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CHIEF JUSTICE FULLER.

Melville Weston Fuller was born at Augusta, Maine, on February 11th, 1833. His father and his father's father are said to have been able lawyers, and his mother's father, Nathan Weston, was for twenty-one years a member of the Supreme Court of Maine. Two of his uncles also were engaged in the active practice of law. He studied in the office of one of those uncles, George Melville Weston, at Bangor, from his graduation from Bowdoin College in 1853 until 1855, in the meanwhile also attending a course of lectures at the Harvard Law School. He then began the practice of law in Augusta as the partner of another uncle, Benjamin A. G. Fuller. Before the end of 1856, however, he moved to Chicago. He there took an active part in public affairs and was elected to the state legislature and to a constitutional convention.

It is recorded that he was of counsel in the first case which was heard by the United States Supreme Court after Chief Justice Waite entered upon his duties as presiding officer of that court,<sup>1</sup> that that was not his first appearance

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<sup>1</sup> *Tappan v. Merchants' National Bank*, (1874) 19 Wall. 490; see also p. iii of that volume.

in the court of last resort, and that it was far from being the last occasion on which he argued before that august tribunal.<sup>2</sup> Indeed, in a number of cases which were heard by the court after his own appointment to the Chief Justiceship he had been of counsel and for that reason did not participate in the decision.<sup>3</sup>

He was appointed Chief Justice of the United States Supreme Court by President Cleveland in 1888 and took his seat upon the bench in October of that year, where he served until his death at Sorrento, Maine, on July 4th, 1910.

During the twenty-two years in which he held that important office he took part in the decision of almost every question which came before the court. He himself was called upon to announce the judgment in no less than eight hundred and thirty-two cases, and in most of those cases he accompanied the announcement with a carefully prepared opinion. He also in thirty-one cases both dissented from the position taken by the court and stated the reasons for his dissent.<sup>4</sup>

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<sup>2</sup>The statements here made as to Mr. Fuller's ancestry and his career before his appointment to the Chief Justiceship are based upon an article at the beginning of the first volume of *The Green Bag* (1889). The statements as to his subsequent career are based upon a page by page examination of the reports.

<sup>3</sup>This was true in *Cleveland v. Richardson*, (1889) 132 U. S. 318, 10 Sup. Ct. 100; *Elwell v. Fosdick*, (1890) 134 U. S. 500, 10 Sup. Ct. 598; *Union Bank of Chicago v. Kansas City Bank*, (1890) 136 U. S. 223, 10 Sup. Ct. 1013; *Chicago, M. & St. P. Ry. Co. v. Hoyt*, (1893) 149 U. S. 1, 13 Sup. Ct. 779; *North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co.*, (1894) 152 U. S. 506, 14 Sup. Ct. 710; *United States v. Illinois C. R. Co.*, (1894) 154 U. S. 225, 14 Sup. Ct. 1015; *Pittsburgh, C. & St. L. Ry. Co. v. Keokuk & Hamilton Bridge Co.*, (1894) 155 U. S. 156, 15 Sup. Ct. 42; *Illinois C. R. Co. v. Illinois*, (1892) 146 U. S. 387, 13 Sup. Ct. 110; *Illinois v. Illinois C. R. Co.*, (1902) 184 U. S. 77, 22 Sup. Ct. 300.

<sup>4</sup>He dissented one hundred and twenty-nine times from the decision of the court and also dissented in part twice. He expressed his concurrence with the result reached seven times. In seventy-one cases one or more justices dissented from decisions announced by him and in three additional cases other justices dissented in part. In eight cases other justices expressed concurrence and once also a concurrence in part was expressed. The Chief Justice on December 11th, 1889, delivered before the two houses of Congress an address on The In-

His opinions cover a wide range of subjects. Many of them, of course, relate to constitutional law, but most of them do not. They concern, many of them, simply the jurisdiction of the court. There are cases in which the admiralty jurisdiction of the court has been invoked.<sup>5</sup> There are a number of prize cases arising out of our war with Spain.<sup>6</sup> The cases deal with the interpretation of the anti-trust act<sup>7</sup> and the tariff<sup>8</sup> and patent and bankruptcy laws and other federal statutes. They include cases on state law in which the federal courts acquired jurisdiction by reason of the diverse citizenship of the parties. And they deal with controversies between states.<sup>9</sup> Of this vast multitude of

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auguration of Washington, which is printed as an appendix to 132 U. S. In *Smithsonian Institution v. Meech*, (1898) 169 U. S. 398, 18 Sup. Ct. 396, and in *Smithsonian Institution v. St. John*, (1909) 214 U. S. 19, 29 Sup. Ct. 601, he took no part in the decision, doubtless because he was ex officio a regent of that institution.

<sup>5</sup> See, for example, *Cleveland T. & V. R. Co. v. Cleveland Steamship Co.*, (1908) 208 U. S. 316, 28 Sup. Ct. 414; *International Nav. Co. v. Farr & Bailey Mfg. Co.*, (1901) 181 U. S. 218, 21 Sup. Ct. 591; *Oregon R. & Nav. Co. v. Balfour*, (1900) 179 U. S. 55, 21 Sup. Ct. 28; *Smith v. Burnett*, (1899) 173 U. S. 430, 19 Sup. Ct. 442; *Rea v. The Eclipse*, (1890) 135 U. S. 599, 10 Sup. Ct. 873.

<sup>6</sup> See, for example, *The Manila Prize Cases*, (1903) 188 U. S. 254, 23 Sup. Ct. 415; *The Infanta Maria Teresa*, (1903) 188 U. S. 283, 23 Sup. Ct. 412; *The Carlos F. Roses*, (1900) 177 U. S. 655, 20 Sup. Ct. 803; *The Benito Estenger*, (1900) 176 U. S. 568, 20 Sup. Ct. 489; *The Pedro*, (1899) 175 U. S. 354, 20 Sup. Ct. 138; and see his dissenting opinions in *Dewey v. United States*, (1900) 178 U. S. 510, 20 Sup. Ct. 981; *The Paquete Habana*, (1900) 175 U. S. 677, 20 Sup. Ct. 290.

<sup>7</sup> *United States v. E. C. Knight Co.*, (1895) 156 U. S. 1, 15 Sup. Ct. 249; *Loewe v. Lawlor*, (1908) 208 U. S. 274, 28 Sup. Ct. 301.

<sup>8</sup> See, for example, *Robertson v. Rosenthal*, (1889) 132 U. S. 460, 10 Sup. Ct. 120, on the question whether hair-pins were pins within the meaning of the tariff act.

<sup>9</sup> See, for example, *Virginia v. West Virginia*, (1907) 206 U. S. 290, 27 Sup. Ct. 732, (1908) 209 U. S. 514, 28 Sup. Ct. 614; *Louisiana v. Mississippi*, (1906) 202 U. S. 1, 26 Sup. Ct. 408; *Kansas v. Colorado*, (1902) 185 U. S. 125, 22 Sup. Ct. 552; and also *Louisiana v. Texas*, (1900) 176 U. S. 1, 20 Sup. Ct. 251, where the court decided that there was no controversy between the states; *Missouri v. Illinois*, (1901) 180 U. S. 208, 21 Sup. Ct. 331, where the Chief Justice dissented; *South Dakota v. North Carolina*, (1904) 192 U. S. 286, 24 Sup. Ct. 269, where he was one of the dissenting justices. See also *Kansas v. United States*, (1907) 204 U. S. 331, 27 Sup. Ct. 388, as to suit by state against United States.

cases in the decision of which Chief Justice Fuller took an active part it is impossible in this brief article to refer to more than a few of the most important.

He prepared the opinions of the court in the Income Tax Case,<sup>10</sup> the Original Package Case,<sup>11</sup> the Sugar Trust Case<sup>12</sup> and the Danbury Hatters' Case;<sup>13</sup> and he prepared dissenting opinions in the most important of the Insular Cases<sup>14</sup> and in the Lottery Case.<sup>15</sup>

In the Income Tax Case the court construed the provision of the Constitution that Congress may not lay any direct tax unless in proportion to the population and decided, by a vote of five to four, that a tax upon the income from real or personal property was a direct tax, that a federal law which taxed such income otherwise than in proportion to the population was in that respect unconstitutional, and that, as the court believed that Congress would not have taxed incomes from other sources if it knew that a tax upon income from real or personal property would be declared unconstitutional, all that part of the law of 1894 which related to taxes upon incomes must be regarded as void.

In the Original Package Case the court decided, by a vote of six to three, that, in view of the provision of the Constitution which authorizes Congress to regulate interstate commerce, a law of Iowa which prohibited the sale of

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<sup>10</sup> *Pollock v. Farmers' Loan & Trust Co.*, (1895) 157 U. S. 429, 158 U. S. 601, 15 Sup. Ct. 673, 912.

<sup>11</sup> *Leisy v. Hardin*, (1890) 135 U. S. 100, 10 Sup. Ct. 681. See also *Lyng v. Michigan*, (1890) 135 U. S. 161, 10 Sup. Ct. 725.

<sup>12</sup> *United States v. E. C. Knight Co.*, (1895) 156 U. S. 1, 15 Sup. Ct. 249.

<sup>13</sup> *Loewe v. Lawlor*, (1908) 208 U. S. 274, 28 Sup. Ct. 301.

<sup>14</sup> *Downes v. Bidwell*, (1901) 182 U. S. 244, 21 Sup. Ct. 770; *Dooley v. United States*, (1901) 183 U. S. 151, 22 Sup. Ct. 62; *Hawaii v. Mankichi*, (1903) 190 U. S. 197, 23 Sup. Ct. 787. Justices Harlan, Brewer and Peckham concurred in these dissenting opinions. They also concurred in the opinion which he prepared in the *Diamond Rings Case*, (1901) 183 U. S. 176, 22 Sup. Ct. 59. Justice Brown prepared a separate opinion in that case, and four justices dissented.

<sup>15</sup> (1903) 188 U. S. 321, 23 Sup. Ct. 321.

intoxicating liquors could not constitutionally be enforced against one who brought liquor from another state and offered it for sale in the package in which it was brought into the state. In order to reach this decision it was necessary for the court to declare that the case of *Peirce v. New Hampshire*<sup>16</sup> was overruled, and the decision was reached in spite of the contention of the dissenting justices that the purpose of the statute furnished sufficient ground for holding that the statute was enforceable against all dealers in intoxicating liquors, certainly in the absence of conflicting federal legislation, and possibly regardless of any conflicting federal legislation.

There might also have been made the more sweeping criticism that the court did not show, and never has shown, any sufficient reason for saying that in any respect Congress is granted more than paramount power over commerce. It is true that when Congress exercises a power which has actually been granted to it that legislation excludes the exercise of any state power: the states have no concurrent power which enables them to pass laws which are inconsistent with federal legislation based upon the Constitution.<sup>17</sup> But the court has never shown any satisfactory reason for saying that state legislation which directly regulates what is unquestionably interstate commerce but which does not conflict with federal legislation upon that subject is unconstitutional. Those who adopted the Constitution were careful to provide that several designated powers which were granted to Congress might not be exercised by the states even in the absence of federal action; and in view of those express prohibitions the fact that there is no such provision concerning the power which Congress may exercise by virtue of the commerce clause seems to show clearly that even when state

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<sup>16</sup> (1847) 5 How. 504.

<sup>17</sup> United States Constitution, Article VI, section 2.

legislation regulates interstate commerce if it does not conflict with federal legislation it ought to be held constitutional.

Upon the announcement of the decision in the Original Package Case Congress promptly passed the Wilson Act, which provided that intoxicating liquors which were taken into any state should upon arrival be subject to laws enacted in the exercise of the police powers of the state to the same extent as were such liquors produced in that state, and the court in the case of *In re Rahrer*<sup>18</sup> in an opinion by Chief Justice Fuller declared that that act was constitutional and that it validated state laws which had been passed prior to the enactment of the federal law. In later cases the court has declared unconstitutional several state regulations concerning the carrying of intoxicating liquors into the state;<sup>19</sup> while in other cases the court has declared that, in view of the Wilson Act, state statutes relating to the *sale* of intoxicating liquors even when brought from without the state were constitutional.<sup>20</sup> The Chief Justice dissented in every one of those later cases in which prohibitory legislation was held valid.

There have also been cases involving the question as to what were original packages of merchandise and in most of those cases he was one of the justices who dissented, declaring that articles were in original packages within the

<sup>18</sup> (1891) 140 U. S. 545, 11 Sup. Ct. 865.

<sup>19</sup> *Scott v. Donald*, (1897) 165 U. S. 58, 17 Sup. Ct. 265; *Rhodes v. Iowa*, (1898) 170 U. S. 412, 18 Sup. Ct. 664; *Vance v. W. A. Vandercook Co.*, (1898) 170 U. S. 438, 18 Sup. Ct. 674; *American Express Co. v. Iowa*, (1905) 196 U. S. 133, 25 Sup. Ct. 182; *Adams Express Co. v. Iowa*, (1905) 196 U. S. 147, 25 Sup. Ct. 185; *Heyman v. Southern Ry. Co.*, (1906) 203 U. S. 270, 27 Sup. Ct. 104. The opinion was by Justice White in every case except *Scott v. Donald*, where it was by Justice Shiras.

<sup>20</sup> *Vance v. W. A. Vandercook Co.*, (1898) 170 U. S. 438, 18 Sup. Ct. 674; *Pabst Brewing Co. v. Crenshaw*, (1905) 198 U. S. 17, 25 Sup. Ct. 552; *Delamater v. South Dakota*, (1907) 205 U. S. 93, 27 Sup. Ct. 447. See also *Foppiano v. Speed*, (1905) 199 U. S. 501, 26 Sup. Ct. 138, where a license law was held constitutional. The opinions in the three first cases were by Justice White. The opinion in *Foppiano v. Speed* was by Justice Peckham.

meaning of the rule although the majority of the court decided otherwise.<sup>21</sup>

The Chief Justice also dissented when the court decided that a law of Georgia which greatly restricted the running on Sunday of all freight trains within that state did not violate the commerce clause.<sup>22</sup> But, on the other hand, he delivered opinions sustaining a state inspection law<sup>23</sup> and a state law imposing on railroad companies a penalty for failure to pay promptly claims for loss or damage arising out of freight transportation;<sup>24</sup> and he dissented when the court held that the commerce clause invalidated a state law which required the furnishing of freight cars regardless of any excuses except "in cases of strikes or other public calamity."<sup>25</sup> And while, in a case in which counsel conceded that such a result was necessary if previous decisions were to be followed, he announced the decision of the court that a state law which imposed a tax upon telegraph compa-

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<sup>21</sup> *May v. New Orleans*, (1900) 178 U. S. 496, 20 Sup. Ct. 976, Chief Justice Fuller and Justices Brewer, Shiras and Peckham dissenting; *Austin v. Tennessee*, (1900) 179 U. S. 343, 21 Sup. Ct. 132, Justice White concurring and Chief Justice Fuller and Justices Brewer, Shiras and Peckham dissenting; *Cook v. Marshall County*, (1905) 196 U. S. 261, 25 Sup. Ct. 233, Justice White concurring and Chief Justice Fuller and Justices Brewer and Peckham dissenting. See also *Plumley v. Massachusetts*, (1894) 155 U. S. 461, 15 Sup. Ct. 154, in which the Chief Justice and Justices Field and Brewer dissented; *Schollenberger v. Pennsylvania*, (1898) 171 U. S. 1, 18 Sup. Ct. 757; *Collins v. New Hampshire*, (1898) 171 U. S. 30, 18 Sup. Ct. 768, two cases in which state laws relating to oleomargarine were declared unconstitutional, Justices Gray and Harlan alone dissenting; and *Crossman v. Lurman*, (1904) 192 U. S. 189, 24 Sup. Ct. 234, in which there was no dissent.—For further discussion of the original package question see Cooke, *The Commerce Clause*, pp. 27, 161, 253; Howland, *The Police Power and Interstate Commerce*, 4 Harv. L. Rev. 221; Trickett, *The Original Package Ineptitude*, 6 Col. L. Rev. 161.

<sup>22</sup> *Hemington v. Georgia*, (1896) 163 U. S. 299, 16 Sup. Ct. 1086.

<sup>23</sup> *Patapsco Guano Co. v. North Carolina*, (1898) 171 U. S. 345, 18 Sup. Ct. 852.

<sup>24</sup> *Atlantic C. L. R. Co. v. Mazursky*, (1910) 216 U. S. 122, 30 Sup. Ct. 378.

<sup>25</sup> *Houston & T. C. R. Co. v. Mayes*, (1906) 201 U. S. 321, 26 Sup. Ct. 491.

nies was unconstitutional in part,<sup>26</sup> yet in every other case which involved the question whether a state tax law violated the commerce clause and in which he delivered the opinion of the court the state law was sustained,<sup>27</sup> and in every case which involved such a question and in which he dissented the court had against his dissent declared that the state legislation was unconstitutional.<sup>28</sup>

Moreover, in the Lottery Case<sup>29</sup> he took the position that the commerce clause did not bestow upon Congress as much power as Congress had sought to exercise. When the court sustained the federal statute which prohibited the interstate transportation of material directly relating to lotteries, even though the transportation was not by mail,<sup>30</sup> he filed a vigorous dissenting opinion, in which three other justices con-

<sup>26</sup> *Western Union Tel. Co. v. Pennsylvania*, (1888) 128 U. S. 39, 9 Sup. Ct. 6. This was the first opinion delivered by him.

<sup>27</sup> *Ficklen v. Shelby County Taxing Dist.*, (1892) 145 U. S. 1, 12 Sup. Ct. 810; *Postal Tel. Cable Co. v. Adams*, (1895) 155 U. S. 688, 15 Sup. Ct. 268, 360; *Adams Express Co. v. Ohio State Auditor*, (1897) 165 U. S. 194, *sub nom. Sanford v. Poe*, 17 Sup. Ct. 305; *Adams Express Co. v. Kentucky*, (1897) 166 U. S. 171, *sub nom. Weir v. Norman*, 17 Sup. Ct. 527; *Henderson Bridge Co. v. Kentucky*, (1897) 166 U. S. 150, 17 Sup. Ct. 532; *Keokuk & Hamilton Bridge Co. v. Illinois*, (1900) 175 U. S. 626, 20 Sup. Ct. 205; *Union Refrigerator Transit Co. v. Lynch*, (1900) 177 U. S. 149, 20 Sup. Ct. 631; *Williams v. Fears*, (1900) 179 U. S. 270, 21 Sup. Ct. 128; *Western Union Tel. Co. v. New Hope*, (1903) 187 U. S. 419, 23 Sup. Ct. 204. And in *Maine v. Grand T. Ry. Co.*, (1891) 142 U. S. 217, 12 Sup. Ct. 121, 163, he agreed with the decision sustaining the state statute although four justices dissented.

<sup>28</sup> *McCall v. California*, (1890) 136 U. S. 104, 10 Sup. Ct. 881; *Norfolk & W. R. Co. v. Pennsylvania*, (1890) 136 U. S. 114, 10 Sup. Ct. 958; *Cruicher v. Kentucky*, (1891) 141 U. S. 47, 11 Sup. Ct. 851; *Fargo v. Hart*, (1904) 193 U. S. 490, 24 Sup. Ct. 498; *Galveston, H. & S. A. Ry. Co. v. Texas*, (1908) 210 U. S. 217, 28 Sup. Ct. 638; *Western Union Tel. Co. v. Kansas*, (1910) 216 U. S. 1, 30 Sup. Ct. 190; *Pullman Co. v. Kansas*, (1910) 216 U. S. 56, 30 Sup. Ct. 232; *Ludwig v. Western Union Tel. Co.*, (1900) 216 U. S. 146, 30 Sup. Ct. 280.

<sup>29</sup> (1903) 188 U. S. 321, 23 Sup. Ct. 321.

<sup>30</sup> In *Ex parte Rapier*, (1892) 143 U. S. 110, 12 Sup. Ct. 374, the court in an opinion by the Chief Justice declared that Congress may exclude lottery matter from the mails. That power does not rest on the commerce clause but on the grant to Congress of power over the post-office system.

curred.<sup>31</sup> And when in the Northern Securities Case<sup>32</sup> the court held that in view of the Anti-Trust Act a corporation might not lawfully be organized under a state charter to hold a majority of the stock of each of two railroad companies which were incorporated under state charters and which had been competing for contracts for interstate transportation, the Chief Justice was one of four dissentients who declared, in opinions by Justices White and Holmes, not only that Congress had not intended to interfere with such acquisition and ownership, but also that the commerce clause did not empower Congress to prevent such acquisition and ownership.

In the Insular Cases,<sup>33</sup> when the court decided that in part of the territory which is subject to the jurisdiction of the United States the provisions which were placed in the Federal Constitution as restraints upon the federal government do not *ipso facto* restrain that government, the Chief Justice prepared several able dissenting opinions.<sup>34</sup>

He wrote the opinion in *Boyd v. Thayer*<sup>35</sup> in which the court with doubtful propriety<sup>36</sup> considered the title to the governorship of Nebraska and reversed the judgment of the supreme court of the state that Boyd was not the lawful incumbent of that office; and, on the other hand, in the later case of *Taylor and Marshall v. Beckham*<sup>37</sup> he wrote the

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<sup>31</sup> See also *Stoutenburgh v. Hennick*, (1889) 129 U. S. 141, 9 Sup. Ct. 256, where he delivered the opinion, on the power which was granted to Congress by the commerce clause.

<sup>32</sup> *Northern Securities Co. v. United States*, (1904) 193 U. S. 197, 24 Sup. Ct. 436.

<sup>33</sup> See note 14, *supra*.

<sup>34</sup> See also his dissenting opinion in *Mormon Church v. United States*, (1890) 136 U. S. 1, 10 Sup. Ct. 792. The Insular Cases are discussed in Patterson, *The United States and the States Under the Constitution*, 2d ed., sec. 8.

<sup>35</sup> (1892) 143 U. S. 135, 12 Sup. Ct. 375.

<sup>36</sup> See the dissenting opinion of Justice Field. Reference should also be made to the discussion of the decision in 26 Am. L. Rev. 278, although the language there used is open to objection.

<sup>37</sup> (1900) 178 U. S. 548, 20 Sup. Ct. 890.

opinion in which the court declined to consider the title to the governorship of Kentucky.

In *Atkin v. Kansas*,<sup>38</sup> when the court decided that the due process clause of the Fourteenth Amendment did not invalidate a state law which provided that no one undertaking work for it or for one of its municipal agencies should permit or require an employee on such work to labor more than eight hours each day, the Chief Justice dissented, together with Justices Brewer and Peckham. The dissentients gave no reason for their position, and the opinion of the court seems to be unanswerable. In *Lochner v. New York*,<sup>39</sup> when the court, by a vote of five to four, declared that the law of New York which limited the hours of labor of bakers to ten hours each day was in violation of the due process clause of the Fourteenth Amendment, the Chief Justice approved of the decision.<sup>40</sup> And in *Adair v. United States*,<sup>41</sup> when it was decided, by a vote of six to two, that the federal statute which made it unlawful for an agent of an interstate carrier to discharge an employee of such carrier because of membership in a labor organization was not authorized by the commerce clause and was forbidden by the due process clause of the Fifth Amendment, he sided with the majority.

But, on the other hand, he wrote the opinion<sup>42</sup> in which the federal coupler law was so interpreted as to furnish the protection to railroad employees which was intended by Congress, and when so interpreted was held to be constitutional. He also prepared opinions in several cases, in which the federal courts acquired jurisdiction by reason of the

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<sup>38</sup> (1903) 191 U. S. 207, 24 Sup. Ct. 124.

<sup>39</sup> (1905) 198 U. S. 45, 25 Sup. Ct. 539.

<sup>40</sup> See article in the U. of Pa. L. Rev. for Jan., 1910, on the bearing of the due process clauses on substantive law.

<sup>41</sup> (1908) 208 U. S. 161, 28 Sup. Ct. 277.

<sup>42</sup> *Johnson v. Southern Pacific Co.*, (1904) 196 U. S. 1, 25 Sup. Ct. 158.

diverse citizenship of the parties, in which railroad employees claimed damages from their employers for injuries arising out of defects in the roadbed or machinery, and in every case the decision was in favor of the employee.<sup>43</sup> He wrote the opinion of the court in one case in which a railroad employee was injured through the negligence of a fellow employee and in which the decision was in favor of the plaintiff;<sup>44</sup> and in a number of railroad cases in which injuries to employees were caused by persons who were said to be co-employees and in which the decision was in favor of the railroad company, the Chief Justice dissented.<sup>45</sup> He does not appear to have prepared an opinion in favor of the defendant in a single case in which the fellow-servant rule was invoked.<sup>46</sup>

Reference has already been made to the fact that he was one of the justices who dissented from the decision in the Northern Securities Case.<sup>47</sup> In the earlier case of *United States v. E. C. Knight Co.*<sup>48</sup> he had prepared the opinion in which the court had declared that, where a combination of companies which refined nearly all of the sugar which was

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<sup>43</sup> *Gardner v. Michigan C. R. Co.*, (1893) 150 U. S. 349, 14 Sup. Ct. 140; *Union Pac. Ry. Co. v. Snyder*, (1894) 152 U. S. 684, 14 Sup. Ct. 756; *Union Pac. Ry. Co. v. O'Brien*, (1896) 161 U. S. 451, 16 Sup. Ct. 618; *Texas & P. Ry. Co. v. Barrett*, (1897) 166 U. S. 617, 17 Sup. Ct. 707; and see *Dunlap v. Northeastern R. Co.*, (1889) 130 U. S. 649, 9 Sup. Ct. 647.

<sup>44</sup> *Chicago, K. & W. R. Co. v. Pontius*, (1895) 157 U. S. 209, 15 Sup. Ct. 585.

<sup>45</sup> *Baltimore & O. R. Co. v. Baugh*, (1893) 149 U. S. 368, 13 Sup. Ct. 914; *Northern Pac. R. Co. v. Hambly*, (1894) 154 U. S. 349, 14 Sup. Ct. 983; *Central R. Co. of N. J. v. Keegan*, (1895) 160 U. S. 259, 16 Sup. Ct. 269; *Northern Pac. R. Co. v. Peterson*, (1896) 162 U. S. 346, 16 Sup. Ct. 843; *Northern Pac. R. Co. v. Charless*, (1896) 162 U. S. 359, 16 Sup. Ct. 848; *Northern Pac. R. Co. v. Dixon*, (1904) 194 U. S. 338, 24 Sup. Ct. 683.

<sup>46</sup> For other accident cases see *Union Pac. Ry. Co. v. Harris*, (1895) 158 U. S. 326, 15 Sup. Ct. 843; *Baltimore & O. R. Co. v. Griffith*, (1895) 159 U. S. 603, 16 Sup. Ct. 105; *Northern P. R. Co. v. Freeman*, (1899) 174 U. S. 379, 19 Sup. Ct. 763, in the last of which he dissented.

<sup>47</sup> See page 9, *supra*.

<sup>48</sup> (1895) 156 U. S. 1, 15 Sup. Ct. 249.

refined in the United States was wrought by exchanges of shares of stock of the American Sugar Refining Company for shares of stock of competing companies, the Anti-Trust Act did not authorize the federal courts to order the return of the shares of stock of the respective companies by their then holders to their former owners. And in the case of *Loewe v. Lawlor*<sup>49</sup> he prepared the opinion in which the court declared unanimously that the Anti-Trust Act rendered illegal a combination of consumers to boycott the products of a particular factory and thus prevent, as far as possible, any traffic in those products. The traffic was mainly interstate.

In this brief summary we have noted only a few of the cases before the court in the decision of which the Chief Justice took an important part. Reference might also be made to hundreds of other cases, for the court must have decided some eight or ten thousand cases during his Chief Justiceship. But, of course, a thorough discussion of his judicial record is not attempted.

We must, however, note in conclusion one further fact which is interesting in view of the number of vacancies upon the bench which will be filled by President Taft and the Senate and the many statements which have been made concerning the political importance of those appointments. Since the decision in *Field v. Clark*<sup>50</sup> more than eighteen years ago, there has been but one case before the Supreme Court which involved a question of constitutional law and in which all of the Republican members of the court took one position and all of the Democratic members of the court

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<sup>49</sup> (1908) 208 U. S. 274, 28 Sup. Ct. 301.

<sup>50</sup> (1892) 143 U. S. 649, 12 Sup. Ct. 495. On the question of delegation of legislative power see U. of Pa. L. Rev., Nov., 1908, p. 69. Prior to that decision see *In re Neagle*, (1890) 135 U. S. 1, 10 Sup. Ct. 658; *United States v. Texas*, (1892) 143 U. S. 621, 12 Sup. Ct. 488. And see *Handley v. Stutz*, (1891) 139 U. S. 417, 11 Sup. Ct. 530, which related simply to corporation law.

took a contrary position. The question in that case<sup>51</sup> was whether a federal inheritance tax which was collected while the property was in the hands of the executor could constitutionally be applied to a bequest to a municipality for public purposes. The court upheld the tax against the dissents of the Chief Justice and of Justices White and Peckham. This decision will not be of much practical importance until the people of the United States have become far more eager to make bequests to municipalities than they are to-day.

There was only one other case during those eighteen years in which all of the Republican members of the court approved of the decision and all of the Democratic members disapproved. That was an appeal from the Court of Claims,<sup>52</sup> and neither of the two dissenting justices<sup>53</sup> filed an opinion.

There have been but two other decisions within that period in which the members of the court have divided almost upon party lines. In *Muhlker v. Harlem R. Co.*,<sup>54</sup> where it was urged that the decision of the state court violated the contract clause of the Constitution and the Fourteenth Amendment, and that decision was reversed, the Chief Justice and Justices White, Peckham and Holmes dissented in an opinion by Justice Holmes. And in the Northern Securities Case<sup>55</sup> the same justices dissented.

The case last cited is the only one of the four cases just referred to which aroused a widespread public interest, and it would be going far to say that the justices who dissented from that decision were expressing the views of the Democratic party. Indeed, an examination of the decisions during the entire period in which Mr. Fuller was Chief Justice

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<sup>51</sup> *Snyder v. Bettman*, (1903) 190 U. S. 249, 23 Sup. Ct. 803.

<sup>52</sup> *United States v. Shea*, (1894) 152 U. S. 178, 14 Sup. Ct. 519.

<sup>53</sup> The Chief Justice and Justice Jackson.

<sup>54</sup> (1905) 197 U. S. 544, 25 Sup. Ct. 522.

<sup>55</sup> *Northern Securities Co. v. United States*, (1904) 193 U. S. 197, 24 Sup. Ct. 436.

shows conclusively that party lines had but little bearing upon the decisions of the Supreme Court. It is true that men of widely divergent views call themselves by the same party name, and this fact may help to account for the absence of any appearance of partisanship in the decisions. But it is also true that there is no excuse for the existence of partisan feeling among the justices. The duty of the court, especially when dealing with the Constitution, is simply to interpret and in interpreting to show clearly the connection between its conclusion and the words of the Constitution or law upon which the conclusion is said to be based. When this is done there is but little room for partisan feeling. When it is not done, however desirable the conclusion may be, the opinion of the court, and perhaps its judgment, deserves serious criticism.

*Robert P. Reeder.*