 1, at 204–21.

investment.¹⁴⁷ Although the question was not before the Court, everything about its decision suggested that the Court intended to permit states to force monopoly firms to behave more like competitive firms—not that it intended to permit states to use regulation to drive firms out of business.

The fairest reading of the Supreme Court's fits and starts in the area of price regulation is not that the Court was hostile toward all regulation; nor that it was trying to apply contractarian principles to determine the permissible bounds of rate regulation.¹⁴⁸ Contractarianism would have outlawed all regulation, for the owners of regulated firms would always object. Rather, the Court was looking to economics, which was only then in the process of developing a generalized theory of regulated markets. The Supreme Court was engaged in economic policymaking in precisely the way it was engaged in economic policymaking when it attempted to define the appropriate limits of the Sherman Act through the rule of reason, or to define the appropriate scope of workplace regulation in *Lochner*.

III. RACE RELATIONS AND THE *PLESSY* CASE

The story of *Plessy v. Ferguson*¹⁴⁹ is always told with sadness. The Supreme Court upheld a Louisiana statute that required separate but equal accommodations for black and white railroad passengers. Fiss' interesting account of *Plessy* generally agrees with the consensus view that the decision substantially undermined a prior political commitment to civil rights that Congress established during the Civil War and Reconstruction and that was manifested in the Civil War Amendments and the 1866 and 1875 Civil Rights Acts.

The story of that commitment has been revised several times to account for the weak evidence supporting it. In the original version, Union armies and black and carpetbagger politicians created a post-Civil War regime of racial integration. This regime dominated Southern social life from 1865 until the late 1870's or early 1880's.¹⁵⁰ The 1875 Civil Rights Act, the only federal statute applying to privately owned public accommodations, was passed contemporaneously with Union withdrawal in order to ensure that this

147. Dicta in *Munn* suggested no limit on the legislative power to set rates, and it further suggested that a legislative determination of what is reasonable should not be subject to judicial review. See *Munn v. Illinois*, 94 U.S. 113, 133–34 (1877). But the Court had already clarified its position even before Fuller's administration began. See *Spring Valley Water Works v. Schottler*, 110 U.S. 347, 354 (1884) (hinting that Court would be more hostile toward rate regulation if "authorities do not exercise an honest judgment, or if they fix upon a price which is manifestly unreasonable"). As Fiss notes, even Justice Brewer would permit regulation providing no return at all if the firm's costs had been inflated through extravagance or mismanagement. See *Reagan*, 154 U.S. at 412; FISS, *supra* note 1, at 206 n.71.

148. For Fiss' suggestion that Justices were considering contractarian principles, see FISS, *supra* note 1, at 186–87; see discussion *supra* text accompanying notes 12–30.

149. 163 U.S. 537 (1896).

150. C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (3d ed. 1974).

integration would be continued after Southern political self-determination had been restored. But the Supreme Court first upset this strategy by declaring the 1875 Act unconstitutional in 1883,¹⁵¹ thus paving the way for a return to Southern white domination and segregation. The icing on the cake was *Plessy*, which legitimated the subsequent segregationist era that today goes by the name "Jim Crow."

Fiss acknowledges that some of this story is wrong. He describes the rise of racial segregation in the South as something that occurred after the Civil War, rather than after Reconstruction.¹⁵² But that naturally provokes the question, "rise from what?" There is no evidence that the Old South was a regime in which free black and white strangers shared seats on trains or the same floors in hotels or the same dining rooms in restaurants on a full and equal basis. In fact, they did not even share them on a segregated basis. Except for servants, blacks in the South before the war were generally excluded from restaurants, hotels, parks, theaters, and other places of amusement.¹⁵³ Railroads and steamships accepted black passengers under the common carrier's general common law duty to serve all paying customers, but they were almost universally accorded inferior accommodations. In most cases this meant the smoking car, but in some parts of Alabama in 1871, after the Union Army was in control and Reconstruction mores were well established, blacks were forced to ride in the open platforms at the ends of passenger train cars.¹⁵⁴ Any pre-Civil War integration existed within the hierarchical slave-master relationship, and consisted mainly in the ability of white people to bring their slaves with them into public facilities and send them on errands. For free blacks, the right to accommodations was determined by the whim of the proprietor. The evidence suggests a variety of practices, but outright integration was clearly the exception rather than the rule.

Plessy's significance in our time is unambiguous and readily comprehended. One needs only to compare *Plessy*'s conclusion that "separate but equal" is permissible state policy with *Brown*'s conclusion sixty years later that separate facilities are inherently unequal.¹⁵⁵ Numerous historians have presented the road to *Brown* as the Supreme Court's decisive unraveling of the Jim Crow regime that *Plessy* represents.

151. The Civil Rights Cases, 109 U.S. 3, 26 (1883); see FISS, *supra* note 1, at 359-63, 379-85 (discussing effect of decision).

152. FISS, *supra* note 1, at 352.

153. See IRA BERLIN, *SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH* 321-27 (1974); HOWARD N. RABINOWITZ, *RACE RELATIONS IN THE URBAN SOUTH 1865-1890*, at 182-83 (1978). Postwar segregation practices aboard railways are summarized in CHARLES A. LOFGREN, *THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION* 9-20 (1987).

154. RABINOWITZ, *supra* note 153, at 183. One of the most turbulent cities was Charleston, South Carolina, perhaps because it had so many people of mixed race who had never been slaves. See BERNARD E. POWERS JR., *BLACK CHARLESTONIANS: A SOCIAL HISTORY, 1822-1885*, at 226-60 (1994).

155. *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954).

But was *Plessy* so significant in its own time? Although *Plessy* upheld a statute that actually expanded existing rights of blacks to public accommodations, its contemporaries believed it to be a minor decision, hardly rocking—indeed, barely tilting—the boat of American social relations. Indeed, Charles Warren, the Progressive era's greatest constitutional historian, wrote a chapter on the Fuller Court in his multivolume history of the Supreme Court that did not even discuss *Plessy*.¹⁵⁶ By contrast, the Progressive critique of *Plessy* insists that in the minds of U.S. citizens at the time, *Plessy* represented the final, decisive undoing of the Union's Reconstruction agenda.¹⁵⁷ According to the latter account, Congress perceived that the withdrawal of Union armies would result in lax enforcement of Northern-imposed regimes in Southern states. In 1875, it passed the second civil rights act guaranteeing "equal access" to public accommodations for blacks. What the Reconstruction forces could no longer provide, perhaps the federal courts could. But, the story goes, this program was almost completely undermined in 1883 when the Supreme Court declared the 1875 Civil Rights Act unconstitutional. *Plessy* effectively finished the job by compelling what the 1875 Act would have expressly prohibited: segregated accommodations.

In fact, *Plessy* in life was hardly a shadow of *Plessy* in death. It passed with little notice because the plaintiff's claim that segregation is inherently harmful was foreign to nearly everyone's constitutional values. The strong case for *Plessy* as a ground-breaking civil rights decision must rest on two propositions, neither of which can be established. The first is that Congress passed the 1875 Civil Rights Act in order to achieve the kind of social integration that was compelled by 1960's civil rights legislation. The second is that a right to social integration is discernable in either the language or the constitutional history of the Fourteenth Amendment.

First, racial integration did not divide Republicans and traditionalists in the late nineteenth century in the way that protective labor legislation did. Little evidence suggests that any politically significant group wanted forced social integration of public schools, railroads, hotels, or anything else. Political liberals may have been more concerned with black welfare and legal rights, but they were as racist as conservatives on questions of multiracial social relations. Even American Progressives unapologetically shared these views.¹⁵⁸

156. On the lack of national attention to the *Plessy* case, see FISS, *supra* note 1, at 362 & n.39; see also 3 CHARLES WARREN, *THE SUPREME COURT IN THE HISTORY OF THE UNITED STATES* 145–46 (1922).

157. RICHARD KLUGER, *SIMPLE JUSTICE* 74 (1975).

158. See, e.g., JOHN R. COMMONS, *RACES AND IMMIGRANTS IN AMERICA* (1913) (Progressive economist); FRANKLIN H. GIDDINGS, *THE PRINCIPLES OF SOCIOLOGY* 328 (New York, MacMillan 1896) (Progressive psychologist); G. Stanley Hall, *The Negro in Africa and America*, 12 *PEDAGOGICAL SEMINARY* 350 (1905) (Progressive psychologist); Edward A. Ross, *The Causes of Race Superiority*, 18 *ANNALS AM. ACAD. POL. & SOC. SCI.* 67 (1901) (Progressive sociologist); see also Harvey Wish, *Negro Education and the Progressive Movement*, 49 *J. NEGRO HIST.* 184 (1964) (discussing views of Progressives towards black education during Progressive Era).

Reconstruction Republicans, the champions of racial equality following the Civil War, took great care to distinguish political equality and social equality. They espoused the former but not the latter. For example, the platform of the 1874 Alabama Republican Party, a puppet for Northern Reconstruction forces, stated that the party "does not desire mixed schools or accommodations for colored people, but . . . ask[s] that in all these advantages they shall be equal."¹⁵⁹ Within this paradigm, "separate but equal" statutes were considered a step *forward* for newly freed slaves, not backward.

Second, there is no evidence that the kind of social integration compelled by the expansive civil rights legislation of the 1960's was contemplated by anyone when the Civil War Amendments or civil rights statutes were passed. Historians who wrote about Gilded Age race relations generally saw them in the same segregation-integration paradigm characteristic of the Warren Court era. If it is not segregation, it must be integration. But this dichotomy misstates the range of mid-nineteenth-century Southern racial practices and the congressional corrective. The practices included not a dichotomy, but a trichotomy: integration, segregation, and exclusion. During the Civil War and Reconstruction, the common practice was not to give black Americans segregated facilities, but to deny them any access at all.¹⁶⁰ During both periods, hospitals, hotels, restaurants, and other facilities simply excluded blacks altogether. Before the Civil War, blacks were excluded from the public school systems. During Reconstruction, public schools for blacks were set up, but strictly on a segregated basis.¹⁶¹ The prevailing practice in railroads was to deny blacks first-class seating completely and to seat blacks in the smoking car, which was generally reserved not merely for smokers, but for lower-class passengers bearing cheaper tickets.¹⁶²

When Reconstruction governments intervened on behalf of blacks, they were concerned with *access*, not with integration. As a result, they responded with "separate but equal" statutes, which were designed not to segregate what had been integrated, but rather to provide access where there had been no access, or capriciously granted access, or access only on clearly unequal terms. For example, during Reconstruction, two states that were dominated by

159. RABINOWITZ, *supra* note 153, at 185.

160. The practices are thoroughly documented in RABINOWITZ, *supra* note 153, at 160–85.

161. *See, e.g.*, An Act To Establish and Maintain a System of Free Common Schools for the State of Arkansas, No. 52, § 107, 1868 Ark. Acts 163, 196; An Act To Establish a System of Public Instruction, Pub. L. No. 53, 1870 Ga. Laws 49, 57; An Act To Establish a System of Public Free Schools for the State of Texas, ch. 68, § 3(7), 1870 Tex. Gen. Laws 113, 114. The 1876 Texas Constitution, written immediately after Reconstruction, made segregated public education mandatory. TEX. CONST. of 1876, art. VII, § 7; *see also* Act of Aug. 11, 1868, 1868 Ala. Acts 148 (making segregation in public schools mandatory unless all parents consented to integration); An Act To Provide for a System of Public Instruction, ch. 184, § 50, 1868–69 N.C. Sess. Laws 458, 471 (requiring separate schools for children of each race). For a more extended survey, *see* Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 DUKE L.J. 624, 638–44; *see also* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 366–67 (1988) (discussing Southern whites' rejection of desegregated education in late 19th century).

162. FONER, *supra* note 161, at 368.

Republican legislatures, Arkansas and Georgia, passed separate but equal measures.¹⁶³ During the second half of Reconstruction, several states passed "full and equal access" statutes in anticipation of Union withdrawal. However, the small amount of recorded litigation under these statutes indicates that they were interpreted as access statutes, not as integration statutes.¹⁶⁴

The 1875 Civil Rights Act was also concerned with access, not integration. Its purpose was to federalize a regime of equal access so that post-Reconstruction Southern governments could neither repeal these novel state statutes nor refuse to enforce them. In upholding its constitutionality, both Radical Republican and traditionalist federal court judges consistently interpreted the intent of the 1875 Civil Rights Act in this manner. Even Radical Republican federal judges, such as Robert P. Dick, who became a federal judge in Reconstruction North Carolina and wrote that the 1875 Civil Rights Act required innkeepers to accept all customers regardless of color, was careful to allow the innkeeper to "arrange his business to suit his own advantage," and to make clear that the guest had "no right to select a particular apartment."¹⁶⁵ He then noted that the 1875 statute was not "intended to confer any rights or privileges of social equality among men: the hope and expectation that there will ever be a nation on earth in which all men will associate upon terms of social equality is a wild dream of fanaticism, which can never be realized."¹⁶⁶ Instead, he found, the statute "only propose[d] to provide for the enforcement of legal rights guaranteed to all citizens by the laws of the land, and le[ft] social rights and privileges to be regulated, as they ha[ve] ever been, by the customs and usages of society."¹⁶⁷ Under this reading "innkeepers [could] have separate rooms and accommodations for colored men" so long as they were "equal in quality and convenience to those furnished white men." Likewise, "[r]ailroad companies could have first class coaches for colored men, and first class coaches for white men."¹⁶⁸ Notably, the cases that collectively went up to the Supreme Court as the *Civil Rights Cases* all involved access, not integration.¹⁶⁹

Ironically, in some cases separate but equal statutes such as the one upheld in *Plessy* furthered rather than undermined the mandate of the 1875 Civil

163. An Act To Punish Public Carriers and Others for Refusing Persons Passage, Lodging, Admission &c., 1868 Ark. Acts 39; An Act To Regulate Common Carriers in this State, 1870 Ga. Laws 398; Act of Oct. 26, 1870, 1870 Ga. Laws 427.

164. See ROGER A. FISCHER, *THE SEGREGATION STRUGGLE IN LOUISIANA 1862-1877*, at 83-85 (1974) (discussing discriminatory effect of Act passed in Louisiana).

165. Charge to Grand Jury—The Civil Rights Act, 30 F. Cas. 999, 999 (C.C.W.D.N.C. 1875) (No. 18,258).

166. *Id.* at 1000-01.

167. *Id.* at 1001.

168. *Id.* For other judicial interpretations and the prior history of the *Civil Rights Cases* indicating that the 1875 statute was entirely concerned with exclusion, not segregation, see Hovenkamp, *supra* note 161, at 643-48.

169. *Id.*

Rights Act, which the Supreme Court had made into a dead letter. In the process, they may have increased rather than diminished black rights in public accommodations—it all depends on the status quo. If before *Plessy* blacks and whites were sharing seats on Southern trains, then *Plessy* separate but equal statutes took away an important social right. By contrast, if blacks were being subjected to the whim of the train conductor, denied access altogether, or relegated to facilities that were not even arguably “equal,” then enforced separate but equal accommodations were an improvement—as long as “equal” was not a hollow term of art.

Attention to *Plessy*’s background also sheds some light on the historical understanding of the Equal Protection Clause: Equal protection had not been identified with social integration when the Fourteenth Amendment was drafted in 1866, nor when it was ratified in 1868, nor when *Plessy* was decided in 1896. Historians such as Richard Kluger who state the contrary are simply wrong.¹⁷⁰

Some of the best evidence of this can be obtained by looking, not just at *Plessy*, but also at the Fuller Court’s earlier separate but equal decision, *Louisville Railway v. Mississippi*.¹⁷¹ That case involved a Mississippi statute identical to the *Plessy* statute. Indeed, the Louisiana Legislature undoubtedly copied the Mississippi statute, which had been passed two years earlier.¹⁷² Plaintiffs, the Louisville Railway, claimed the Mississippi statute violated the Commerce Clause under an earlier Supreme Court ruling that a state could not regulate even the intrastate portion of an interstate railway trip.¹⁷³ The Railway hired Wiley Pope Harris, a former U.S. Congressman and a prominent

170. See KLUGER, *supra* note 157, at 74. For the majority view of the early understanding of the meaning of equal protection, see *United States v. Buntin*, 10 F. 730, 736 (S.D. Ohio 1882) (summarizing case law and concluding that cases uniformly hold that creation of separate schools for black and white school children did not violate equal protection, but rather that equal protection referred only to equality of public tribunals or access to government institutions); Jonathan Lurie, *The Fourteenth Amendment: Use and Application in Selected State Court Civil Liberties Cases, 1870–1890—A Preliminary Assessment*, 28 AM. J. LEGAL HIST. 295, 297 (1984); see also LOFGREN, *supra* note 153, at 61–66 (noting lack of evidence that Congress contemplated social integration when it passed Civil War legislation or constitutional amendments).

171. 133 U.S. 587 (1890).

172. The 1890 Louisiana statute upheld in *Plessy v. Ferguson* provided:

[A]ll railway companies carrying passengers in their coaches in this State, shall provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations; *provided* that this section shall not be construed to apply to street railroads.

Act of July 10, 1890, No. 111, § 1, 1890 La. Acts 152, 153. The Mississippi statute at issue in *Louisville Ry. v. Mississippi*, 133 U.S. 587 (1890), provided:

[A]ll railroads carrying passengers in this State (other than street railroads) shall provide equal but separate accommodations for the white and colored races, by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by a partition so as to secure separate accommodations.

Act of Mar. 2, 1888, ch. 27, § 1, 1888 Miss. Laws 48, 48.

173. *Wabash, St. Louis & Pac. Ry. v. Illinois*, 118 U.S. 557 (1886); see discussion *supra* text accompanying notes 140–45.

constitutional lawyer, to argue before the Supreme Court. Never once in the challenge, in Justice Brewer's opinion for the Court upholding the statute,¹⁷⁴ or in Justice Harlan's dissent,¹⁷⁵ did anyone even suggest that the Equal Protection Clause might be relevant to a separate but equal statute.

In sum, it is difficult to escape the conclusion that the equal protection argument in *Plessy* was an afterthought. The argument that the Fourteenth Amendment might have something to do with social integration does not lie in the language or history of the Civil War or congressional redesign of the structure of post-emancipation race relations. Rather, it was first cooked up sometime between 1890 and 1896 in order to create a second route for challenging the constitutionality of state separate but equal laws. *That* story is much more consistent with the history of the American commitment to racial equality.

IV. CONCLUSION

As Fiss' book points out, the Fuller Court gives us little to cheer about. A group of Justices gave themselves the constitutional power to delay or prevent the development of the modern regulatory and welfare state. Whether they were right or wrong on the merits, what they did was not the prerogative of judges. For that reason, of course, Holmes is a hero to contemporary conservatives and liberals alike. On the one hand, he did not put much confidence in the welfare and regulatory state. On the other, he knew the difference between being a legislator and being a judge.

For all its shortcomings, the Fuller Court provides us with powerful lessons about judicial power, modernity, economics, and human nature. As Fiss' book illustrates, however, the lessons are hidden in a confoundingly complex debate about origins and influences. Historians' theses about the origins and motivations of Fuller Court doctrine are extremely diverse and often incompatible. By all comparative measures, most of the Justices of the Fuller Court were reactionary, narrow, and lacking in vision. Perhaps for these reasons they serve as such excellent mirrors of the elite milieu they lived in, but that the American democratic process rejected.

174. In upholding the statute, Justice Brewer noted that Mississippi's own courts had construed the statute to apply only to intrastate passengers. 133 U.S. at 591-92; see also Hovenkamp, *supra* note 161, at 646-47 (discussing *Louisville* decision).

175. 133 U.S. at 592-94.