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FULLER COURT
(1888–1910)

MELVILLE W. FULLER was Chief Justice of the United States from 1888 to 1910. Lawyers and historians know the period, and its significance for constitutional law, but do not generally identify it with Fuller's name—and for good reason. He was no leader. Fuller discharged his administrative duties effectively, and in "good humor," to borrow a phrase from OLIVER WENDELL HOLMES, one of his admirers, but he was not an important source of the ideas and vision that shaped the work of the Court.

The year of Fuller's appointment, 1888, was nonetheless an important date in the life of the Court because it marked the beginning of a period of rapid turnover. From 1888 to 1895 there were a considerable number of vacancies, and the two Presidents then in office, GROVER CLEVELAND, a Democrat, and BENJAMIN HARRISON, a Republican—whose politics were conservative and largely indistinguishable—appointed six of the Justices. One was Fuller himself. At the time of his appointment he was a respected Chicago lawyer and, perhaps more significantly, a friend of Cleveland's. The others were DAVID J. BREWER, a federal circuit judge in Kansas; HENRY BILLINGS BROWN, a federal district judge in Detroit; RUFUS PECKHAM, a judge on the New York Court of Appeals; GEORGE SHIRAS, a lawyer from Pittsburgh; and EDWARD D. WHITE, a senator from Louisiana. (LUCIUS Q. C. LAMAR and HOWELL JACKSON were also appointed during this period, but served for relatively short periods.) The intellectual leaders

of this group of six were Brewer and Peckham. They appeared in their written opinions as the most powerful and most eloquent, and the Chief Justice usually turned to one or the other to write for the Court in the major cases.

In constructing their majorities, Brewer and Peckham could usually count on the support of STEPHEN J. FIELD (Brewer's uncle), who earlier had achieved his fame by protesting various forms of government regulation in the SLAUGHTERHOUSE CASES and the GRANGER CASES. In the late 1890s Field was replaced by JOSEPH MCKENNA, who was chosen by WILLIAM MCKINLEY, a President who continued in the conservative tradition of Cleveland and Harrison. Another ally of this Cleveland-Harrison group, though perhaps not so steadfast as Field or McKenna, was HORACE GRAY. Gray was appointed in 1881 by President CHESTER A. ARTHUR and served until 1902.

As a result of these appointments, the Court over which Fuller presided was perhaps one of the most homogeneous in the history of the Supreme Court. Even more striking, its composition did not significantly change for most of Fuller's tenure. Fuller died in July 1910, just months after Brewer and Peckham. It was almost as though he could not go on without them. Brown resigned in 1906 and Shiras in 1903, but their replacements—WILLIAM H. MOODY and WILLIAM R. DAY—did not radically alter the balance of power. The only important break with the past came when THEODORE ROOSEVELT appointed Oliver Wendell Holmes, Jr., to replace Gray.

At the time of his appointment, Holmes was the Chief Justice of the Supreme Judicial Court of Massachusetts and had already written a number of the classics of American jurisprudence. Brown described Holmes's appointment as a "topping off." On the Court, however, Holmes played a different role, for he had no taste for either the method of analysis or general philosophical outlook of the Cleveland-Harrison appointees. His stance was fully captured by his quip in LOCHNER V. NEW YORK (1905) that "The FOURTEENTH AMENDMENT does not enact Mr. Herbert Spencer's Social Statics." In this remark Holmes was finally vindicated in 1937 with the constitutional triumph of the New Deal, but in the early 1900s he spoke mostly for himself, at least on the bench, and had no appreciable impact on the course of decisions. No other Justice joined his *Lochner* dissent.

The other significant presence on the Court at the turn of the century was JOHN MARSHALL HARLAN. He was originally appointed by President RUTHERFORD B. HAYES in 1877 and served until 1911. He is greatly admired today for his views on the rights of the newly freed slaves and on the power of the national government. But, like Holmes, Harlan suffered the fate of a prophet: He was a loner. He had his own agenda, and though he sometimes spoke for the Cleveland-Harrison group, Harlan seemed most comfortable playing the role of "the great dissenter."

At the turn of the century, as in many other periods of our history, the Court was principally concerned with the excesses of democracy and the danger of tyranny of the majority. In one instance, the people in Chicago took to the streets and, through a mass strike, tied up the rail system of the nation and threatened the public order. President Cleveland responded by sending the army, and the judiciary helped by issuing an INJUNCTION. In IN RE DEBS (1895) Brewer, writing for a unanimous Court, upheld the contempt conviction of the leader of the union, and legitimated the use of the federal injunctive power to prevent forcible obstructions of INTERSTATE COMMERCE. For the most part, however, the people fought their battles in the legislative halls, and presented the Court with a number of statutes regulating economic relationships. The question posed time and time again was whether these exercises of state power were consistent with the limitations the Constitution imposed upon popular majorities. Sometimes the question was answered in the affirmative, but the Court over which Fuller presided is largely remembered for its negative responses. It stands as a monument to the idea of limited government.

The most important such response consists of POLLOCK V. FARMERS' LOAN & TRUST CO. when, in the spring of 1895, the Court invalidated the first federal income tax enacted in peacetime. The statute imposed a 2 percent tax on all annual incomes above $4,000, and it was estimated that, due to the exemption, the tax actually fell on less than 2 percent of the population, the wealthy few who resided in a few northeastern states. The tax was denounced by JOSEPH CHOATE, in arguments before the Supreme Court, as an incident in the "communistic march," but the Court chose not to base its decision on a rule that would protect the wealthy few from redistribution. The Court instead largely relied upon that provision of the Constitution linking REPRESENTATION and taxation and requiring the apportionment among the states according to population of all DIRECT TAXES.

The Constitution identified a POLL TAX as an example of a direct tax. It was also assumed by all that a real estate tax would be another example of a direct tax, and the Court first decided that a tax upon the income from real estate is a direct tax. This ruling resulted in the invalidation of the statute as applied

to rents (since the tax was not apportioned according to population), but on all other issues the Court was evenly divided, 4–4. The ninth justice, Howell Jackson, was sick at the time. A second argument was held and then the Court continued along the path it had started. Just as a tax on income from real property was deemed a direct tax, so was the tax on income from personal property (such as dividends). This still left unresolved the question whether a tax on wages was a direct tax, but the majority held that the portions of the statute taxing rents and dividends were not severable and that as a result the whole statute would fall. As Fuller reasoned, writing for the majority, if the provision on wages were severable, and it alone sustained, the statute would be transformed, for "what was intended as a tax on capital would remain in substance a tax on occupations and labors."

A decision of the Court invalidating the work of a coordinate branch of government is always problematic. *Pollock* seemed especially so, however, because the Court was sharply divided (5–4), and even more so because one of the Justices (whose identity is still unknown) seems to have switched sides after the reargument. The Justice who did not participate the first time (Jackson) voted to uphold the statute, yet the side he joined lost. It was no surprise, therefore, that *Pollock*, like *Debs*, became an issue in the presidential campaign of 1896, when William Jennings Bryan—a sponsor of the income tax in Congress—wrested control of the Democratic Party from the traditional, conservative elements and fused it with the emerging populist movement. Bryan lost the election, but remained the leader of the party for the next decade or so, during which the political elements critical of the Court grew in number and persuasiveness. By 1913 a constitutional amendment—the first since Reconstruction—was adopted. The SIXTEENTH AMENDMENT did not directly confront the egalitarian issue, any more than did the Court, but simply declared that an income tax did not have to be apportioned.

The Court's first encounter with the SHERMAN ACT of 1890 was negative and thus bore some resemblance to *Pollock*. In UNITED STATES V. E. C. KNIGHT COMPANY, also announced in 1895, just months before *Debs* and *Pollock*, the Court refused to read the Sherman Act to bar the acquisition of a sugar refinery even though it resulted in a firm that controlled 98 percent of the market and aptly was described (by Harlan in dissent) as a "stupendous combination." The Court reasoned that manufacturing was not within the reach of Congress's power over "commerce." The difference with *Pollock*, however, lay in the fact that this decision (written by Fuller) was in accord with long-standing interpretations of the COMMERCE CLAUSE, which equated "commerce" with the transportation of goods and services across state lines. And this decision was not denounced by the populists; they had no desire whatsoever to have the federal government assume jurisdiction over productive activities such as agriculture. In any event, by the end of Fuller's Chief Justiceship, *E. C. Knight* was in effect eradicated by the Court itself. The Court fully indicated that it was prepared to apply the act to manufacturing enterprises, provided the challenged conduct impeded or affected the flow of goods across state lines.

In the late 1890s, almost immediately after *E. C. Knight*, the Court, speaking through Peckham, applied the Sherman Act to prohibit open price-fixing arrangements by a number of railroads. There was little issue in these cases about the reach of the commerce power, because they involved transportation, but the Court was sharply divided over an issue that was presented by these early antitrust cases, namely, whether such an interference with what was then perceived as ordinary or accepted business practices (supposedly aimed at preventing "ruinous competition") was an abridgment of FREEDOM OF CONTRACT. At first the argument about freedom of contract was presented as a constitutional defense of the application of the Sherman Act, wholly based on the DUE PROCESS clause, but starting with Brewer's separate concurrence in UNITED STATES V. NORTHERN SECURITIES COMPANY (1903) and then again in White's opinions for a near-unanimous Court in the STANDARD OIL COMPANY V. UNITED STATES (1911) and UNITED STATES V. AMERICAN TOBACCO COMPANY (1911), the liberty issue dissolved into a question of statutory interpretation. The Sherman Act was read to prohibit not all but only "unreasonable" restraints of trade, and if a business practice was "unreasonable," then it was, almost by definition, the proper subject of government regulation.

In the late 1890s and early 1900s, antitrust sentiments were the principal cause of the growing Progressive movement. While populists extolled cooperative activity, progressives tried to use the legislative power to preserve the market and the liberties that it implied. They condemned activities (such as mergers or price fixing) that stemmed from the ruthless pursuit of self-interest but that, if carried to their logical extreme, would destroy the social mechanism that both legitimates and is supposed to control such self-interested activity. Progressives were also concerned, however, with stopping certain practices that did not threaten the existence of the market, but rather of-

fended some standard of "fairness" or "decency" that had a wholly independent source. And they used the legislative power for this end.

The Justices were not unmoved by the moralistic concerns that fueled the progressives, but they were also determined—as they had been in *Pollock*—to make certain that the majorities were not using the legislative power to redistribute wealth or power in their favor. In some instances the Court allowed redistributive measures that benefited some group that was especially disadvantaged and thus could be deemed a ward of the state. On that theory, the Court, in a unanimous opinion by Brewer, upheld in MULLER V. OREGON (1908) a statute creating a sixty-hour maximum work week for women employed in factories or laundries. More generally, however, the Court voiced the same fears that had animated *Pollock* and insisted that there be a "direct" connection between the legislative rule and an acceptable (that is, nonredistributive) end such as health. The statute at issue in *Lochner v. New York,* for example, was defended on the ground that a work week for bakers in excess of sixty hours would endanger their health. Justice Peckham's opinion for the majority acknowledged that there might be some connection between a maximum work week and health, but suspected redistributive purposes and argued that if, in the case of bakers, this connection with health were deemed sufficient—that is, direct—the same could be said for virtually every occupation or profession: "No trade, no occupation, no mode of earning one's living, could escape this all-pervading power."

Just as it was fearful of state intervention to control the terms of employment, the Court was also wary of legislation regulating consumer prices—a practice initiated by the Granger movement of the 1870s but continued by the populists and progressives in the 1890s and the early 1900s. In this instance the Court feared that the customers would enrich themselves at the expense of the investors. The danger was, as Brewer formulated it, one of legalized theft. In contrast to cases like *Lochner,* however, the Court took up this issue with a viable and highly visible precedent on the books, namely, *Munn v. Illinois* (1877). Some consideration was given to OVERRULING the decision (there was no limit to the daring of some of the Justices), but the Court finally settled upon a more modest strategy—of cabining *Munn.*

For one thing, the *Munn* formula for determining which industries would be regulated—a formula that allowed the state to reach "any industry AFFECTED WITH A PUBLIC INTEREST"—was narrowed. In *Budd v. New York* (1892) the Court upheld the power of the legislature to regulate the rates of grain operators, but placed no reliance on the *Munn* public interest formula. Instead, it stressed the presence of monopoly power and the place of the grain operation in the transportation system. Second, the Court began to surround the rate-settling power with procedural guarantees. Legislatures were now delegating the power of setting prices to administrative bodies, such as railroad commissions, and the Court, in CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO. V. MINNESOTA (1890), required agencies of that type to afford investors a full, quasi-judicial hearing prior to setting rates. Finally, the Court ended the tradition of judicial deference initiated by *Munn* by authorizing judicial review of the rate actually set. The purpose was to insure against confiscation and to this end Brewer articulated in REAGAN V. FARMERS' LOAN & TRUST (1894) a right of FAIR RETURN ON FAIR VALUE. In that case the rate was set so low as to deny the investors any return at all. In the next case, SMYTH V. AMES (1898), there was some return to the investors, but the Court simply concluded that the rate was "too low."

Reagan v. Farmers' Loan & Trust and *Smyth v. Ames* were both unanimous and thrust the federal judiciary into the business of policing state rate regulations. A particularly momentous and divisive exercise of this supervisory jurisdiction occurred when a federal judge in Minnesota enjoined the attorney general of that state from enforcing a state statute that set maximum railroad rates. The attorney general disobeyed the injunction and was held in criminal contempt. Peckham wrote the opinion for the Court in EX PARTE YOUNG (1908) affirming the contempt conviction, and in doing so, constructed a theory that, notwithstanding the ELEVENTH AMENDMENT, provided access to the federal EQUITY courts to test the constitutionality of state statutes—an avenue of recourse that was to become critical for the CIVIL RIGHTS movement of the 1960s. Ironically, Harlan, who, by dissenting in the CIVIL RIGHTS CASES (1883) and in PLESSY V. FERGUSON (1896), had already earned for himself an honored place in the history of civil rights, bitterly dissented in *Ex parte Young,* because, he argued, the Court was opening the doors of federal courts to test the validity of all state statutes.

The confrontations between the Court and political branches in economic matters such as antitrust, maximum hours, and rate regulation were considerable—*Northern Securities, Lochner,* and *Ex Parte Young* were important public events of their day. Some of these decisions were denounced by political forces, particularly by the Progressive movement, which had begun to dominate national politics. Roosevelt made

his disappointment with Holmes's performance in *Northern Securities* well known ("I could carve out of a banana a judge with more backbone than that"—a comment that seems only to have either amused or pleased Holmes) and finished his presidency in 1908 with a speech to Congress sharply critical of the Court. By 1912 the Supreme Court and its work were once again the subject of debate in a presidential election, as it had been in the election of 1896. It was as though the body politic was scoring the Court over which Fuller had presided for the past twenty years. Now the critical voices were more respected and covered a wider political spectrum than in 1896, but the results were mixed.

In the 1912 election the Democratic candidate, Woodrow Wilson, beat the incumbent WILLIAM HOWARD TAFT, who was generally seen as the defender, indeed the embodiment, of the judicial power. On the other hand, Wilson was less critical of the Court than Roosevelt, who ran as a Progressive. The legislation of this period also was two-sided. The CLAYTON ACT of 1914, for example, exempted labor from antitrust legislation (thus reversing the *Danbury Hatters* decision of 1908), and also imposed procedural limits on the use of the labor injunction (thus revising *Debs*), but it did not in fact have as critical an edge as the Sixteenth Amendment of 1913. The Clayton Act did not repudiate the idea of the labor injunction altogether nor did it repudiate the rule of reason in antitrust cases. Similarly, although Congress reacted in 1910 to *Ex Parte Young,* it did so only in a trivial, near-cosmetic way, by requiring three judges (as opposed to one) to issue an injunction against the enforcement of state statutes.

In attempting to construct limits on the power of the political branches, and to guard against the tyranny of the majority as it did in *Pollock, Ex Parte Young,* and *Lochner,* the Court assumed an activist posture. The Justices were prepared to use their power to frustrate what appeared popular sentiments. The activist posture was, however, mostly confined to economic reforms—redistributing income, regulating prices, controlling the terms of employment—as though the constitutional conception of liberty were structured by an overriding commitment to capitalism and the market. This characterization of their work, voiced in a critical spirit in their day and in ours, is strengthened when a view is taken of the Justices' overall receptiveness to the antitrust program of the progressives, and even more when account is taken of the pattern of decisions outside the economic domain, respecting human rights as opposed to property rights. The Justices were passive about human rights—by and large willing to let majorities have their way.

A particularly striking instance of this passivity consists of their reaction to the treatment of Chinese residents. Ever since the Civil War the Chinese were by statute denied the right to become naturalized citizens, but in the late 1880s and the early 1900s their situation worsened. The doors of the nation were closed to any further IMMIGRATION, and Congress (in the Geary Act of 1892) created an oppressive regime for those who had previously been admitted. Chinese residents were required to carry passes, and failure to have the passes subjected them to DEPORTATION proceedings that were to be conducted by commissioners (rather than judges or juries) and that put them to the task of producing "at least one credible white witness." YICK WO V. HOPKINS (1886), which invalidated, on EQUAL PROTECTION grounds, a San Francisco laundry ordinance that had disadvantaged the Chinese, was already on the books. But neither it nor the passionate dissent of Brewer ("In view of this enactment of the highest legislative body of the foremost Christian nation, may not the thoughtful Chinese disciple of Confucius fairly ask, why do they send missionaries here?") was of much avail. The Court sustained the Geary Act in *Fong Yue Ting v. United States* (1893) in virtually all its particulars.

A few years later the Court held in UNITED STATES V. WONG KIM ARK (1898) that Chinese children born here were, by virtue of the FOURTEENTH AMENDMENT, citizens of the United States. But this decision sharply divided the Court, despite the straightforward language of the amendment ("All persons born . . . in the United States and subject to the jurisdiction thereof are citizens of the United States"), and did not materially improve the quality of the process the Chinese received. There was, by virtue of *Wong Kim Ark,* a chance that a Chinese person whom the government was trying to deport was a natural born citizen, yet the Court did not even require that this claim of CITIZENSHIP be tried by a judge. Holmes wrote the opinion in these cases, *United States v. Sing Tuck* (1904) and *United States v. Ju Toy* (1905), and once again Brewer, now joined by Peckham, dissented with an intensity equal to that he had exhibited in *Fong Yue Ting.*

The same spirit of acquiescence was manifest in the cases involving the civil rights of blacks, though here it was Harlan who kept the nation's conscience. In *Plessy v. Ferguson* (1896) the Court upheld a Louisiana statute requiring racial SEGREGATION of rail cars; Harlan dissented and, borrowing a line from Plessy's lawyer, Albion Tourgee, insisted that "our Constitu-

tion is colorblind." In HODGES V. UNITED STATES (1906) the Court dismissed a federal INDICTMENT against a group of white citizens in Arkansas who forced a mill owner to discharge the blacks who had been hired. Brewer, for the majority, said that the power of the federal government under the Civil War-Reconstruction amendments (and thus under the criminal statute in question) extended only to acts by state officials. He reaffirmed the principle of the CIVIL RIGHTS CASES of 1883 by which the Court effectively ceded to the states exclusive jurisdiction to govern the treatment of one citizen by another. In *Hodges,* Harlan, the Union general from Kentucky, replayed his dissent in the *Civil Rights* cases, and denounced this principle as a fundamental distortion of the Thirteenth and Fourteenth Amendments. And in BEREA COLLEGE V. KENTUCKY (1908) the Court, over Harlan's dissent, upheld a state law that prohibited a private educational corporation from conducting its educational programs on an integrated basis.

Berea College was also written by Brewer. He was mindful of the contrast with a case such as *Lochner,* where the judicial power had been used to the utmost to protect the contractual freedom of worker and employer. Accordingly, Brewer stressed the fact that this law was applicable only to CORPORATIONS, which, to pick up a theme he had previously articulated in his concurring opinion in *Northern Securities,* were merely artificial entities created by government, not entitled to the same degree of protection as natural persons. He specifically left open the question of the validity of a similar statute if it regulated the conduct of natural persons. Harlan, in an equally equivocal dissent, said that a different result might follow if the statute regulated public rather than private education. In fact, the distorting impact of public subsidies upon the articulation of civil rights had been implicitly acknowledged some years earlier in *Cumming v. Board of Education* (1899). In that case Harlan dismissed a challenge by black parents to a decision of a local county, which ran its schools on a segregated basis, to close the only black high school and to send the black students out of the county for their education.

In the 1890s and early 1900s blacks, through one scheme or another, were disenfranchised on a grand scale. The FIFTEENTH AMENDMENT was reduced to a nullity, as Jim Crow was becoming more firmly entrenched. On several occasions, the Court was presented with challenges to these electoral practices, yet it was unable to respond with the energy that it had summoned in *Pollock* or *Lochner* or *Reagan* or, even more to the point, *Debs.* Holmes, the spokesman in these early VOTING RIGHTS cases, saw judicial relief as nothing but an "empty form": "[R]elief from a great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States." Harlan dissented, as might be expected, but so did Brewer. They realized that, because the disenfranchisement was the work of state officials, something more was at issue than the allocation of power between states and nation approved in the *Civil Rights Cases.* What was at issue, according to Brewer and Harlan, was nothing less than the integrity of the judicial power and the duty of the judiciary, to borrow a line from *Debs,* to do whatever it could to fulfill the promise of the Constitution.

The principal issue before the Court at the turn of the century was democracy and, more specifically, the determination of what limits should be placed on popular majorities. As was evident in the civil rights cases, however, the Court was also asked to allocate power between the states and the national government. The FEDERALISM issue arose in many contexts, including antitrust, labor, and rate regulation, but the one in which it proved most troublesome was PROHIBITION. By the late 1880s the prohibition movement was an active force in the states, and Fuller began his Chief Justiceship with a set of constitutional decisions that were unstable. In MUGLER V. KANSAS (1887) the Court had held that prohibition was within the STATE POLICE POWER, yet, just weeks before Chief Justice MORRISON R. WAITE's death, the Court in *Bowman v. Iowa* (1888) had also held that the states were without power to prohibit the importation of liquor from other states. The Court seemed to take away in one decision what it gave in the other. Fuller confronted this problem early on in LEISY V. HARDIN (1890), and in probably his most lasting contribution to constitutional law, fashioned an odd response. First, he announced that the commerce clause barred the states from prohibiting the sale of imported liquor (as well as its actual importation). Second, he invited Congress to intervene, and to authorize states to pass laws that would prohibit out-of-state liquor. Congress quickly responded to this invitation, and in the Wilson Act of 1890 authorized states to enact measures aimed at erecting walls to out-of-state liquor.

The state laws in question in *Leisy v. Hardin* were invalidated on the theory that they sought to regulate a matter that required nationwide uniformity. When it came to judging the congressional response, Fuller found the requisite uniformity since it was Congress that had spoken (even though it did no more than allow the states to choose) and on that theory, in *In*

re Rahrer (1891), upheld the Wilson Act. In 1898, however, after some change in the composition of the Court and after the responsibility of speaking on this issue had shifted to one of the new appointees, Edward White, a sharply divided Court cut back on the Wilson Act. *Rhodes v. Iowa* (1890) held that the Wilson Act authorized a ban on sales of imported liquor within the state but not a ban on the importation itself. White insisted that any other construction would raise grave constitutional doubts as to the validity of the Wilson Act. Fuller joined White's opinion.

Over the next decade, mail order business in out-of-state liquor grew. The conflict between the Court and the prohibition movement escalated. Then in 1913 Congress, as part of the same era that saw the Sixteenth Amendment and the Clayton Act, passed the WEBB-KENYON ACT to remove any ambiguity over what it sought to accomplish in the Wilson Act. Congress allowed states to bar both the sale and the importation of out-of-state liquor. After considerable struggle and deliberation, the Webb-Kenyon Act was upheld in an opinion by White (then Chief Justice) on the theory (if that is what it can be called) that "liquor is different." For all other goods, the common market was deemed a constitutional necessity.

The federalism issue has recurred throughout the entire history of the Supreme Court. The Court over which Fuller presided did, however, confront one issue pertaining to structure of government that was unique to the times: colonialism. The issue arose from the "splendid little war," as Secretary of State John Hay called the Spanish-American War of 1898, which left the United States with two former Spanish colonies, PUERTO RICO and the Philippines. (Much earlier the United States had purchased Alaska, and in the late 1890s it had also taken possession of Hawaii.) The assumption was that the United States would hold these territories as territories, for an indefinite period, and perhaps ultimately build a colonial empire along the European model. The question posed for the Supreme Court—not just by the litigants but by the nation at large—was whether colonialism was a constitutionally permissible strategy for the United States. Technically, the case involved a challenge to a statute imposing a tariff on goods (sugar) imported from Puerto Rico into the states. The Constitution bars Congress from imposing duties on the importation of goods from one state to another, and so the issue was whether a territory was to be treated the same as a state, or, as phrased in the language of the day, whether the Constitution followed the flag.

Three positions emerged in a series of decisions beginning in 1901 known as the INSULAR CASES. The first, most in keeping with the position of the Court in *Pollock* and the other economic cases, proclaimed the idea of limited government. The government of the United States was formed and established by the Constitution, and thus it was impossible to conceive of a separation of Constitution and government. This was the position taken by Brewer, Peckham, Fuller, and Harlan. At the opposite end of the spectrum was the so-called annexation position. It proclaimed the separation of Constitution and flag, and generally left the government unrestricted in its activities in the territories; whatever restrictions there were flowed from natural law or from a small group of provisions of the Constitution deemed essential (the tariff provision was not one). This position was most congenial to the government and yet at odds with the general jurisprudence of the Court. Only Justice Brown subscribed to it.

The remaining four Justices, in an opinion written by White, put forth what was called the incorporation theory. It tried to chart a middle course, as appeared to be White's trade. It made the Constitution fully applicable to a territory, but only after that territory was incorporated into the United States. (Prior to incorporation the government would be subject only to the restraints of natural law.) Justice White's opinion also made it clear that the decision to incorporate a territory resided in Congress. In the case before it the Court decided that the territory was not incorporated, but White also acknowledged that incorporation could be done by implication and, even more to the point, he reserved for the judiciary the power to determine whether that act of incorporation had taken place.

Ultimately incorporation was adopted as the position of the Court. But this did not occur until 1905, after an insurrection in the Phillipines and other developments in the world (such as the Boer War) had made the idea of a colonial empire seem less attractive, and the danger of further imperial acquisitions seemed to have waned. In fact, incorporation became majority doctrine in *Rassmussen v. United States* (1905) in which the Court held that Alaska had been *implicitly* incorporated and that the United States was bound by the BILL OF RIGHTS in its governance of that territory. The outcome in this case affirmed the idea of limited government and JUDICIAL SUPREMACY, the hallmarks of this Court, and made it possible for Fuller, and perhaps even more significantly, for Brewer and Peckham, to abandon their absolutist position and to support the middle-of-the-road theory

of White—perhaps a sign of what was to come in 1910, when Fuller died and Taft, who had once served as the commissioner in the Philippines, replaced him with White.

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