ABSTRACT

Liberty in Full: Justice Stephen Field's Cooperative Constitution of Liberty

Adam M. Carrington, Ph.D.

Mentor: David K. Nichols, Ph.D.

In this dissertation, I examine 19th century Supreme Court Justice Stephen Field's understanding of liberty. Scholars often define Field's liberty solely as opposition to government regulation. I challenge this position, arguing that Field articulated a fuller liberty, one which encompassed liberty both from and through government action. Justice Field saw the Constitution as pursuing this fuller liberty, with certain provisions protecting individual rights through government regulation and others by restraining such regulation. To show Field's perspective, I focus on two sets of Constitutional provisions which Field saw as cooperating toward a full liberty. The first consisted of the Due Process Clause and the states' police power. The Due Process Clause protected expansively-defined individual rights against impairing state action while the police power protected the same rights from non-governmental threats. The second set of provisions was state and national police power. I show how Field believed that all government wielded a police power for the purpose of protecting individual rights, with the state and national governments cooperating by pursuing this common purpose within their distinct spheres. I then turn to Field's use of the Declaration of Independence and

the common law to interpret liberty's Constitutional meaning, showing how these documents displayed the context which informed the Constitution. Finally, I conclude with a brief discussion of how Field's cooperative Constitution of liberty might provide a useful context for contemporary judicial debates over liberty's meaning and application.

Liberty in Full: Justice Stephen Field's Cooperative Constitution of Liberty

by

Adam M. Carrington, B.A., M.A.

A Dissertation

Approved by the Department of Political Science

_____
W. David Clinton, Ph.D., Chairperson

Submitted to the Graduate Faculty of
Baylor University in Partial Fulfillment of the
Requirements for the Degree
of
Doctor of Philosophy

Approved by the Dissertation Committee

_____
David K. Nichols, Ph.D., Chairperson

_____
Mary P. Nichols, Ph.D.

_____
Jerold L. Waltman, Ph.D.

_____
David Bridge, Ph.D.

_____
Elizabeth C. Corey, Ph.D.

Accepted by the Graduate School
May 2014

_____
J. Larry Lyon, Ph.D., Dean

Page bearing signatures is kept on file in the Graduate School.

TABLE OF CONTENTS

TABLE OF CASES

ACKNOWLEDGMENTS

In completing this project, and thereby graduate school, I am overwhelmed with gratitude for the support I have received. I wish to begin by thanking my family. My parents, Rick and Melinda Carrington, supported every step of my education, never wavering in their encouragement, love, and provision. They are a godly example I treasure to know as my parents.

When I left Ohio for Texas, I said goodbye to all three of my grandparents. I returned three times to say goodbye as each departed this earth. I wish I could thank them in person for their love and their example. I trust that one day I will.

Aside from family, one of my greatest blessings has been the teachers who guided and instructed me over the years. At Ashland University, I had the extraordinary privilege to study under Dr. Peter Schramm. Dr. Schramm helped me see the magnificence of a liberal arts education, of studying the noble, the just, and the beautiful. He taught me to love my country not only because it was my own but because it was good. Moreover, it was in his class on Abraham Lincoln that I first perceived my own love for teaching. He continues to readily provide valued counsel and encouragement to this day.

My graduate studies at Baylor have been a great blessing as well. Professors within the Political Science Department, such as Jerold Waltman, Dave Bridge, Curt Nichols, David Corey, Dwight Allman, and David Clinton all provided instruction, counsel, and many other aids during my studies. But I wish to give a special thanks to David and Mary Nichols. They are tireless supporters of their students, cultivating them into teachers and scholars, encouraging a supportive intellectual community, and aiding

their students' professional pursuits. David Nichols has influenced me greatly in my approach to teaching and scholarship. Serving as chair of this project, his help has been vital from its beginning to its end, help given with his singular combination of biting wit and gentle encouragement. Mary Nichols also provided many helpful comments, in doing so exemplifying her usual grace and wisdom. So much of the good in this project and in myself stems from them that I cannot thank them enough.

I also wish to thank my graduate student colleagues in Baylor's Political Science Department. I cannot imagine better men and women with whom to learn and to laugh. Their generosity of spirit and relentless pursuit of truth has been a great gift to me over these last five years.

Finally, I wish to thank my wife, Emily, for her willingness to go on this adventure with me and for her support along the way.

To my grandparents: Nina "Nemaw" Sparks, David "Happy Dave" Yuenger, and

Dolores Faye "Mom" Yuenger,

Who exemplified to me courage, laughter, and love

CHAPTER ONE

Introduction

Justice Stephen J. Field served on the United States' Supreme Court from 1863-1897. A Lincoln appointee, the California Democrat retired as the then longest serving justice on the nation's highest bench. During his tenure, America concluded its Civil War, ratified three new Amendments to the Constitution, enacted and retracted Reconstruction, and saw its economy nationalize and industrialize well beyond that seen in any previous time period.[1] Field's more than five hundred Supreme Court opinions addressed all of these momentous events, making him one of the Court's most voluminous writers in addition to one of its longest occupants.

In this dissertation, I examine a crucial aspect of Field's expansive work: his understanding of liberty. Justice Field, I claim, articulated a liberty in full. This liberty included both an active role for government regulations as well as restraints on governmental power. Such a combination of liberty from and through government had a common purpose: protecting inalienable rights. Particular provisions of the Constitution, including the Due Process Clause, police power, and the Commerce Clause, pursued this purpose in a cooperative fashion, some protecting liberty from government, others through it.

[1] Richard Franklin Bensel, *Yankee Leviathan: The Origins of Central State Authority in America, 1859-1877* (New York: Cambridge University Press, 1990); Bensel, *The Political Economy of American Industrialization, 1877-1900* (New York: Cambridge University Press, 2000).

In making these claims, I place Field within a contentious contemporary debate. This debate concerns the meaning of liberty in the U.S. Constitution. Libertarian thinkers such as Randy Barnett define liberty predominately as protection against government intrusion on individual rights.[2] Barnett's "presumption of liberty" standard of judicial review displays this stance. In it, liberty's "presumption" is against a law's constitutionality with a heavy burden on the state to prove otherwise.[3] Thus the Court should use Constitutional provisions aggressively to thwart large portions of state legislation. Though Barnett claims to permit adequate regulatory power,[4] Walter Edward Williams articulates Barnett and others' tendency toward liberty against government in his book title: *More Liberty Means Less Government.*[5]

In contrast to the libertarian reading are those who see liberty more as a result of government action. Proponents of this position give two rationales: the protection of rights and the exercise of popular will. Scholars such as Malcom Freely and Edward Rubin take the first approach, pointing to the theory that "government plays a positive role in securing liberty: that its function is to protect liberty from private power."[6] While agreeing that government action protects rights,[7] Cass Sunstein also articulates the

---

[2] Randy Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton, NJ: Princeton University Press, 2004).

[3] *Ibid.,* 215-217, 259-269.

[4] *Ibid.,* 197.

[5] Walter Edward Williams, *More Liberty Means Less Government: Our Founders Knew This Well* (Stanford, CA: Hoover Institute Press, 1999). Others who might fall within this libertarian category include Richard Epstein. See Epstein, *The Classical Liberal Constitution: The Uncertain Quest for Limited Government* (Cambridge, MA: Harvard University Press, 2013).

[6] Malcom M. Freely and Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (New York: Cambridge University Press, 1999), 194.

[7] Cass Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Cambridge, MA: Harvard University Press, 1999), 22.

second—liberty through popular will—speaking of the "freedom of collectivities or communities—a freedom embodied in decisions, reached by the citizenry as a whole, about what courses to pursue."[8] The people here are free in exercising their power through governmental actions. This conception of government action as liberty also receives significant scholarly support, particularly in reference to liberty as popular will.[9] Whether the justification is the protection of rights or popular will's exercise, these scholars all see liberty as existing through government power, not against it as do libertarian writers.

Literature Review

Within these debates, Field already receives some attention as prefiguring the Court's infamous "Lochner-Era." The name stems from the 1905 case of *Lochner v. New York,* where the Court struck down state laws setting work-hour limits for bakers.[10] Howard Gillman sums up the "long-standing wisdom about this period"—dating roughly from Field's last year on the Court until the New Deal turn of 1937—as a time when "many conservative judges began to aggressively disregard the proper boundaries of their authority in order to search out and destroy 'social legislation' that was inconsistent with their personal belief in laissez-faire economics and social darwinism."[11] The problem

[8] *Ibid.,* 35. See also Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, MA: Harvard University Press, 1999), 259-260.

[9] Larry Kramer makes this point, arguing for Americans assuming "once again the full responsibilities of self-government." See Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004), 247. See also Cass Sunstein, *One Case at a Time,* 26, 27, 108.

[10] *Lochner v. New York* 198 U.S. 45 (1905). Jean-Christian Vinel, *The Employee: A Political History* (University Park, PA: University of Pennsylvania Press, 2013), 40-41.

[11] Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham, NC: Duke University Press, 1993), 1. See also Lawrence Tribe, *The*

thus concerned both result and justification. The "Locher Era" subverted needed regulation to protect persons against big business while reading economic and social theories into the Constitution.

These readings stemmed mostly from what is known in Constitutional law as "Substantive Due Process."[12] Echoing language in the Fifth Amendment, the Fourteenth Amendment declared that no state shall "deprive any person of life, liberty, or property without due process of law." Those who understand this clause to refer to "Procedural Due Process" claim that it requires the government only to follow certain procedures in order to deprive a person of life, liberty, or property.[13] By contrast, proponents of "Substantive Due Process" claim "that there were certain things that government—especially the legislative power—could not do, no matter what process or procedure it followed."[14] Those who favored government action tended to interpret due process as merely procedural, whereas a substantive due process reading would limit such government action.

Invisible Constitution (New York: Oxford University Press, 2008); John J. Patrick, Richard M. Pious, Donald A. Ritchie, *The Oxford Guide to the United States Government* (New York: Oxford University Press, 1993), 199; Robert Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Touchstone, 1990), 44-47. Perhaps the most famous gloss on the era came from Justice Oliver Wendell Holmes, Jr.'s, terse dissent in *Lochner v. New York* itself. Holmes objected that "[t]his case is decided upon an economic theory which a large part of the country does not entertain" and that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." *Lochner v. New York* 198 U.S. 75 (1905).

[12] See Edward Keynes, *Liberty, Property, and Privacy: Toward a Jurisprudence of Substantive Due Process* (University Park, PA: Pennsylvania State University Press, 1996), 112.

[13] See E. Thomas Sullivan and Toni M. Massaro, *The Arc of Due Process in American Constitutional Law* (New York: Oxford University Press, 2013), 47-48.

[14] Alfred H. Kelly, Winfred A. Harbison, and Herman Belz, *The American Constitution: Its Origins and Development, Vol. II, 7th Ed.* (New York: W. W. Norton & Company, 1991), 388. See also Milton Ridvas Konvitz, *Fundamental Rights: History of a Constitutional Doctrine* (Brunswich, NJ: Transaction Publishers, 2009), 66.

To this day, Supreme Court justices invoke *Locher* and its era of Court history to attack opposing opinions they believe overstep judicial bounds.[15] The narrative goes that Field's dissents in cases such as *Munn v. Illinois* in 1877 constituted some of the earliest and most influential articulations of what later became known as Substantive Due Process. Thereby, Field defined liberty solely in terms of limiting government regulation. A Court majority then began to follow this reading two decades later, in the 1897 case of *Allgeyer v. Louisiana.* There, the Court struck down a state law banning the making of contracts with out-of-state insurance companies.[16] Doing so, the Majority found, violated the right to "liberty" as articulated in the Due Process Clause. According to the narrative, for the proceeding forty years this Field-inspired liberty from government reigned supreme in the nation's highest judicial body.

Largely responding to both the contemporary debate and academic work on the "Lochner Era," three distinct phases of scholarship exist on Justice Field. The first, and most dominant, described Field as the epitome of libertarian liberty: a Justice whose liberty was defined exclusively as protection from government regulation. Previewing *Lochner,* Field did so mainly by protecting business through *laissez faire* principles, applying a Substantive Due Process understanding to restrict government action, and articulating anti-democratic judicial supremacy.

---

[15] For an extensive list of examples, see David E. Bernstein, "*Lochner* Era Revisionsim, Revised: *Lochner* and the Origins of Fundamental Rights Constitutionalism" *Georgetown Law Journal* 92(1)(2003-2004): 1 n2.

[16] See Paul Kens, *Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age* (Lawrence, KS: University of Kansas Press, 1997), 5-6. Michael P. Zuckert, "Judicial Liberalism and Capitalism: Justice Field Reconsidered" *Liberalism and Capitalism,* Vol. 28, Part 2, edited by Ellen Frankel Paul, Fred Dycus Miller, Jeffrey Paul (New York: Cambridge University Press, 2011), 103; Robert G. McCloskey, *The American Supreme Court, 4th ed.* (Chicago: University of Chicago Press, 2005), 87-90.

Carl Brent Swisher's 1930 biography, *Stephen J. Field: Craftsman of the Law*,[17] inaugurated this dominant strain of interpretation. In this first 20th century biography of the Justice, Swisher argued that Field invoked an understanding of Substantive Due Process to nullify large segments of state social legislation which encroached on his *laissez faire* economic principles and elite, big business social circle.[18] In so doing, Field manifested his distrust of democracy, instead preferring judicial power to popular rule.[19] This rule he wielded to protect his conception of inalienable rights, which he read into the Constitution without reasonable judicial justification.[20] Swisher's Field defined liberty, therefore, as thwarting government action, thereby pitting the Due Process Clause against state police power—the state's fundamental power to make laws for the community's welfare.

Subsequent scholarship retained these basic themes, though positing two different kinds of explanations for Field's jurisprudence. Robert McCloskey continued Swisher's emphasis on Field's economic prejudices. According to this scholar, Field used the Due Process Clause to achieve *laissez-faire* ends which included severely limiting the police power.[21] Doing so, McCloskey contended, not only impaired liberty by preventing its protection by the government but also subverted democracy by thwarting popular will.[22] In making these points, McCloskey argued that Field misunderstood the concept of

---

[17] Carl Brent Swisher, *Stephen J. Field: Craftsman of the Law* (Washington, DC: Brookings Institute, 1930).

[18] *Ibid.*, 124-125, 396, 424-425.

[19] *Ibid.,* 204, 384.

[20] *Ibid.,* 414.

[21] McCloskey, 1, 77-79, 89, 115-116.

[22] *Ibid.,* 72.

liberty by preferring to protect property rights instead of more essential "human" rights.[23] In elaborating this difference, McCloskey understood liberty as proceeding from government protections, which upheld human rights, while describing Field's economic liberty as primarily one of negating regulation, which guarded property.[24] Field's efforts again are labeled as rigidly, almost religiously seeking to further his doctrine of natural rights against any conception of social change or responsible reading of the Constitutional text.[25]

Wallace Mendelson and Howard Jay Graham continued the basic claims of the first interpretive framework, seeing Field's liberty defined as against government. For both scholars, therefore, Field's liberty contained both anti-democratic leanings and Due Process-based antagonism toward government regulation that greatly limited the police power. Unlike Swisher and McCloskey, however, these scholars posited psychological/sociological reasons behind Field's Due Process jurisprudence. In their view, Field wielded Due Process against government regulation due to his near-pathological fear of communism and socialism, beginning in the early 1870s as reaction to the Paris Commune and the Franco-Prussian War in Europe.[26] But regardless of whether they traced Field's jurisprudence to an economic Social Darwinism or a

---

[23] Roberty G. McCloskey, *American Conservatism in the Age of Enterprise: A Study of William Graham Sumner, Stephen J. Field, and Andrew Carnagie (Cambridge, MA: Harvard University Press, 1951),* 2-4, 116.

[24] *Ibid.,* 6-9.

[25] *Ibid.,* 88.

[26] See Wallace Mendalson, "Justice Field and *Laissez-Faire*" *Virginia Law Review* 36(1) (Feb. 1950): 48; Howard Jay Graham, "Justice Field and the Fourteenth Amendment" *Yale Law Review Journal* 52(4) (Sept. 1943): 854-870.

pathological fear of socialism, this first group of scholars all understood Field's liberty as antagonism to government regulation.

This first interpretation of Field remained basically unchallenged for more than forty years after Swisher's 1930 biography. Starting in the 1970s, however, some scholars began critiquing significant parts of the dominant narrative. They did so by rejecting Field's status as important originator of Substantive Due Process or of the "Lochner Era" as traditionally understood. Instead, they argued that the Justice drew upon antebellum ideologies that located liberty in equal treatment from government, not necessarily protection from its regulations.

Charles McCurdy began this challenge. In a 1975 article, McCurdy claimed that fundamental to Field's jurisprudence was a "Jacksonian, radical anti-slavery" concept—also known as "free soil" or "free labor"—that all should be able to pursue common jobs and keep the fruits of their toil.[27] According to this view, a hard line separated private and public property. Yet the primary purpose of this divide was to prevent discrimination in government regulation, not to stop substantive violations. Thus Field's limits on the police power intended to stop both special privileges as well as regulations that discriminated against businesses.[28] Such a view did not conflict with a vigorous police power, one which could legislate for the common good and impose numerous regulations.[29] Field's liberty, therefore, appeared more as requiring government action to

[27] Charles McCurdy, "Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897" *The Journal of American History,* 61(4)(March 1975), 972.

[28] *Ibid.,* 977-983.

[29] *Ibid.,* 974, 993-994.

involve equal treatment, with McCurdy downplaying any conception of Substantive Due Process in Field's thought and denying Field's role as father of the "Lochner Era."

Much of this revisionist view gained scholarly adherents. Howard Gillman's book on the "Lochner Era" cited McCurdy to also argue that Field's Jacksonian stance against government privilege allowed for extensive police power regulation.[30] Gillman was even more explicit than McCurdy in denying a Substantive Due Process reading in Field, instead arguing that the Justice sought only, not primarily, equal application of laws.[31] Kelly, Harbison, and Beltz further echoed McCurdy, arguing that in his Slaughterhouse dissent Field was "not seeking to promote a policy of big-business expansion. On the contrary, [Field and other like-minded justices] objected to the state law as class (that is, special) legislation….Theirs was an equal-rights, anti-monopoly attitude…."[32] Liberty for Field, again, was defined as equal treatment by government.[33]

This revisionism only advanced so far, however. Though modifying scholarly treatment, the older perspective retained its dominance if not its hegemony. Since the latter 1990s a third phase of Field scholarship has taken shape. This latest era shows less cohesion than its predecessors, largely seeking to adjudicate between the previous lines of interpretation. While some seek to synthesize dominant and revisionist strains, nearly all fall decidedly toward one or the other camp.

Paul Kens, in the only modern biography of Justice Field, claimed fusion by subordinating the revisionists' claims within the dominant perspective's fundamental

---

[30] See Gillman, 7-8, 74-75, 105.

[31] *Ibid.,* 66, 70.

[32] Kelly, Harbison, and Belz, 389. See also [32] Michael Les Benedict, 314-331.

[33] See also Michael Les Benedict, 318-321.

premises. The author accepted the revisionists' Jacksonian, free labor reading of Field.[34] But Kens saw Field as part of a split after the Civil War in antebellum, Jacksonian ideals regarding liberty. Whereas some post-Civil War Jacksonians saw a threat to liberty from social forces like industrialization, Field continued to guard liberty only from government power and privilege.[35] Field thereby belonged to the "radical individualist" strain of Jacksonian liberty.[36] This strain aligned with many of the characterizations of older scholarship. In particular, Kens contended that Field understood liberty as against government action while his opponents sought liberty through that action. In making this case, Kens continued to credit Field as the most significant judicial precursor to the *Lochner* era, giving him primary responsibility for establishing Substantive Due Process and its subsidiary, the "Right to Contract."[37]

Manuel Cachan also attempted a combination that results in a return to the older, dominant perspective. The revisionists, he argued, posit too great a distinction between Jacksonian, free labor ideas and *laissez-faire*.[38] Cachan explains that these two concepts fused in the post-bellum period, a fusion which Field exemplified.[39] Field therefore "was deeply committed to the conservatism of his era," which included many of the older accusations of "investing property rights with institutional protections" such as the

---

[34] Paul Kens, *Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age* (Lawrence, KS: University of Kansas Press, 1997), 7, 49-50.

[35] *Ibid.,* 8-9, 196.

[36] *Ibid.,* 160-162, 165, 269.

[37] *Ibid.*, 5.

[38] Manuel Cachan, "Justice Stephen Field and 'Free Soil, Free Labor' Constitutionalism: Reconsidering Revisionism" *Law and History Review* 20(Fall, 2002): 544; see also Stephen A. Siegal, "The Revision Thickens" *Law and History Review* 20(2002): 631-637.

[39] *Ibid.,* 576.

Court's appeal to the Due Process Clause.[40] Liberty, ultimately, continued to be understood as rights against government, not as rights protected through its regulatory power.

Other contemporary scholars, finally, accepted Field's expansive view of liberty from government but, unlike these other scholars, bestow praise upon it. This group often focuses on Field's natural rights' language and his grounding in natural law and the Declaration of Independence.

John Eastman and Timothy Sandefur, for example, described Field as a leading defender of natural rights—as articulated in the Declaration—against intrusive government regulation.[41] The Due Process Clause as well as other provisions in the Constitution all stem from natural rights' principles and should be interpreted as securing liberty. Though these authors do state that, for Field, government possesses a positive role in securing liberty, they fail to give a single case in which he does.[42] Instead, these authors list numerous instances where Field votes to strike down regulation. Thus, their picture of Field remains decidedly one of liberty against government action.

Michael Zuckert, too, sees Field's understanding of natural rights as essential to his jurisprudence.[43] Other explanations, from his *laissez faire* beliefs to his business

---

[40] *Ibid.,* 564, 567. See also Thomas H. Burrell, "Justice Stephen Field's Expansion of the Fourteenth Amendment: From the Safeguards of Federalism to a State of Judicial Hegemony" *Gonzaga Law Review* 43(1)(2007): 77-168. This article links Field to the judicial activism of the Warren Court. Goedecke's 1965 article also links Field to the Warren Court. See Robert Goedecke, "Justice Field and Inherent Rights" *Review of Politics* 27(2) (April, 1965): 198. See also Phillip A. Kissam, "Constitutional Theory and Ideological Factors" *Kansas Law Review* 54(2006): 785-786.

[41] John Eastman and Timothy Sandefur, "Stephen Field: Frontier Justice or Justice on the Natural Rights Frontier?" *Nexus* 6(2001): 123-125.

[42] *Ibid.,* 122, 129.

[43] See Zuckert, "Judicial Liberalism and Capitalism," 105ff.

associations, all stand as secondary explanations to the concept of inalienable rights to life, liberty, and property.[44] In so doing, Zuckert better articulates Field's understanding of rights as both substantive in content *and* Constitutional in basis than Eastman and Sandefur. The connection between Declaration and Constitution, his argument goes, is deep and its recognition needed to rightly interpret the Constitution. But like Eastman and Sandefur, these interpretations focus almost exclusively on liberty from government regulation, with little to no mention of Field's jurisprudence asserting liberty in such government action. Liberty for Field, yet again, is seen as predominately from government.

Thus, Field's legacy remains a source of scholarly debate. The older view retains great power, power which the revisionists have been able to weaken but not supplant. The current phase displays openness to re-evaluating the Justice's legacy from new perspectives. However, no clear, effective new perspective has taken hold.

Contribution

My dissertation seeks to offer a new perspective on Justice Field's liberty jurisprudence. In it, I acknowledge the limits Field placed on government regulation that so many scholars recognize. Like Eastman, Sandefur, and Zuckert, I argue that they were based on the protection of natural, inalienable rights as articulated in the Declaration of Independence.

But I also claim that Field's jurisprudence included expansive regulatory power. Because Field defined government power's purpose as protecting rights, his broad

[44] See Eastmand and Sandefur, 121-129; Hadley Arkes, *Constitutional Illusions & Anchoring Truths: The Touchstone of the Natural Law* (New York: Cambridge University Press, 2010), 92-95.

definition of those rights bestowed significant legislative power to accomplish this purpose. Liberty existed through government as much as from government. Field therefore saw the particular provisions of the Constitution as cooperating toward a fuller liberty, with some protecting liberty through government regulation and others protecting it from such regulation's overreach.

Discussing this fuller liberty, furthermore, reveals that scholars' discussion of Substantive Due Process in Field is anachronistic, placed upon him by those fighting later judicial battles. Although Field certainly believed the Due Process Clause protected what are today considered substantive rights, Field understood this clause as protecting a unified conception of life, liberty, and property, not distinct procedural or substantive rights.

Field's unified conception of liberty, moreover, led him to one of the earliest articulations of a national police power (which he found most prominently in the Commerce Clause), an achievement for which he has not been given credit in the literature. Consistent with his view of liberty and its protection by government, Field understood the purpose of the police power, whether of the national or the state governments, as protecting inalienable, natural rights instead of manifesting the amorphous concept of the popular will that is more typically associated with the power. He therefore brought closer together the way in which the power of national and state governments should be understood, thereby reinforcing the purpose of government at all levels as protecting individual rights. These subjects show that, far from the caricature of a rigid, unbending justice who merely read his own extra-constitutional views into the

Constitution, Field's cooperative vision exercised a flexible judgment that took seriously both Constitutional text and its underlying purpose and meaning.

Finally, my work will point to ways in which Field's jurisprudence speaks to the contemporary Court. Justices on today's Court continue to dispute liberty's meaning as understood in the Constitution. Often splitting along a perceived liberal/conservative divide, they continue to do so in ways parallel to the greater scholarly debate. On Constitutional provisions with which Field dealt, such as the Due Process Clause, police power, and the Commerce Clause, deep disagreement over liberty as popular will and liberty as individual rights often erupts.[45]

As liberty and its Constitutional meaning remains a point of judicial debate, Field's cooperative Constitution of liberty presents a potential contribution to these ongoing judicial discussions. My work will show how Field does so in providing a rights' protecting framework for adjudicating these different perspectives. Though certainly not a means to end all debate over liberty, I argue that Field's approach may give the contemporary Court the common ground necessary to talk to, rather than past, each other. I also argue that Field's perspective gives current justices a potential way to better exercise the particular judicial power of judgment, of applying general principles to particular, and often difficult, circumstances.

[45] It is in part for this reason that these provisions are the focus of this work. Field certainly wrote other important opinions not discussed here, particularly regarding the Constitutionality of the income tax or of paper money (see *Pollack v. Famer's Loan & Trust* 157 U.S. 429 (1895) or *Legal Tender Cases* 79 U.S. 457 (1870)). However, the provisions focused upon here both present Field's clearest articulations of the meaning of liberty and constitute continuing debates on the present Court. As noted in the concluding chapter, extensions and refinements of the argument made in these pages could incorporate these cases in later research.

Chapter Outline

I divide my discussion of Field's views into seven chapters. In Chapter Two, I begin my examination of the cooperative relationship between police power and the Due Process Clause. After showing precursors in his early Fourteenth Amendment opinions, I turn to Field's first full articulation of this relationship in *Munn v. Illinois.* In his dissent, Field attacked the majority for too narrowly interpreting the Due Process Clause, instead arguing for broad meaning to the protections afforded life, liberty, and property. The Justice then articulated a common goal to unite state police power and due process: the protection of individual rights. The Due Process Clause would protect broadly against state infringements of life, liberty, and property. The States likewise would wield the police power, regulating in order to protect rights against non-governmental threats.

In Chapter Three, I move beyond *Munn* to address remaining questions regarding the cooperative relationship between state police power and the Due Process Clause. First, I combat the notion that Field's jurisprudence fell within the concept of Substantive Due Process as presently understood. Justice Field, I argue, did not consider the Due Process Clause according to such categories, but saw what are today substantive and procedural protections as similar means to safeguard a unified conception of life, liberty, and property. Second, I discuss how Field's broad conception of rights was protected by traditional police power categories of health, safety, and morals, thereby ensuring an expansive state power to regulate. Third and finally, I address how Field articulated his cooperative understanding in adjudicating between competing police power and Due Process claims. The Justice's decisions looked to the facts of each case, seeking which claim most directly realized the common goal of protecting individual liberty.

I conclude my discussion of police power and the Due Process Clause in Chapter Four with Field's troubling record regarding civil rights. The Justice often sided against African-American litigants and supported interpretations which left blacks unprotected in the post-Reconstruction South. I explain Field's decisions by describing both his state action doctrine and his limiting of Fourteenth Amendment protections to so-called "civil rights," which equated to life, liberty, and property. I then argue that Field too narrowly interpreted and applied both concepts, resulting in a gap in protection for African-Americans. I state that doing so here showed the inconsistency in his judicial decisions between his theory and practice, with Field's general vision being adequate to protect liberty but his application not always doing the same.

I move on in Chapter Five to discuss Field's cooperative vision within the context of federalism. Justice Field uniquely argued for a national police power, which cooperated with state police power to protect individual rights. I argue that this cooperation showed a similarity between the origins and purposes of state and national government that separated Field from many of his colleagues, one grounded in protecting rights not in some manifestation of mere popular will. I next discuss the lines Field drew between state and national power in the Commerce Clause, where a complex system of exclusive and overlapping spheres partook of the cooperative pursuit of liberty. I conclude by discussing the adequacy of Field's national regulatory power, therein returning to the difficulty of matching principle with practice. Here the Justice struggled to protect federalism's principles while sufficiently modifying these principles' application in swiftly changing economic circumstances.

Chapter Six looks to the foundational ideas underlying Field's cooperative vision. Though scholars point to several competing foundations, I argue that Field's ideas stem most fundamentally from his reading of the common law and the Declaration of Independence. By examining Field's reading and use of these sources in his opinions, I display the roots to his conception of inalienable rights and government—and hence police power's—purpose in their protection. I furthermore show Field's use of the Declaration and common law in relationship to the Constitutional text. Field understood these sources as means to understand the context out of which the Constitution emerged and thus to better comprehend its phrases and provisions. I conclude by showing the primacy of the Constitutional text in relation to these documents, comparing Field's protection of individual rights against state action before and after the Fourteenth Amendment's ratification.

Finally, I conclude the dissertation by briefly considering further how Field's cooperative Constitution of liberty holds significance to the debate regarding liberty on the contemporary Court. I argue that Field provides a context in which contemporary judicial debates over liberty can be adjudicated. Within Field's common purpose of protecting rights, justices can better speak to rather than past each other, focusing on the ramifications for the common view of liberty in particular cases. This approach, I continue, could move the Court as a whole further away from bright line rules and more toward the complicated but necessary use of the judiciary's particular function: the exercise of judgment.

CHAPTER TWO

Due Process and Police Power: Origins and First Articulation

In this chapter, I begin examining Field's understanding of liberty in the relationship between police power and the Due Process Clause. First, I trace the origins of Field's Due Process jurisprudence in his early Fourteenth Amendment decisions and beyond. These cases reveal a consistent reading of the Amendment that both includes the actual content of listed rights and implies reliance on the Due Process Clause.[1] Then I turn to the Justice's first explicit articulation of this concept in *Munn v. Illinois.* Field's opinion here is his most succinct explanation of the relationship between the Due Process Clause and police power. The Justice aligns the Due Process Clause with police power in a common goal: protecting the actual content of the rights comprising liberty. This goal sought rights' protection from various dangers, giving significant power to both provisions for its accomplishment.

Fourteenth Amendment's Beginning: Slaughterhouse

Field's attempt to protect individual rights through the Fourteenth Amendment did not begin with his reading of the Due Process Clause. Originally, he argued for content-based rights' protection within another portion of the Fourteenth Amendment's first section: the Privileges and Immunities clause. This prequel to his Due Process

[1] In this chapter, I refer to Field's perspective as "content-based" protections of rights instead of the more common "Substantive Due Process." As I argue in Chapter III, the concept of "Substantive Due Process," as distinct from "Procedural Due Process," is anachronistic and misunderstands Field's interpretation of the Due Process Clause.

jurisprudence came in 1873 in the *Slaughterhouse Cases,*[2] the first Supreme Court adjudication of the Fourteenth Amendment.[3]

In 1869, Louisiana's legislature bestowed a monopoly on a corporation to establish and maintain what would be the only legal slaughterhouse in the greater New Orleans area.[4] A purported purpose of this move was sanitary. The dumping of animal parts at various locations upstream to residential areas continually contributed to disease among the populace—including cholera and yellow fever—for nearly half a century.[5] The law sought to consolidate all animal slaughtering to one location, downriver from New Orleans. Such consolidation and the manner through which it was accomplished—by monopoly—enraged butchers in the New Orleans region, who thought the law's true motive was corrupt deals involving bribery and kickbacks.[6] A number of butchers sued, claiming violations of their rights under the Thirteenth and Fourteenth Amendments.

At the Supreme Court, much of the debate concentrated on the relationship between state police power and the Fourteenth Amendment's Privileges or Immunities Clause, not Due Process. This clause declares that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[7]

---

[2] *The Slaughterhouse Cases* 83 U.S. 36 (1873).

[3] Donald E. Lively, *Landmark Supreme Court Cases: A Reference Guide* (Westport, CT: Greenwood, 1999), 13.

[4] Jonathan Lurie, *The Chase Court: Justices, Rulings, and Legacy* (Santa Barbara, CA: ACB-CLIO, 2004), 80.

[5] Michael Anthony Ross, *Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court during the Civil War Era* (Baton Rouge: Louisiana State University Press, 2003), 191; Howard Gillman, *The Constitution Besieged,* 64.

[6] Kimberly C. Shankman and Roger Pilon, "Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government" *Texas Review of Law and Politics* 3(1998-1999): 27

[7] U.S. Constitution, Amendment XIV, Sec. 1.

The Supreme Court, with Field dissenting, upheld the law, calling it an acceptable police power regulation for the public health. Its reasoning did much more. In reaching this conclusion, the justices severely restrained the scope of the Privileges or Immunities Clause. The Court argued that the Clause maintained a strict division between privileges and immunities stemming from national citizenship and those emanating from citizenship in a state. The Clause only protected "the privileges and immunities of the citizen of the United States."[8] State governments were therefore not prevented from determining the privileges and immunities that belong to the citizens of their states. As the Court wrote, privileges or immunities of state citizens "are not intended to have any additional protection by this paragraph of the amendment."[9]

This division proved greatly limiting if not debilitating for the new Privileges or Immunities Clause. Quoting precedent for Article IV's Privileges and Immunities Clause, the Court argued that the sphere within which states could define their own citizens' privileges or immunities was broad. State privileges or immunities were so expansive that the concept "embraces nearly every civil right for the establishment and protection of which organized government is instituted"[10] including life, liberty, and property. This reasoning left little room for national privileges or immunities, since, as Field would say in another context, "there are few subjects upon which legislation can be had besides life, liberty, and property."[11] Only those few protections enumerated elsewhere in the Constitution could be enforced as national privileges or immunities. Such rights were

[8] *Slaughterhouse Cases* 83 U.S. 74.

[9] *Ibid.* 83 U.S. 74.

[10] *Ibid.,* 83 U.S. 76.

[11] *Ex Parte Virginia* 100 U.S. 366 (1880).

limited to areas such as petitioning government, access to seaports, and protection of life, liberty, and property "when on the high seas or within the jurisdiction of a foreign government."[12] Thus, the vast domain of protections over life, liberty, and property were left domestically to the states. No real protection remained for fundamental rights' against state action.

Justice Field roundly objected to this decision. He reasoned that the Privileges or Immunities Clause referred to a national instead of state citizenship, meaning "[a] citizen of a State is now only a citizen of the United States residing in that State."[13] As national citizenship became primary, to it attached privileges or immunities previously considered as belonging to state citizenship. These national privileges or immunities of a citizen now included those which are "fundamental…which belong to him as a free man and a free citizen, and are not dependent upon his citizenship of any State."[14] Protections of life, liberty, and property now constituted part of national citizenship, requiring protection against contrary state activities. Otherwise, Field argued, the Fourteenth Amendment constituted "a vain and idle enactment, which accomplished nothing…."[15] Though Field agreed that states held the power to pass health and safety regulations under its police power, he said that such power was wrongly used here. The monopoly established by the Louisiana law was unnecessary to protect the public and instead infringed on other butchers' property right in their own labor.

---

[12] *Slaughterhouse Cases* 83 U.S. 79.

[13] *Ibid.,* 83 U.S. 95.

[14] *Ibid.*

[15] *Ibid.,* 83 U.S. 96.

Despite Field's protests, the decision of the majority proved definitive both for the time and for posterity.[16] The Privilege or Immunities Clause to this day remains so restricted as to rarely receive judicial examination.[17] Its life, if it has one, remains predominately in academic debate.[18]

Judicially, the extent of the Privileges or Immunities Clause was settled. The Due Process Clause was not. The *Slaughterhouse* majority had given it only brief mention. It noted the parallel language in the Fifth Amendment and in many states' own constitutions. This connection, the Court stated, meant the meaning of due process did not change by the Amendment's ratification except in its federal enforcement against the states. The Court's reasoning for the new Due Process Clause's non-enforcement in this case was sparse. The Court gave no definition of the concept of Due Process found in the U.S. or state constitutions. It cited no case law upon which to reference for precedent. Instead, the Court stated, "it is sufficient to say that under no construction of that provision that we have ever seen, or any we deem admissible, can the restraint imposed by the state of Louisiana …be held to be a deprivation of property within the meaning of that provision."[19] The dissents also gave the clause short attention. Justice Swayne quickly defined it as "the application of the law as it exists in the fair and regular course

---

[16] Bernard Schwartz, *A History of the Supreme Court,* (New York: Oxford University Press, 1993), 160.

[17] Recent exceptions being *Saenz v. Roe* 526 U.S. 489 (1999) and Justice Clarence Thomas's concurrence in *McDonald v. City of Chicago* 561 U.S. 3025 (2010).

[18] Oral arguments in *McDonald v. Chicago* exemplify the point. When lawyers asserted the Privileges or Immunities Clause to incorporate the Second Amendment, Justice Scalia asked, "why are you asking us to overrule 150, 140 years of prior law…I mean, you know, unless you're bucking for a—a place on some law school faculty….what you argue is the darling of the professorate." *McDonald v. Chicago* 6-7.

[19] *Slaughterhouse Cases* 83 U.S. 81.

of administrative procedure."[20] Justices Bradley and Field each focused on Privileges or Immunities with only brief mention of Due Process.

The *Slaughterhouse* decision thus set the stage for Field's later examination of the Due Process Clause. The Court's summary treatment pointed toward narrow protections of individuals stemming from judicial procedures and popular elections. Legislation passed and upheld by state governments seemed to follow the "process" that was "due." Even Justice Swayne's dissent merely added that Due Process necessitated state actions be based on a law implemented fairly "as it exists." Yet especially for the majority opinion, these conclusions stemmed more from inference than declaration. No extensive argument came for the new clause's nature. Room remained for further judicial definition. Field would seek to articulate that definition, presenting the first cogent argument that the Clause included protecting the content of the rights listed in its text. In adjudicating the case's competing claims, Field also would re-interpret the concept of police power. This re-interpretation would bring police power's purposes in line with those of the Due Process Clause, providing the basis for their cooperation.

Precursor: From Bartemeyer *to* Munn

At first, Field did not specifically articulate this reading of the Due Process Clause. In the immediate aftermath of *Slaughterhouse,* he looked to the Fourteenth Amendment as a whole to protect the content of particular rights. Yet in doing so, Field implied the reading of the Due Process Clause that he would make explicit only four years later.

[20] *Ibid.,* 83U.S. 127.

This approach first came in *Bartemeyer v. Iowa,* a case decided in 1873, the same year as *Slaughterhouse*. Iowa enacted a statewide prohibition of alcohol in 1851 which now was challenged on the basis of the Due Process Clause.[21] Chief Justice Waite spoke for a unanimous Court in upholding the regulation. Though voting along with the Chief Justice, Field wrote a concurring opinion distinguishing his vote here from that of *Slaughterhouse.* Field remained frustrated by the *Slaughterhouse* majority's opinion, briefly re-stating the argument of his dissent. But Field's language regarding rights' protection differed from *Slaughterhouse* to *Bartemeyer.* Instead of speaking about the Privileges or Immunities Clause in particular, Field focused on the Fourteenth Amendment in general. He argued that the Fourteenth Amendment's purpose was to ensure the protection of a citizen's "fundamental rights everywhere…throughout the limits of the republic."[22]

But where within the Fourteenth Amendment did these protections come? What text could he appeal to supporting such a claim? The use of the term "citizens" could be read to intend only the defunct Privileges or Immunities Clause. It was this clause which spoke of citizens. An appeal to Privileges or Immunities would merely re-state Field's old position, falling before the new *Slaughterhouse* precedent. However, Field's intentions appeared to extend beyond a re-assertion of his previous dissent. He went on to say first that the Fourteenth Amendment "was intended to make it possible for all persons…to live in peace and security."[23] Here Field speaks of "persons," not of "citizens." It is not the

[21] Bernard H. Siegan, *Property Rights: From Magna Carta—14th Amendment* (New York: Transaction Publishers, 2001), 264.

[22] *Bartemeyer v. Iowa* 85 U.S. 140.

[23] *Ibid.*

Privileges or Immunities Clause that talks of persons. Instead, it is the Due Process Clause which uses such language.

The use of persons instead of citizens suggests that Field had more in mind than the Privileges or Immunities Clause. The Fourteenth Amendment must make possible the "peace and security" of persons, not merely the protection of citizens. This language points toward the Due Process Clause as a source of Field's broader Fourteenth Amendment argument.

Field further suggested protections for the actual content of rights in Due Process by paralleling descriptions of citizens with those of persons. Citizens were to receive protection, persons security. The concepts of protection and security closely align; a secure person is a protected person. Field's language closely associates the extent of citizens' and persons' protections as well. Citizens' protection stretched "throughout the limits of the republic."[24] Those of persons were to have security "wherever the jurisdiction of the nation reached."[25] Therefore, Field makes a close connection between citizens and persons on what the Fourteenth Amendment gives (protection/security) as well as where it is given (within U.S. jurisdiction).

This parallel carries over into what is secured or protected. The protections afforded citizens were that their "fundamental rights…should not be abridged by any state."[26] But what was the content of these fundamental rights? They included the right to "life and liberty" as well as the freedom "to follow any lawful employment."[27] This last

[24] *Bartemeyer v. Iowa* 85 U.S. 140.

[25] *Ibid.,* 85 U.S. 140.

[26] *Ibid.,* 85 U.S. 140.

[27] *Ibid.,* 85 U.S. 139-140.

freedom of employment Field placed under the right to property inhering in labor.[28] Therefore, the fundamental rights of citizens included rights to life, liberty, and property. These rights of citizens, therefore, clearly align with those described for persons in the Due Process Clause, which says that neither "life, liberty, or property" can be deprived without due process.[29]

In these parallels lay conflation. Both persons and citizens should receive protection or security. This protection or security should extend to all places over which the United States holds jurisdiction. But this protection also included the same content—the fundamental rights to life, liberty, and property. To the extent fundamental rights were concerned, therefore, no difference existed in the Fourteenth Amendment between persons and citizens.

This conflation continued even after Field explicitly asserted the Due Process Clause as protecting the content of particular rights. In the 1893 Chinese immigrant case, *Fong Yue Ting v. United States,* Field said regarding non-citizen immigrants that "[t]hey differ only from citizens in that they cannot vote or hold any public office."[30] Here Field clearly conflates citizens and persons in almost every way, limiting the distinction merely to voting and office-holding, which he elsewhere said are not inalienable rights.[31] In this same passage he reiterates some of the particular parallels between citizens and persons. He declares that "despotic power can no more be exercised over them, with reference to

---

[28] See *Butchers Union Company v. Crescent City Company* 111 U.S. 757-758 (1884); *Geer v. Connecticut* 161 U.S. 539 (1896).

[29] U.S. Constitution, Amendment XIV, Sec. 1.

[30] *Fong Yue Ting v. United States* 149 U.S. 754 (1893).

[31] See *Ex Parte Virginia* 100 U.S. 339. See also Chapter IV for a detailed examination of Field's distinction between fundamental, civil rights and political or social rights.

their persons and property, than over persons and property of native-born citizens."[32] Field's language here attaches content-based protections to persons in two ways. First, in saying that persons receive the same rights' protection as citizens, he reads the content of Privileges or Immunities as the same as the rights found in the Due Process Clause. Second, Field's choice of examples for what is protected—persons and property—aligns closely with the actual text of the Due Process Clause's "life, liberty, or property."

We therefore see that in *Bartemeyer* and beyond, Field conflated citizens and persons regarding the protection of rights. In so doing, the Justice equated the nature and content of their protections. As the rights of citizens protected by Privileges or Immunities included their actual content, so also were those of persons protected by Due Process. Thus the Justice could not be accused of merely re-stating his *Slaughterhouse* position. The argument for such rights' protection in the Fourteenth Amendment did not rely solely on the now restricted Privileges or Immunities Clause. Without mentioning the Due Process Clause by name, Field placed the content-based protections of the Fourteenth Amendment upon it.

Munn v. Illinois*: The Cooperation of Due Process and Police Power*

This implied use of the Due Process Clause became expressed four years after *Bartemeyer* in the 1877 case of *Munn v. Illinois.*[33] Here Field directly addressed the Due Process Clause, arguing for the content-based reading of rights previously implied. In so doing, Field also extensively addressed the nature of police power. Together, these

[32] *Fong Yu Ting v. United States* 149 U.S. 754.

[33] *Munn v. Illinois* 94 U.S. 113 (1877).

arguments comprised Field's most concentrated description of his cooperative vision of Constitutional liberty.

Munn concerned rates charged for storing grain in elevators near Chicago.[34] According to the Court there were at the time fourteen elevators owned by thirty persons and controlled by nine business firms operating in the area. The elevator owners annually agreed to the price each would charge, publishing the rates every January.[35] This price-setting caused much consternation among the public, who objected to what they viewed as excessive rates. Thus, in 1870, the people of Illinois ratified a new state constitution, one which declared that "all elevators or storehouses where grain or other property is stored for a compensation…are declared to be public warehouses."[36] The following year Illinois's legislature used this new constitutional definition to pass a law regulating the maximum price grain elevator owners could charge others for using their facilities.[37] The owners of the Chicago-area elevators sued, claiming the legislation violated their property right under the Due Process Clause.

The Court sided with the state of Illinois. The regulations did not violate the right to property under Due Process. Instead, they constituted a legitimate exercise of the police power. In making this argument, the nature of the Due Process Clause came to the forefront.

---

[34] *Ibid.,* 94 U.S. 113-118; See also McCloskey, *The American Supreme Court,* 85.

[35] *Ibid.,* 94 U.S. 131.

[36] Illinois State Constitution, Article XIII, Sec. 1 in *The Constitution of the State of Illinois, as Adopted in Convention, May 13, 1870, and Ratified by the People of the State, July 2, A.D. 1870* (Chicago: The Western News Company, 1870), 37; Paul D. Moreno, *The American State from the Civil War to the New Deal: The Twilight of Constitutionalism and the Triumph of Progressivism* (New York: Cambridge University Press, 2013), 64.

[37] Kelly, Harbison, Belz, 389; Schwartz, *A History of the Supreme Court,*164.

Writing for the majority, Chief Justice Waite declared that the state cannot "control rights which are purely and exclusively private."[38] This distinction between public and private would prove crucial to Field's reading of the Due Process Clause. What, then, made rights not purely or exclusively private? Waite cited English common law to state that "when private property is 'affected with a public interest, it ceases to be *juris private*' only."[39] The attachment of a public interest to private property does not remove its status as private property entirely. Yet it does remove its status as private property *only.* Upon losing its status as purely private, the owner of the property "must submit to be controlled by the public for the common good, to the extent of the [public] interest he has thus created."[40]

The question then became what exactly attaches a public interest to property? The Chief Justice continued that "[p]roperty does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large."[41] The important point pertained to a property's use. The property may not be intrinsically public. The owner may retain the title and deed exclusive of others, including the state. However, Waite distinguished use from mere possession. For the Court, to use privately owned property in a manner that affects the community receives the dress of public interest and hence the reach of public regulation.

---

[38] *Munn v. Illinois* 94 U.S. 124.

[39] *Ibid.,* 94 U.S. 126. The Chief Justice cited 17th century British Lord Chief Justice Hale. See Kens, *Justice Field,* 161.

[40] *Munn v. Illinois* 94 U.S. 126.

[41] *Ibid.,* 94 U.S. 126.

Waite then applied these principles to the grain elevators. The elevators' ownership was and continued to be private. Its use, however, was not purely and exclusively private. He based this latter conclusion on two arguments. The first was factual. Waite emphasized the extensive power the elevator owners possessed over commerce. Chicago had become a hub for Westerners transporting grain to the northern part of the East Coast and to parts of Europe.[42] The transport of grain, of which storage comprised a part, constituted an important commercial activity affecting the livelihood of many citizens as well as the economic prospects of the state. Such importance to so many citizens and to the state meant that "the whole public has a direct and positive interest" in the grain elevators.[43] Thus, the property's *possession* remained private in that the owners retained title and deed. Yet the private property's *use* was not purely and exclusively private. Its use had public consequences that affected the general community. As such, the price controls constituted a legitimate regulation of a public entity by the state government.

Compounding the public interest was the control the grain operators wielded. Recall that 30 owners operating all 14 elevators collaborated on prices. To go through Chicago, those shipping grain had to use these elevators' storage. That the warehouses together so controlled the ability to store grain in the area constituted a "'virtual' monopoly"[44] to the Court's majority. Considering the economic importance of such grain shipments, this monopoly made the elevators *de facto* "common carriers," who "exercise

[42] *Munn v. Illinois.,* 94 U.S. 130; Ross, *Justice of Shattered Dreams,* 230-231.

[43] *Munn v. Illinois,* 94 U.S. 133.

[44] *Munn v. Illinois.,* 94 U.S. 131.

a sort of public office" in storing the grain.[45] This public office with its "duties to perform in which the public is interested"[46] further consolidated the elevators' public usages. More than a mere mixture of private and public interest, the grain elevators were a "private property …devoted to public use."[47]

Waite's second argument for the majority pertained to the state constitution. As noted above, the newly revised Illinois state constitution declared grain elevators to be "public warehouses." Waite argued that the changes in the state constitution recognized in law what already existed in fact. This recognition was important in itself. Waite's adjudication of the concepts of public and private interest had been according to common law principles. Yet the Chief Justice later notes that "a mere common law regulation of trade or business may be changed by statute."[48] Statutes trump the common law. Thus passing laws defining grain elevators as clothed in a public interest only enhanced the power of the common law reasoning. Even more, the public categorization of the grain elevators came not from ordinary statute but from constitutional ratification. Therefore it was not passed by elected representatives who might or might not perfectly reflect popular will. Instead, this measure came in the state's fundamental law, its constitution, which was approved by "the people of Illinois….the whole body of the people."[49] Only under this exercise of constitutional popular will did the legislature act by regular statute to set price controls.

---

[45] *Ibid.,* 94 U.S. 130.

[46] *Ibid.,* 94 U.S. 130.

[47] *Ibid.,* 94 U.S. 130; Edmund W. Kitch and Clara Ann Bowler, "The Facts of Munn v. Illinois" *Supreme Court Review* (1978): 313-314.

[48] *Munn v. Illinois* 94 U.S. 134.

[49] *Ibid.,* 94 U.S. 132.

The regulations then passed by the legislature were made pursuant to fact and to state constitutional law. Though privately owned, the elevators' use brought a public interest susceptible to regulation. The state constitution, furthermore, declared them public and thus subject to the very kind of price regulations passed by the state legislature. If any content-based protections inhered in the Due Process Clause, they did not apply here.

But did they apply anywhere? Waite appeared to leave room for content-based protections under the Due Process Clause when he stated that private rights were beyond state regulatory authority. Thus scholars have argued this opinion contains the principle of what would later be called Substantive Due Process. It simply denied its application to this particular case.[50]

In reality the opinion constituted a commanding victory for an exclusively procedural reading of the Clause. This victory stemmed from the line drawn between public and private interests. Waite had declared outside state control only those rights "which are *purely* and *exclusively* private."[51] These and only these garnered content-based protection. Purity and exclusivity are high standards, however. By default, those not attaining the requisite purity and exclusivity would receive only judicial process as safeguards.

Field's dissent excoriated the Court for negating in practice any concept of content-based rights' protection it had affirmed in theory. He began his attack with this distinction between private and public. Justice Field understood that under the Majority's

[50] Kens, 161; Burrell, 343.

[51] *Munn v. Illinois* 94 U.S. 124.

view, private rights lost their exclusivity and purity by crossing a nearly unavoidable line. Field objected that according to the very common law sources the majority cited, property lost its purely private status only when "dedicated by the owner to public uses," granted by the government to be used by private parties, or bestowed special privileges by the state.[52] But the Court decisively broke with this common law precedent it purported to apply. By their new standard, the loss of private status comes when the exercise of a right is "of public consequence" or will "affect the community at large."[53] The connection the majority of the Court made between private rights and the public, Field objected, need not be great. After all, nearly any right's exercise could "affect the community" and thus be "of public consequence," particularly given that laws confront generalities pertaining to many persons. If exercise by one alone of a right did not raise it to the level of affecting the public, Field also pointed out, then its exercise by all or many under the law, would. Nor did every facet of a right, Field argued, lose its private status by affecting the community. Only its purely private and exclusive character must be compromised in some way to some degree for it do so.

Field's dissent expressed the problem the Court's opinion in *Munn* posed for content-based protection. Speaking of property in particular, Field noted that "there is hardly an enterprise or business engaging the attention and labor of any considerable portion of the community in which the public has not an interest in the sense in which that term is used by the court…."[54] Therefore, the Court did say private rights qualified

[52] Swisher, *Stephen J. Field,* 376.

[53] *Munn v. Illinois* 94 U.S. 126.

[54] *Ibid.,* 94 U.S. 141.

for content-based protection. But Field argued it so defined public and private as to effectively eliminate the latter for Due Process Clause purposes.

Waite somewhat anticipated this objection. He argued that an owner did possess private control over his property. He did because he "may withdraw his grant by discontinuing the use, but, so long as he maintains the use, he must submit to the control."[55] Illinois's Supreme Court made the same basic argument, stating that so long as an owner retained deed and title, his rights had not been violated.[56] Thus content-based protection did not exist in the use of rights, which likely could always be linked to a public consequence of some kind. However, content-based protection did exist in the actual possession of rights. The state could not, Waite implied, take away their actual possession, so long as possession itself did not partake of a public interest.

Yet the distinction between ownership and use only completed the negation of content-based protections in the Due Process Clause. Field pointed out that such a position makes nothing of content-based protections by making nothing of the rights protected. He responded "[a]ll that is beneficial in property arises from its use and the fruits of that use…."[57] The point of possession is use. The point of protecting rights is so that those possessing them may exercise them. Thus Field later argues that protecting life necessitates "more…than mere animal existence."[58] We seek to protect life because we

[55] *Munn v. Illinois.,* 94 U.S. 126.

[56] Even this point could be debated in the case of the grain elevators. According to the Court's own logic, possession without use could "affect the community" and be "of public consequence," particularly property so important to the economic status of the state. It is not clear the argument could be made that such effects would trump the distinction between possession and use, that non-use could be considered itself a form of use. This connects to the debate over activity and in-activity in the Commerce Clause in the recent Health Care case.

[57] *Munn v. Illinois* 94 U.S. 141.

[58] *Ibid.,* 94 U.S. 142.

seek to do something with our lives. Liberty, too, entails activity, entails use of some kind. To claim content-based protection of liberty's *possession* while denying such security to its *use* would effectively negate itself. The same would be true, finally, of property, which Field claimed is possessed so that the owner might use it. Granting content-based protection to ownership as distinct from use made the property, and hence its content-based protection, worthless. Field concludes that, in the interpretation of the Court, "[t]here is, indeed, no protection of any value under the constitutional provision which does not extend to the use and income of the property, as well as to its title and possession."[59]

Thus, we see the completeness of the problem of content-based Due Process Clause protections for the *Munn* majority. The Court claimed such protections existed. Yet it placed these protections solely within the private realm only to define that realm so narrowly as to effectively eliminate it. The Court then distinguished possession and use so as to negate the purpose of the former by denying protection for the latter.

Therefore, the *Munn* majority left no effective, content-based protections in Due Process. Waite's articulation of such Due Process protections can be likened to a familiar articulation of the Equal Protection Clause's Strict Scrutiny standard of review. Such review is said by some to be "Strict in theory, fatal in fact."[60] Field similarly described the Clause as now so "limited in scope" as to be "impotent for good."[61] Litigants could argue content-based rights before the Court. Under *Munn,* they had no reason to hope for

---

[59] *Munn v. Illinoi* 94 U.S. 143.

[60] This quote has appeared in numerous cases, though it was first stated in Gerald Gunther, "The Supreme Court 1971 Term, Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection" *Harvard Law Review* 86(1) (November 1972): 8.

[61] *Munn v. Illinois* 94 U.S. 141.

success. All left to the elevator owners and future litigants were procedural protections. Processes such as the making of laws in the legislative branch and judicial proceedings in court remained. Yet even these were limited by the Court's decision. Field saw these limitations to extend to procedure, noting"[i]f this be sound law…all property and all business in the State are held at the mercy of a majority of its legislature."[62]

For one, the judicial process was closed to the elevator owners. Judicial procedure would apply only to two circumstances. The first consisted of private contracts not involving the government at all. If a violation occurred in this instance, the judicial process could adjudicate between the disputants. Yet it was not clear this reasoning even found its basis in the Due Process Clause. After all, the Court several years later would emphasize how the Fourteenth Amendment only restrained state action, not that of individual citizens.[63] As this case did not involve private disputes but those between a state and citizens, it did not qualify for the judicial process. The other circumstance related to common law situations where "there are no statutory regulations upon the subject…."[64] In these instances the dispute could go to court, with the judges consulting the common law much as Waite had in this case. Yet even the latter situation does not definitively restrain other parts of the state government. Waite said, recall, that statutes trump the common law. Thus even common law limitations could be taken away from judicial process by the simple act of the legislature passing a statute. All the process that remained for the elevator owners, Waite reasoned, pertained to the legislative branch. The legislative process could be used, passing laws to protect property interests.

---

[62] *Munn v. Illinois.,* 94 U.S. 140.

[63] See *Civil Rights Cases* 109 U.S. 3 (1883).

[64] *Munn v. Illinois* 94 U.S. 134.

However, it was the legislature who, by the process of lawmaking, passed the contested rate regulations. Waite acknowledged that legislatures may abuse their power in this area. Therefore, the Chief Justice arrived at one final process: the franchise. He concluded that "[f]or protection against abuses by legislatures, the people must resort to the polls, not to the courts."[65] The only true procedural protection for property clothed in a public interest is the ballot box. Thus Field's accusation that, under the majority opinion, no protection existed against a legislative majority.

Due Process

Field's dissent criticized the distinctions the Court made between public and private as well as between ownership and use. He lamented that only the vote remained as a defense against majority will. But his dissent also built up where it tore down. In addition to criticizing Waite's opinion, Field articulated his own content-based reading of the Due Process Clause.

The Justice began his dissent by asserting that rights existed and their protection applied to this case: "[t]he principle upon which the opinion of the majority proceeds is…subversive of the rights of private property, heretofore believed to be protected by constitutional guarantees against legislative interference."[66] For the source of these Constitutional guarantees Field did not cite the Fourteenth Amendment in general, as he had in *Bartemeyer.* Instead, he turned explicitly to the Due Process Clause. Field

[65] *Munn v. Illinois.,* 94 U.S. 134.

[66] *Ibid.,* 94 U.S. 136.

connected the right to property with the other two named guarantees, declaring that the Clause "places property under the same protection as life and liberty."[67]

But what was the nature and extent of these protections? Field argued that life, liberty, and property "should never be, construed in any narrow or restricted sense."[68] This, Field claimed, was what the Chief Justice's opinion did. Instead, the Due Process Clause "has a much more extended operation than either court, State, or Federal has given to it."[69]

This extension included an expansion in procedure. Field agreed with greater judicial access beyond that accorded by the Court. Yet such a change hardly comprised "a much more extended operation" than the Majority opinion. Field's problem with the *Munn* majority was the lack of real, content-based protections.

Field's reading of the Due Process Clause comes out forcefully as he individually addressed the rights to life, liberty, and property. He stated that by "the term 'life,' as here used, something more is meant than mere animal existence."[70] Field's focus is revealing. He does not speak of procedures which the state can or cannot use to deprive a person of life. Instead, the Justice focuses on the *degree* or *extent* to which life itself must be protected. In doing so, he assumes content instead of mere procedural protections. Procedural protections consider how something may be deprived. Content-based protections consider what can be deprived. By focusing on the degree to which life must be protected, Field's starting position is an existing entity—life—not the process by

---

[67] *Munn v. Illinois* 94 U.S. 141.

[68] *Ibid.,* 94 U.S. 142.

[69] *Ibid.,* 94 U.S. 141.

[70] *Ibid.,* 94 U.S. 142.

which it can be removed. To the extent to which this right exists, limits on state action exist regardless of procedure.

Liberty receives similar treatment. The Justice argued that by "the term 'liberty,' as used in the provision, something more is meant than mere freedom from physical restraint or the bounds of prison."[71] Field does not discuss by what process legislation must be passed or the procedures in Court that must be followed for a person to be deprived of liberty. He defines a sphere of liberty in which the person may act as she sees fit without government interference.

In last turning to property, Field's content-based articulation of rights continues. He declares "[t]he same liberal construction which is required for the protection of life and liberty…should be applied to the protection of private property."[72] The Due Process right to property, like life and liberty, contains an essence, a content to it beyond procedure and thus beyond approach by the state. In such rights reside the true basis of the equality Field's revisionist scholars articulate. In asserting the rights of one person, Field spoke also of "the equal rights of others." The equal protection that sought to avoid "class legislation" did not stand on its own merits alone. It stemmed, at least in large part, from the government's obligation to protect equal, content-based rights in an equal manner.[73]

Field furthermore sought to expand Due Process protections not only in kind but in extent. The Clause protects the content of rights in addition to procedure. But even this

---

[71] *Munn v. Illinois.,* 94 U.S. 142.

[72] *Ibid.,* 94 U.S. 142.

[73] Howard Gillman's discussion of Field's *Slaughterhouse* and *Munn* opinions fails to adequately address this connection, focusing only on Field's assertion of equal treatment by law. See *The Constitution Besieged,* 64-69.

content could be narrowly defined. Field's expanded sense of the Due Process Clause rejected the narrowness within a content-based reading in addition to the restriction of a purely procedural interpretation. Field's insistence on expansively defining rights' content related to his objection to the ownership/use distinction made by the *Munn* majority. Field had argued "all that is beneficial in property arises from its use and the fruits of that use…."[74] The Justice understood that narrowly defined rights could leave persons in the same practical relationship to states as did Waite's opinion. He understood the right to life, as we have seen, to refer to more than "mere animal existence."[75] The state could do much to a person if the only restraint was life's destruction. Torture, beatings, psychological and emotional distress, any number of inhumane actions could be perpetrated without running afoul of a content-based Due Process Clause. Such state action would, like the distinction between ownership and use, disregard the reason for rights' protection. Life can be made to be not worth living, Field implies. This possibility means that, to be truly effective, "[t]he provision [Due Process Clause] equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world."[76] Torture deprives life as does murder. The right to life includes, therefore, bodily integrity. Even broader than restricting death and mutilation, the state cannot deprive a person "of whatever God has given to everyone with life for its growth and enjoyment…."[77] As will be discussed in Chapter V, Field saw

[74] *Munn v. Illinois* 94 U.S. 141.

[75] *Ibid.,* 94 U.S. 142.

[76] *Ibid*.

[77] *Ibid.*

Constitutional and governmental protections of rights as facilitating individual and communal pursuits of happiness. God gives many means to felicity in a person's life. The Due Process Clause, Field reasons, protects the person from a state interfering with these gifts.

As discussed above, the right to liberty ties so closely to its expression as to make ownership and use practically indistinguishable. Liberty with little use, with little sphere of expression, can be no liberty at all. Therefore, like life, liberty goes beyond escaping "physical restraint or the bounds of prison."[78] Government can obliterate liberty by regulation outside of cell bars as it can by confinement within them. More expansively, Due Process in the case of liberty means freedom of travel, to choose employment, "and to act in such a manner, not inconsistent with the equal rights of others, as his judgment may dictate for the promotion of his happiness…."[79]

Property rights, finally, must also extend well beyond mere possession. They, like all other rights, exist for use. Governments certainly could infringe on the right to property through confiscation. But it may deprive property's use just as effectively through regulation. Field notes that if:

> the owner is prohibited from using his building for the purposes for which it was designed, it is of little consequence that he is permitted to retain the title and possession; or if he is compelled to take as compensation for its use less than the expenses to which he is subjected by its ownership, he is, for all practical purposes, deprived of the property as effectually as if the legislature had ordered his forcible dispossession.[80]

[78] *Munn v. Illinois* 94 U.S. 142.

[79] *Ibid.*

[80] *Munn v. Illinois* 94 U.S. 142-3.

This reasoning reflects much modern Takings Clause jurisprudence.[81] Regulation may constrain the use of property as to make it worthless for its intended purposes, or any purposes at all. It may make possession untenable through price controls or requirements making property undesirable. To truly protect the actual content of property rights, Due Process enforcement must guard against such back-door infringement.

Here we see Justice Field articulating for the first time his vision of a content-based Due Process Clause. The Due Process Clause expansively protected the rights to life, liberty, and property beyond mere procedure. These protections ensured a core content to rights against any state action.

Police Power

A content-based Due Process Clause served the important task of protecting individuals against state governments. Yet these protections were incomplete. They articulated what state governments could not do. But what policy goals could and should they pursue?

This question turns my focus to the other half of Field's cooperative vision: the police power. For the majority in *Munn v. Illinois,* the relationship did not appear cooperative. In denying Due Process Clause claims, the Court upheld Illinois's rate regulation as a legitimate exercise of police power.

But how did the Court understand this state power? Though the basis for upholding the regulation, Waite dealt only briefly with the police power in and of itself. The police power, he noted, broadly bestowed on state governments the authority to

[81] See *Nolan v. California Coastal Commission* 483 U.S. 125 (1987); *Lucas v. South Carolina Coastal Council* 505 U.S. 1003 (1992).

legislate for the common good.[82] Waite left this common good undefined except to include the contested regulations within it. The laws under review pursued the common good as "regulations requiring each citizen to so conduct himself…so as not unnecessarily to injure another."[83] This obligation comprised "the very essence of government" and "[f]rom this source come the police powers…."[84] Police power sought to stop injury. Yet the common good was far from limited to such protection. Therefore, the Chief Justice gave an example not a definition. After this brief discussion, Waite revealed no more on the matter, focusing instead on the public/private and ownership/use distinctions discussed above. The concept of the common good, central to knowing the purpose and extent of police power, remained undefined.

Waite's broad, vague description reflected for Field a deep problem in police power jurisprudence. Judicial treatment of this concept suffered from the opposite problem facing the Due Process Clause. Whereas the latter had been defined into non-existence, the former's definition left no limits. Waite's language was far from original on this matter. Police power at times received definition in the context of federalism, where the power might divide along state and national lines.[85] Chief Justice Taney, for example, referred to police power as "nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions."[86] Police power

[82] *Munn v. Illinois* 94 U.S. 126.

[83] *Ibid.,* 94 U.S. 124.

[84] *Ibid.,* 94 U.S. 125

[85] This point is particularly true regarding police power's relationship to the Commerce Clause, which will be addressed in detail in Chapter Four.

[86] *License Cases* 46 U.S. 583 (1847).

thus was equated with state power in general, to be contrasted to functions of the national government.

But regarding police power limits on the state-citizen plain, definition was as broad as it was tentative. Markus Dubber therefore notes that "[t]he police power's defining characteristic became its very undefinability," continuing that "[v]irtually every definition of the police power was accompanied by the remark that it cannot be, and has not been, defined."[87] An example of this tendency predating *Munn* came just four years earlier in the *Slaughterhouse Cases.* Justice Miller's majority opinion said "[t]his power is, and must be from its very nature, incapable of any very exact definition or limitation."[88] Miller cited precedent from the 1851 Massachusetts Supreme Court case of *Commonwealth v. Alger*, where state Chief Justice Lemuel Shaw said, "[i]t is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise."[89] The problem constituted an epistemological gap between essence and application. A judicial body could not know police power in and of itself enough to give it cognizable definition. But the same body could look to particular pieces of legislation and pronounce them valid. Waite's opinion fell squarely into this line of reasoning, leaving the police power broadly, vaguely, and thus barely defined.

Field therefore lamented that "from the language often used respecting it, one would suppose [police power] to be an undefined and irresponsible element in

---

[87] Markus Dirk Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (New York: Colombia University Press, 2005), 120. See also Randy Barnett, "The Proper Scope of the Police Power," *Notre Dame Law Review* 79(2003-2004): 475.

[88] *Slaughterhouse Cases* 83 U.S. 62.

[89] *Commonwealth v. Alger* 61 MA 85 (1851).

government…."[90] Police power's status as undefined contributed to its status as irresponsible. To hold responsible entailed knowing what an entity was and thereby what it should and should not do. How could a judicial body declare a law inside or outside police power when it possessed no real definition of the power? Melded with this dearth of knowledge was the judicial principle, re-affirmed by Waite, that "[e]very statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained."[91]

Absence of definition combined with presumed constitutionality left no real restraint within police power itself. Here we see the basis for the combative understanding of police power and the Due Process Clause which lingers to this day. Functionally, police power was boundless in and of itself. It sought an amorphous common good or was merely state sovereignty. In practice this constituted majority will. The states would do as they pleased so far as their police power was concerned. By contrast, the purpose of the Due Process Clause was to limit state government when it sought to violate rights. Due Process curbed police power, setting parameters to its boundless reach that majority will would try to exceed and thereby combat.

For Field, such parameters would certainly improve upon mere procedural due process, which in *Munn* amounted to a re-assertion of pure majority will. Some limits on the power's exercise would occur. Yet these limits would not define what police power was, merely where it could not go.

---

[90] *Munn v. Illinois* 94 U.S. 145.

[91] *Munn v. Illinois.,* 94 U.S. 123.

Instead of reading the Constitutional provisions against each other, Field sought cooperation through establishing intrinsic limits to police power. Rightly defined, police power could constitute a limited but legitimate governmental function which did not conflict but cooperated with the Due Process Clause.

Giving police power definition for Field started with its application—the part the courts claimed the ability to know in particular cases. These applications were discussed in the language of traditional police power categories. In one of the earliest extended discussions of police power, 1837's *New York v. Miln,* Justice Barbour's majority opinion and Justice Story's dissent together spoke of safety, health, peace, and morals as police power categories.[92] In the *Passenger Cases* ten years later*,* Justice McLean described police power as "guarding the safety, the health, and morals of its citizens."[93] These categories comprised examples of areas over which state police power could regulate. Descriptions like these became standard for the Court when addressing police power questions up to and past Justice Field's tenure on the Court.

Field used these categories in his *Munn* dissent. Areas over which police power could legislate included "[w]hatever affects the peace, good order, morals, and health of the community…."[94] Later on in the dissent, Field added "safety" to this list as well.[95] Field therefore began his definition of police power from ground he held in common with his colleagues, for the basic categories he used to describe police power conformed to the history of the Court.

---

[92] *New York v. Miln* 36 U.S. 102 (1837).

[93] *Passenger Cases* 48 U.S. 408 (1849).

[94] *Munn v. Illinois* 94 U.S. 145.

[95] *Ibid.,* 94U.S. 146.

But Field's use of the categories was different. Previous articulations looked on the police power categories as mere examples, descriptions that in no way entailed limitations. Field instead saw them as identifiable parameters for the power's application. These parameters were judicially cognizable. Cognizable, these categories could comprise boundaries.

The shifting of categories from vague example to precise application necessitated giving police power itself definition beyond vague notions of sovereignty or the common good. Real definition would both empower and restrain, marking off spheres of power in which states could act but beyond which they could not go. Field sought to give this definition through articulating a discernible purpose to the police power itself. What it sought defined what it was. What it was defined where it could go. Then the police power categories could present boundaries because, more than mere example, they logically stemmed from that discernible purpose.

Field described this purpose as "legislation which secures to all protection in their rights…."[96] Police power's object consisted in securing the rights of all persons. For Field, this purpose aligned with the very reason governments' are formed. Citing the Declaration of Independence, Field would elsewhere say that to "secure them [rights] 'governments are instituted among men.'"[97] But additionally, for Field this purpose also answered the problem of lacking definition and thereby responsibility. Rights for Field contained the specificity to make their protection by police power discernible.

[96] *Munn v. Illinois* 94 U.S. 145.

[97] *Butcher's Union Co. v. Crescent Union Co.* 111 U.S. 757.

What was the content of these rights that made them less vague than other judicial articulations? Field, quoting Vermont's Supreme Court, declared the police power to protect "the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property in the state."[98] Such language mixed traditional police power categories with those rights enumerated in the Due Process Clause. Field interpreted the mixture as conflation. The right to life, understood in Field's expansive manner, included health and comfort. Safety included guarding person and property.[99] Far from mere examples, police power subjects paralleled the rights under the Due Process Clause because they were the rights which, as Field stated in *Slaughterhouse,* "belong to the citizens of all free governments."[100] Police power regulations would be a means for their protection. Insofar as they did so, police regulations were legitimate. Insofar as they did not, they transgressed the bounds of legitimate Constitutional power.

As we can see, Field's articulation of police power's end also connected it to the Due Process Clause. Both pursued the same goal, the protection of rights. These rights furthermore aligned in their content. Both sought to protect the rights to life, liberty, and property. Field saw this common goal as the basis for a cooperative, not antagonistic, relationship. The purposes of each provision sought to realize liberty for those protected. In this purpose, their relationship was one of cooperation, not duplication. Common purpose did not mean overlapping application. This is because their cooperation stemmed from the varying threats that existed for rights. The Due Process Clause recognized the

---

[98] *Munn v. Illinois* 94 U.S. 147.

[99] Field's extensive equation of Due Process rights and police power categories receives extended examination in Chapter III.

[100] *Slaughterhouse Cases* 83 U.S. 97.

threat to rights posed by government. It would keep states from infringing on persons' life, liberty, and property. Government, however, was far from the only threat to rights. Other individuals could infringe on a person's rights. Non-governmental actors could employ acts of murder and other bodily harm, physical restraint, and stealing or spoliation of property. These denied an individual his rights to life, liberty, and property as much as similar actions by state entities. Police power recognized these threats posed by persons or groups. It would protect the same rights as Due Process from this different hazard. Together, police power and the Due Process Clause would guard persons' rights from the different entities seeking to infringe upon them. This relationship, far from antagonistic, would cooperate toward governments strong enough to protect rights but limited enough to not constitute their own threat to the same.

This goal placed the key to police power's extensive sphere in the very concept thought only to limit it. Field saw the rights to life, liberty, and property as broad and deep. The right to life in *Munn*, recall, extended beyond "mere animal existence," to that which "God has given to everyone with life for its growth and enjoyment…."[101] The right to liberty meant to do what in one's own judgment "may dictate for the promotion of his happiness"[102] while property included both possession and use. This understanding of rights certainly justified a broad reading of Due Process against state infringement. Many Field scholars affirm this point in order to argue how it severely limited police power.[103]

---

[101] *Munn v. Illinois* 94 U.S. 142.

[102] *Ibid.,* 94 U.S. 142-143.

[103] Kens, *Justice Stephen Field,* 8-9, 165; McCloskey, *American Conservatism,* 77-79; Carl Brent Swisher, *American Constitutional Development,* (Boston: Houghton-Mifflin Company, 1943), 341.

These scholars, however, fail to see that Field did not merely limit police power by protecting life, liberty, and property. He also grounded his police power in the very same protection.[104] This point is crucial to understanding the extent of state regulatory power. It is crucial because rights were inherently expansive regardless of who might try to infringe upon them. As these rights were defined expansively against state action, so Field defined them expansively for state action. This expansiveness included both regulation's subject and its extent. Field thus said regarding police power that "the legislation which secures to all protection in their rights…embraces an almost infinite variety of subjects."[105] Any subject which threatened the rights of others may be touched upon by the police power. This power's extent over these subjects could not itself violate rights. However, it could regulate to the degree needed to protect the rights of others. Thus a state "may control the use and possession of…property, so far as may be necessary for the protection of the rights of others…."[106] It may regulate liberty, as an individual's right only included the ability "to act in such a manner, not inconsistent with the equal rights of others."[107]

Thus, the wide sphere carved out for Due Process applied as well to police power. As these protections gave Due Process wide range to protect *against* government, so these same protections created a large sphere for protection *by* government against other threats. State police power would no longer hold the free reign accorded to

---

[104] Kens notes that in *Munn* petitioners before the Court argued police power was limited to rights' protection. But he does not directly connect this point to Field's own opinion nor does he consider rights' content or expansive scope for police power in Field's jurisprudence. See Kens, *Justice Field,* 61.

[105] *Munn v. Illinois* 94 U.S. 145.

[106] *Ibid*.

[107] *Ibid.,* 142-143.

indiscernibility. But it would contain all power needed to protect expansively defined rights.

Conclusion

In the end, another means of addressing Illinois' problem existed. Rather than interpreting the common law to effectively eliminate the private sphere, the Court could have turned to the same source to limit contracts in restraint of trade. This doctrine, whose origins can be traced as far back as the early 15th century,[108] includes the concept that courts can reject unreasonable "non-compete" contracts that exclude all competition between businesses.[109] The elevator owners, as discussed before, did constitute a "virtual monopoly" in fact even as they were not a monopoly through law.[110] This monopoly was created and perpetuated by agreements—contracts—between the grain elevator owners. Furthermore, this contracted monopoly affected the commercial transport of grain to much of the country east of Chicago. In such extreme circumstances, the Court could have found this agreement an unreasonable restriction of the grain trade. On that basis, and not that of price controls, the Court could have encouraged the state to enact and then upheld subsequent regulations breaking up the monopoly.

Doing so would have upheld some kind of regulation of the elevators while avoiding the Court's defining away protections for private action. Furthermore, in

---

[108] See George Stuart Patterson, *Law of Contracts in Restraint of Trade with Special Reference to "Trusts,"* (Philadelphia: University of Philadelphia Press, 1891), 2-12.

[109] Roger LeRoy Miller, *Modern Principles of Business Law* (Stamford, CT: Cengage Learning, 2011), 246.

[110] *Munn v. Illinois* 94 U.S. 131. Field held that monopolies only existed by law, when government bestowed exclusive privilege on one person or group over a trade. The Justice held tenaciously to this distinction in distinguishing his argument between the legal monopoly of *Slaughterhouse* and the factual one in *Munn.*

defending this position, the Court could have employed the very language of liberty and rights found in Field's dissent. The extremity of these circumstances threatened the just usage of property for those engaging in the grain market. Thus certain regulations were reasonable in this case to protect, not infringe upon, property rights. At the same time, the focus on the facts' extremity could have maintained property protections for those regulated as well. Not every instance of property's usage could be defined as "public" and thereby subject to nearly any statute. Only similar circumstances to this monopoly would apply.

Neither side chose to pursue this route. Instead, the opinions focused on the division between the private and public spheres previously discussed. But in this debate, Field forcefully stated his vision of a cooperative relationship between Due Process and police power. Far from antagonistic, both would protect individual rights in an expansive, content-based manner. Though writing in dissent, Field's opinion in *Munn v. Illinois* established the arguments the Justice would continue to make and which would one day capture a consistent, lasting majority on the Court.

CHAPTER THREE

Beyond *Munn:* The Cooperative Relationship Continued

Field's dissent in *Munn* posited a cooperative relationship between the Due Process Clause and police power. In Field's opinion, these provisions' cooperation inhered in a common goal: the protection of rights. One protected liberty from government, the other through government.

In this chapter, I build upon this view by turning to Field's subsequent jurisprudence. First, I confront a significant objection overshadowing Field's vision.
That objection concerns the legitimacy of Substantive Due Process itself. Many scholars and Supreme Court Justices deny this reading of the Due Process Clause, arguing instead that the Clause declares only procedural rights to be "due" a person. To this objection, I argue that the Justice eschewed the procedural/substantive distinction of modern debates, interpreting due process as protecting a single conception of rights in various ways.

Second, I use the principles Field held for Due Process to better understand police power's nature and extent. Field connected police power categories to Due Process rights, thereby interpreting states to hold extensive regulatory power to protect life, liberty, and property.

Third and finally, I complete my discussion of the cooperative relationship between Due Process and police power by considering how Field adjudicated between the two provisions when asserted against each other. Here I argue that Field again sought to protect

rights, but used judgment to account for particular facts in order to side with the claim most directly protecting individual rights.

Procedure

In *Munn,* Field argued that the Due Process Clause guarded rights from all state infringement. Life, liberty, and property should each receive broad definition and thereby broad protection. In light of such arguments, scholars declare Field "a champion" if not the originator, of "substantive due process."[1]

Doing so enters Field into a longstanding and ongoing judicial and scholarly debate. The debate stems from dividing the rights due process protects into substantive and procedural categories. Substantive Due Process is defined as "the idea that the Due Process Clause imposes substantive limits on governmental power."[2] These substantive limits exist because they protect "substantive rights,"[3] rights which place certain subjects off-limits to state legislation. Procedural due process, however, concerns only the modes by which states carry out their laws. Procedural rights mean such action must be equally administered in a "fair" manner by "organizational and procedural norms."[4]

Within this debate, many deny the legitimacy of a substantive reading. The Due Process Clause, it is argued, is meant to refer only to procedural rights such as trial by

---

[1] Kens, 4; see also 157-163.

[2] Cass Sunstein, *Designing Democracy: What Constitutions Do* (New York: Oxford University Press, 2001), 80.

[3] Mark Tushnet, "The Supreme Court and Contemporary Constitutionalism: The Implications of the Development of Alternative Forms of Constitutional Review" in *The Supreme Court and the Idea of Constitutionalism* edited by Steven Kautz, Arthur Melzer, Jerry Weinberger (Philadelphia: University of Pennsylvania Press, 2009), 122.

[4] Robert Alexey, *Theories of Constitutional Rights* (New York: Oxford University Press, 2002), 349. See also Burt Neuborne, *Fundamentals of American Law,* edited by Alan B. Morrison (New York: Oxford University Press, 1996), 116.

jury or the right to counsel.[5] These scholars look to the text itself to make their argument. The use of the phrase "process" in the clause led John Hart Ely to famously deride Substantive Due Process as "a contradiction in terms—sort of like 'green pastel redness.'"[6] For others, both procedural and substantive rights exist. Ronald Dworkin, for example, claims that we should understand provisions such as the Due Process Clause "to be substantive as well as procedural."[7] Certain situations demand procedural rights' protection, others their substantive counterpart.

However, uniting the differing views is the strong distinction and separation between procedural and substantive rights.[8] For opponents of substantive due process, procedural rights operate independently because they alone exist. For proponents, both procedural and substantive rights exist largely independent of the other, operating mostly alone in particular cases.

---

[5] See Robert Bork, *The Tempting of America,* 31-32. Also, the jurisprudence of Supreme Court Justices Clarence Thomas and, until recently, that of Antonin Scalia denies a substantive reading to the Clause. See both Justices' concurrences in *McDonald v. City of Chicago* 561 U.S. 3025.

[6] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980), 18. Loren P. Beth also says, "[t]he concept of substantive due process is…illogical: the word *process* cannot easily be brought to accommodate substance." See Beth, *John Marshall Harlan: The Last Whig Justice* (Lexington, KY: The University Kentucky Press, 1992), 209. See also Cass Sunstein, *Designing Democracy*, 80; Robert Bork, *The Tempting of America*, 31.

[7] Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (New York: Oxford University Press, 1996), 73; Mark Tushnet, "The Newer Property: Suggestions for the Revival of Substantive Due Process" *The Supreme Court Review* (1975): 261-288.

[8] Sullivan and Massero note how "the two strands have developed into fairly distinct doctrines." See Sullivan and Massaro, *The Arc of the Due Process Clause in American Constitutional Law,* 38. See also Dworkin, *Freedom's Law,* 72; Rhonda Wasserman, *Procedural Due Process: A Reference Guide to the U.S. Constitution* (Westport, CT: Praeger Publishers, 2004), 210.Randy Barnett's justification of Substantive Due Process does not so much put the two together as add a third element—and implied necessary and proper clause—into the calculation. Kermit Hall brings similar reasoning to Barnett in this matter. See Barnett, *Restoring the Lost Constitution,* 206-207; Kermit Hall, *The Myth of Judicial Activism: Making Sense of Supreme Court Decisions* (Hartford, CT: Yale University Press, 2006), 118-122.

Field's place in this debate as defender of Substantive Due Process is problematic. The problem does not rest in whether Field believed the Due Process Clause protected what the current debate considers substantive and procedural rights. The problem concerns how the Justice himself understood the meaning of due process. Significant evidence exists that the procedural and substantive divide within the Due Process Clause may be anachronistic when applied to Field's time. James Ely, Jr., persuasively traces interpretations of due process which make no distinction between substance and procedure back to Magna Charta, continuing in colonial readings of Coke and Blackstone, persisting throughout antebellum state jurisprudence, and systematizing in the post-Civil War treatises of Michigan Supreme Court Justice Thomas M. Cooley.[9] These interpretations protected what today's debate call substantive and procedural rights. They simply did not see such distinctions in the concept of due process.[10]

The narrative asserting a distinct substantive reading as a latter 19th century invention, in reality, may owe more to early twentieth century Progressive historians.[11] Wayne McCormack, for example, argues that, at least linguistically, "[n]o recognized distinction between procedural and substantive due process existed until after the New

---

[9] James W. Ely, Jr., "The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process" *Constitutional Commentary* 16(2) (Summer 1999): 315-345. Field himself read Cooley, citing him in several opinions on the Supreme and circuit courts. See *Ho Ah Ko v. Nunan,* 12 F. Cas. 252 (1879), *Gloucester Ferry Company v. Pennsylvania* 114 U.S. 196 (1885). Ely adds that the phrase "law of the land" was understood by many as equivalent to due process and inclusive of substantive limits on legislative power. Thus even the interpretation of a purely procedural English due process is suspect. See Ely, 320-325. See also Edward Keynes, *Liberty, Property, and Privacy,* 20.

[10] Ryan C. Williams denies this long a lineage but still argues that by the time of the Fourteenth Amendment, the concept of due process included both. See Ryan C. Williams, "The One and Only Substantive Due Process Clause" *Yale Law Journal* 120(2011): 408.

[11] *Ibid.,* See also Richard Hofstadtler's work, *The Progressive Historians: Turner, Beard, Parrington* (Knopf, 1968), 3-4. For a good example, see Edward S. Corwin, *Court Over the Constitution,* (Princeton, NJ: Princeton University Press, 1938), 105-108.

Deal eliminated the substantive protections."[12] This work cannot fully examine the extent to which such claims are true. [13] Yet such scholarship does suggest that in Field's time the substantive/procedural divide did not necessarily define due process understandings. A closer look at Field's Due Process opinions support this interpretation, distancing the Justice from the modern divide. Procedural due process did not represent an alternative to substantive. It did not even constitute a distinct, independent option. Instead, Field saw the rights protected by the Due Process Clause as the same even as he saw distinction in the manner by which states' infringed upon them.

How Field defined the concept of due process helps reveal this perspective. The Justice argued that the full definition of due process would "embrace every permissible exertion of power affecting private rights, and exclude such as are forbidden."[14] This definition posited two components to the concept of due process—rights and actions affecting those rights.

Field defined due process rights according to one term: "private rights." In so doing, he made no procedural/substantive distinction. All due process rights fell within this one category. To describe what these rights included, he turned to the text of the Due Process Clause. Such rights encompassed a persons' "life, his liberty, or his property."[15]

---

[12] Wayne McCormack, "Economic Substantive Due Process and the Right to Livelihood" *Kentucky Law Journal* 82(1993-1994): 404. Ely agrees, declaring that, at least linguistically, "courts did not differentiate between procedural and substantive due process until the New Deal Era." See Ely, 319.

[13] The opinions of Justice Oliver Wendell Holmes, Jr., for instance, can be seen as a predominately a procedural reading of the Due Process Clause. See G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (New York, Oxford University Press, 2007), 326-328. However, his opinions also could be seen to contain substantive protections rooted in tradition. See Sunstein, *Developing Democracy,* 80.

[14] *Dent v. West Virginia* 129 U.S. 123 (1889). Field used the same language in *Pennoyer v. Neff.* See 95 U.S. 733 (1878).

[15] *Dent v. West Virginia* 129 U.S. 124.

Here Field again eschewed a divide along substantive and procedural grounds. These particular private rights were one in kind, with no qualitative distinction between them.

Their similar content followed the description Field gave in his *Munn* dissent. Echoing this opinion, Field asked in *Stone v. Wisconsin* "[o]f what avail is the constitutional provision that no state shall deprive any person of his property except by due process of law if the state can, by fixing the compensation which he may receive for its use, take from him all that is valuable in the property?"[16] A property's value attached to the entity itself, not to the way in which the state treated it. The private right, therefore, concerned the property's actual content. In the 1885 case of *Barbier v. Connelly*, Field similarly argued that these rights included the power to "acquire and enjoy property"[17] along with living life and exercising liberty. Again, Field defined only one kind of right—private rights—whose content of life, liberty, and property each deserved protection in their actual possession and use.

In these claims, Field separated himself from the modern debate. Life, liberty, and property comprised the "private rights" protected by due process. These rights subsisted in their possession and exercise. His argument therefore leaves no place for separate procedural rights regarding administration of laws or components making up a fair trial. The question then becomes where to place these subjects. For Field does speak of these measures as part of due process. Due process included numerous subjects within "the administration of criminal justice," particularly those involved in a trial. If Field asserted

[16] *Munn v. Illinois* 94 U.S. 186.

[17] *Barbier v. Connelly* 113 U.S. 31.

only the content-based private rights to life, liberty, and property, then in what way did these other "rights" exist?

To understand the place of these protections, we must return to how Field expansively interpreted the rights to life, liberty, and property. In the 1888 case of *Powell v. Pennsylvania,*[18] for example, Field opposed state laws banning the production and selling of oleomargarine. Here he declared in dissent the "right to procure healthy and nutritious food..."[19] as a basis for striking down the state law. One cannot find this right listed alongside life, liberty, and property. However, Field declared food to be a means by which "life may be preserved and enjoyed."[20] The right to food existed as part of, even an extension of, the right to life. This reasoning pointed back to *Munn,* where Justice Field argued that the right to life went beyond "mere animal existence" to include "whatever God has given to everyone with life for its growth and enjoyment…."[21]Here in *Powell* Field reiterated this point, claiming that these rights were "not to be construed in a narrow or restricted sense."[22] Food was necessary to preserve life. It also was needed to enjoy it. Therefore, the right to food existed because of its role in fulfilling the right to life.

This principle expounded in *Powell* helps to explain the place of those rights modern debate defines as procedural. Field's expansive view of rights entailed subsidiary rights, liberties which extended from life, liberty, and property as part of their preservation and enjoyment. Field understood proper administration of laws as part of

[18] 127 U.S. 678 (1888).

[19] *Ibid.,* 127 U.S. 692.

[20] *Ibid.*

[21] *Ibid.*

[22] *Ibid.,* 127 U.S. 691.

due process in the same manner as the right to food. The right to food comprised an extension of the expansive right to life, preserving it and aiding in its enjoyment. In the same way, these supposedly "procedural" rights also extended from preserving life, liberty, and property. Field repeatedly spoke in this way. In *Missouri Pacific Railway,* Field argued that "those general rules which our system of jurisprudence prescribes" were "for the security of private rights."[23] As discussed before, private rights consisted of life, liberty, and property as designated in the Due Process Clause. Similarly, in *Pennoyer v. Neff,* the Justice spoke of "those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights."[24] Again, the correct administration of law helped fulfill private rights through protecting and enforcing them.

Understanding Field's argument here requires considering why, ultimately, the means for proper enforcement and application of law are rights. To answer, we first must return to Field's definition of due process. In his definition, Field spoke both of "private rights" and actions "affecting" those rights. While the Justice defined "private rights" in a unified fashion—with no procedural/substantive divide— he distinguished governmental actions which touched upon these rights to life, liberty, or property. Such actions could be "permissible" or "forbidden." Field argued that the line dividing these actions concerned whether or not they infringed upon "private rights." So long as the state did not "deprive one of any of his rights,"[25] their actions were permissible. Insofar as they did infringe, they were forbidden.

---

[23] *Missouri Pacific Railway v. Humes* 115 U.S. 520.

[24] *Pennoyer v. Neff* 95 U.S. 733.

[25] *Dent v. West Virginia* 129 U.S. 123.

But Field did not equate all manner of states' "forbidden" actions. State actions varied. They enacted laws. They also enforced and applied them. Field argued that both forms of state action could infringe upon rights. But they did so in different ways. Certain laws in and of themselves infringed upon life, liberty, and property. At other times, states could impair rights in the manner they enforced a legitimate law.

The latter circumstance helps to explain the connection between so-called "procedural" rights and life, liberty, and property. In cases such as *Powell,* Field objected to the legislation itself. The legislation's purpose in banning oleomargarine infringed on private rights to life, liberty, and property. Here Field would support striking down the legislation itself to protect rights. But in many other cases, the law's intended purpose posed no threat. In the case of *West Virginia v. Dent,* for example, Field agreed with the statute in question. West Virginia passed a law requiring all persons practicing medicine to obtain a medical license approved by a state board. As discussed below, the Justice thought this law a reasonable regulation to protect the public health. Good purposes did not exhaust possible state infractions, however. Field said that "in this case," due process still demanded that the law be "general in its operation…and is enforceable in the usual modes established in the administration of government…that is, by process or proceedings adapted to the nature of the case."[26] If enforcement and application were rightly done, then the state action, in its entirety, was permissible.

Thus, laws' enforcement did not always follow its legitimate, intended purposes. West Virginia could have enforced the medical licensing requirement in *Dent* only in certain counties or against particular economic or social classes. Doing so would violate

[26] *Dent v. West Virginia* 129 U.S. 123.

Dent's right for laws enforced against him to be "general in their operation." But why did Dent possess this right? By not enforcing in a general manner, the law's application would change its effect. It would operate not as a health law, since then it would have "no relation to [the] calling or profession"[27] which it purported to regulate. Instead, Field argued that such enforcement would deny those targeted the ability to seek out and work a particular vocation. Doing so would deprive Dent of the equivalent of "real or personal property" in the "prosecution" of his profession.[28] As each person's property right included "his right to pursue a lawful vocation,"[29] this point formed the core Due Process violation. The ultimate problem with wrong enforcement concerned its effect on Dent's property. Therefore, Dent's right to property was fulfilled and protected by the law being "general in its operation."

The same problem of enforcement applied to the rights comprising a fair trial. What is at stake in a trial? Those convicted receive punishment while those acquitted do not. These punishments certainly affect a person's rights. They could restrict life's enjoyment or even end its existence. Liberty to go where one pleased faced restraint through incarceration. States in punishing could further inhibit or destroy property's use and possession.

Field approved of inhibiting these rights if done "in punishment for a crime."[30] Those who broke legitimate laws could justly see their life, liberty, and property restricted as a punishment. Doing so in fact comprised an essential component of the

---

[27] *Dent v. West Virginia* 129 U.S. 122.

[28] *Ibid.,* 129 U.S. 121-122.

[29] *Ibid.,* 129 U.S. 122.

[30] *Powell v. Pennsylvania* 127 U.S. 692.

police power. Punishment protected rights by inflicting harm on those who, in violating law, infringed on others' liberty.

But accusation does not equate to guilt. The state may rightly proscribe a crime and wrongly charge an individual with committing said crime. Doing so removed the justification for state action. It thereby infringed on life, liberty, or property, for "no state can give and no state can take [life, liberty, property] away…"[31] except as punishment. For Field, therefore, the ultimate problem with enforcing punishment against an innocent person was its infringement on individual rights. The Justice believed this danger was real. The executive branch, in enforcing laws, could make mistakes in whom it accused and therefore sought to punish. Furthermore, the executive branch actually could purposefully make false accusations. Revisionist scholars of Field frequently note his antipathy toward "partial legislation," where state laws bestowed special privileges or harms to particular groups, often for unethical reasons.[32] Given less attention is Field's similar antipathy toward such behavior in the enforcement of law. Executive branches could wield law's enforcement power to reward friends, harm enemies, and other pernicious results unintended by the legislation. Field in fact said that without certain means to curb such dangers, "no one would be safe from oppression wherever power may be lodged."[33]

The rights comprising a fair trial existed to help fulfill the rights to life, liberty, and property by protecting them against such threats. Most essential, trials comprised an "impartial tribunal," including both judge and jury, to hear and decide guilt or

[31] *Powell v. Pennsylvania* 127 U.S. 692

[32] See Howard Gillman, *The Constitution Besieged,* 64-69.

[33] *Ex Parte Robinson* 86 U.S. 513 (1873).

innocence.[34] Justice Field in fact argued that for a state, ensuring those deciding the case did so without "bias" against the defendant "is among its highest duties."[35] Doing so took the final decision to punish out of the hands of the accuser—the executive branch—and placed it among a judge and jury who ideally did not share the biases of that branch in its pre-existing determination of guilt. By so dividing accuser and determiner of guilt, the right to a fair trial protected against wrongful deprivation of life, liberty or property.

Field actually spoke of particular trial procedures as protecting these private rights. In the case of *Ex Parte Robinson,* for example, Field addressed the disbarring of an attorney, J.S. Robinson, by a lower court judge. Robinson stood accused of helping a potential trial witness evade a subpoena, and when questioned in court was summarily disbarred for what the presiding judge thought "angry, disrespectful, and defiant" responses worthy of such punishment.[36]

In this case, Field linked the right to pursue one's profession—such as practicing law— to that of "real or personal property."[37] Robinson's profession and its exercise were a form of property due protection like other forms of ownership.

Field continued that to deprive Robinson of his right to practice law, certain trial requirements were necessary. Their necessity came from the fact that they were "essential to the security of all private rights."[38]A trial helped secure private rights by acting as a

---

[34] See *Spring Valley Waterworks v. Schottler* 110 U.S. 364 (1884); *Hayes v. Missouri* 120 U.S. 71 (1887).

[35] *Hayes v. Missouri* 120 U.S. 70.

[36] *Ex Parte Robinson.* 86 U.S. 506-508.

[37] *Ex Parte Robinson* 86 U.S. 512; See also *Ex Parte Garland* 71 U.S. 333 (1866). *Ex Parte Wall* 107 U.S. 265 (1883).

[38] *Ex Parte Robinson,* 86 U.S. 512.

guard against the mistakes and mischief of those enforcing law, keeping punishment as much as possible only to the guilty.

In the *Ex Parte Robinson* case, Field named two particular components of the right to a trial which secured liberty. The Justice declared that before disbarment, the attorney "should have notice of the grounds of complaint against him and ample opportunity of explanation and defense."[39]

Each right named here helped to preserve Robinson's property right in practicing law. First, a defendant like Robinson should be told of the charges faced. Doing so forced the state to specify his infraction. Among the protections afforded by a trial was that the accused faced charges stemming from a promulgated law. The law formed a standard not only for the accused's conduct but the state's action in prosecuting. Specifying an infraction could reveal whether the state lodged a legitimate accusation. Perhaps the statute did not truly apply in this case. Perhaps the state did not possess clear information to indict. Forcing the state to declare its accusation before enforcement therefore helped protect Robinson's right to property from possible infringement.

Knowing the charges faced connected to the second protection. By it, Robinson, as a defendant, should receive an adequate chance to rebut the charges faced. This right helped address potential mistakes as well as wrongful action by the executive branch. The government's accusation would not stand alone. For this reason, Field in another case argued that Due Process "assured to everyone the same rules of evidence" in Court.[40] The defendant operated under the same rules of evidence as the prosecution and other

[39] *Ex Parte Robinson,* 86 U.S. 512.

[40] *Ex Parte Virginia* 100 U.S. 367.

defendants. Thereby he could respond with countering proof and argument, possibly exposing false accusations. When argued before an impartial judge and jury, the defendant could better preserve whatever rights were at stake—whether life, liberty, or property—against their infringement from mistake or foul play.

Beyond guilt and innocence, a fair trial also protected rights in the extent of punishment a convicted person received. In *O'Neil v. Vermont,*[41] the state passed a law banning the sale and distribution of alcohol within its borders. In his dissent, Field approved the law. Punishments in these kinds of cases conformed to legitimate police power regulations. Even the particular punishment enacted by the legislature passed muster for Justice Field.

The problem lay in how O'Neil was charged. As in *Ex Parte Robinson,* Field argued that due process demanded "a specific description of all the offenses for which the defendant was to be put on trial."[42] In that case, Field worried that failure to do so could infringe the rights of an innocent person. In this case, the Justice agreed that O'Neil broke the law and should be punished. However, to what extent had he broken the law? The indictment "describes only a single offense, yet, by the addition of the words 'at diverse times,' that document is held to justify a trial and uphold a conviction for 307 distinct offenses, only one of which is set forth in the accusation."[43]

O'Neil's conviction extended to more than 300 counts when his indictment described only one concrete instance of violation. This action impaired O'Neil's right to have specific charges made against him, also undercutting his ability to defend himself.

---

[41] *O'Neil v. Vermont* 144 U.S. 323 (1892).

[42] *Ibid.,* 144 U.S. 366.

[43] *Ibid.,* 144 U.S. 338.

But Field ultimately traced this right back to O'Neil's private rights. For his 307 infractions, O'Neil received a sentence of more than fifty years in prison with hard labor.[44] Field declared that such punishment "in its severity…may justly be termed both 'unusual and cruel.'"[45] The problem was not punishment itself. It was the extent of the punishment. Field declared that punishments must not, "by their excessive length and severity" be "greatly disproportioned to the offenses charged."[46] Punishments must possess a reasonable relation to the crime. To do otherwise went beyond correction for the guarding of rights to the actual violation of those rights. Field argued that, in these circumstances, the long imprisonment under hard labor violated O'Neil's right to life and to liberty.[47] He would likely spend the rest of his life in prison without his freedom for one specified crime that did not deserve such extended, harsh punishment. Just as punishing the innocent infringed upon rights, so did punishing the guilty beyond what their crime deserved. In either case, Field repeatedly spoke of rights to a fair trial as helping fulfill the rights to life, liberty, and property. Rights to a fair trial existed because private rights demanded them for the sake of their preservation and enjoyment.[48]

---

[44] William J. Stuntz, *The Collapse of American Criminal Justice,* (Harvard University Press, 2011), 125.

[45] *O'Neil v. Vermont* 144 U.S. 339. In making this claim, Field called upon language residing in the 8th Amendment, stating it to declare an essential right inhering in the Fourteenth Amendment. Aside from Justice John Marshall Harlan, the rest of the Court claimed this prohibition for the national government only. Field disagreed. The Justice argued that the Bill of Rights in and of themselves do not apply to the states. However, insofar as the Bill of Rights "declare or recognize the rights of persons…the Fourteenth Amendment, as to all such rights, places a limit upon state power by ordaining that no State shall make or enforce any law which shall abridge them." 144 U.S. 363. This approach comprised an incorporation of sorts. To the extent that the Bill of Rights articulated the basic rights of persons, its language could be used to describe the substance of Fourteenth Amendment protections.

[46] *Ibid.,* 144 U.S. 340.

[47] *O'Neil v. Vermont* 144 U.S. 359.

[48] For more examples of rights' protection through legal proceedings, see *Fong Yue Ting v. U.S.* 149 U.S. 750 (1893), *Ho Ah Kow v. Nunan* 12 F. Cas. 256.

Here, we see that state enforcement reiterated the single nature of due process rights while highlighting different modes of state impairment. The "due process of law," therefore, did not conflict with protecting the content of life, liberty, and property. By Field's definition, persons were "due" a process whose result protected private rights, excluding every kind of state infringement as Constitutionally "forbidden."[49]

Police Power After Munn

Field's description of the Due Process Clause aids in understanding its relationship to police power. The Clause's cooperation involved recognizing room for state regulation to pursue the common goal of protecting liberty. Field's definition declared that actions which affected private rights were permissible. States could regulate regarding life, liberty, and property in acceptable ways. Furthermore, Field divided types of state action so that even if enforcement infringed on private rights, the restriction on enforcement did not necessarily forbid the law itself.

Field's *Munn* dissent had defined this space for police power in expansive terms. There, the Justice declared "[w]hatever affects the peace, good order, morals, and health of the community comes within its scope…."[50] Thus, for example, he remarked that "there is no end of regulations with respect to the use of property which may not be legitimately prescribed."[51] Whatever non-governmental threats existed to rights, state regulation could address them.

---

[49] *Dent v. West Virginia* 129 U.S. 123. Field used the same language in *Pennoyer v. Neff.* See 95 U.S. 733 (1878).

[50] *Munn v. Illinois* 94 U.S. 145.

[51] *Ibid.,* 94 U.S. 146.

In later cases, Field further described police power's reach by means of its cooperation with Due Process Clause ends. The Justice articulated and upheld a broad regulation by applying the same logic of rights he used in Due Process. The traditional police power categories comprised extensions and fulfillments of Due Process enumerated rights. Police power over health, safety, and morals was intended to protect a broad definition of life, liberty, and property. Field's description of police power categories in this way reinforced *Munn's* assertions of an expansive state regulatory power cooperating with Due Process toward liberty's protection.

Scholarship generally does not follow this interpretation. Older, Progressive historians reject the claim that Field expansively interpreted states' police power.[52] Revisionists accept a more expansive interpretation but, along with the Progressives, do not understand Field's reading of police power as protecting rights.[53]

To both explain Field's position and address these countering interpretations, I turn to specific connections Field made between particular Due Process rights and police power categories. Field regularly affirmed the principles of *Munn* regarding police power's nature and extent. He continued to define government regulation as "laws which are intended for the protection of private rights…"[54] which could "extend to all measures deemed essential" to protecting the public.[55] But he also addressed how life, liberty, and

[52] See Howard J. Graham, *Everyman's Constitution* (Madison, Wi: State Historical Society, 1968), 125; McCloskey, *American Conservatism,*

[53] See McCurdy, 971-974, 980-981; Gillman, 68-75.

[54] *Chicago RI & P RR v. McGlinn*114 U.S. 546 (1885).

[55] See *Charlotte v. Gibbes* 142 U.S. 393 (1892); *Barbier v. Connolly* 113 U.S. 31.

property each individually received protection through state regulations of health, safety, and morals.

Life

I begin with the right to life, the first enumerated in the Due Process Clause. Within Due Process Field gave this right a wide definition. The right extended "beyond mere animal existence" [56] to include the means by which "life may be preserved and enjoyed."[57] In the context of the Due Process Clause, then, the right to life placed significant restrictions on state action. In the context of police power, however, this broad definition empowered state governments to regulate in many ways to guard life from private threats.

Field saw several police power categories as protecting the right to life. The first concerned the public health. Health could be tied to "mere animal existence." Certain diseases posed a mortal threat. States stood well within proper bounds regulating to guard the lives of its people from such terminal health threats. But as the right to life for Field was more than merely staying alive, so regulatory power to protect this right extended beyond that which immediately caused death. Field had declared the right to life to include "whatever God has given to everyone with life for its growth and enjoyment."[58] Health partakes not only of mere living, but of growing in and enjoying life. To be unhealthy could stunt growth, physically, emotionally, and in the vocational pursuits Field saw as so crucial to seeking happiness. An unhealthy life also could infringe on

[56] *Munn v. Illinois* 94 U.S. 142. .

[57] *Powell v. Pennsylvania* 127 U.S. 690.

[58] *Munn v. Illinois* 94 U.S. 142.

enjoyment, as sickness, disability, and other health-related difficulties inhibited a fully protected right to life.

Justice Field thought state governments obligated to regulate so as to combat these kinds of threats to health and thereby to life. Therefore, Field upheld numerous regulations falling within this category. The case of *Dent v. West Virginia* is one example. As noted above, West Virginia required a medical license from the State Board of Health to legally practice medicine in its jurisdiction. Dent was refused his certificate because the medical school he attended, the American Medical Eclectic College of Cincinnati, "did not come under the word 'reputable' as defined by said board of health."[59] Prohibited from practicing medicine, Dent sued. In his lawsuit he claimed that denying him the ability to practice deprived him of his Due Process right to property in pursuing his desired vocation.

Writing for a unanimous Court, Field denied Dent's Due Process claim. He affirmed "the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex, and condition."[60] This right included the practice of medicine. No one could be barred absolutely from practicing without violating the Due Process Clause. However, Field continued that "there is no arbitrary deprivation of such a right where its exercise is not permitted because of a failure to comply with conditions imposed by the State for the protection of society."[61] Exercising one's profession was a

[59] Rennie B. Schoepflin, *Christian Science on Trial: Religious Healing in America* (Baltimore: Johns Hopkins University Press, 2003), 147.

[60] *Dent v. West Virginia* 129 U.S. 121.

[61] *Ibid.,* 129 U.S. 122.

permissible regulation if it had the clear purpose of protecting the people. West Virginia's law sought this goal. But what exactly did the state's regulation protect for the people? Field stated that physicians "deal with all those subtle and mysterious influences upon which health and life depend."[62] Here Field made a connection between the right to life and a person's health. Medical practice can save life or terminate life. But for Field life is more than "mere animal existence." Life includes both preservation and enjoyment.[63] Therefore, a doctor's role in improving or impairing health partakes of the expansive right to life, too. He can harm life not only in negating its preservation but in thwarting its healthy enjoyment. As the state must protect health as a part of life, so it can make regulations to ensure medical doctors possess some training and skill in carrying out a difficult practice. In making this argument, Field connected a right enumerated in the Due Process Clause with a category of police power. In Field's robust view of the right to life, health formed an extension of life, one by which the state could regulate doctors expansively to protect.

Field made similar arguments throughout his other opinions regarding public health. In *Baltimore & Potomac Railroad v. Fifth Baptist Church,*[64] for example, Field addressed a case involving the District of Columbia, where Congressional legislation held the same status as state regulations elsewhere.[65] The railroad company named built an engine house and a repair shop near the church. From the work done in this building, the

[62] *Dent v. West Virginia.,* 129 U.S. 122.

[63] *Powell v. Pennsylvania* 127 U.S. 690.

[64] 108 U.S. 317 (1883).

[65] See U.S. Constitution, Article I, Section 8 giving Congress power "[t]o exercise exclusive legislation in all cases whatsoever" over the area which would "become the seat of the government of the United States…."

church accused the railroad of "annoying the church congregation during services with loud noises, smoke, cinders, dust and offensive odors."[66] Though often reproached as being a railroad business partisan, Field wrote for a unanimous Court in favor of Fifth Baptist.[67] One reason pertained to health. The noises, smoke, and odors caused great discomfort and even illness to parishioners. It thereby violated the "right to comfortable enjoyment" of the Church "for the purposes for which it was erected and dedicated."[68] While it would violate the Due Process Clause to ban the railroad's activities entirely, Field said "[i]t is a wise police regulation, essential to the health and comfort of the inhabitants of a city, that they should be carried on outside of its limits."[69]

The "right to comfortable enjoyment" employed the same logic as that found in *Powell* for Due Process and *Dent* for police power. This right fulfilled an expansive right to life, one where health was necessary not only to its preservation, but to its enjoyment. In these cases, the expansive rights that gave wide range to Due Process gave similar reach to police regulations.

In addition to health, Field also linked the police category of safety to an expansive right to life also. Safety, like health, included a "mere animal existence" element. Murder posed as extreme a threat to individual safety as could be devised. But like health, safety went beyond mere survival. The right to life in the Due Process Clause

---

[66] Bruce Yandle, *Common Sense and Common Law for the Environment: Creating Wealth in Hummingbird Economics* (Lanthan, MD: Rowan & Littlefield, 1997), 102.

[67] See Ross, *Justice of Shattered Dreams,* 241-242; Ted Nace, *Gangs of America: The Rise of Corporate Power and the Disabling of Democracy* (San-Francisco: Barrett-Koehler, 2003), 92-93, 97-98; Swisher, 244-249, 381-383.

[68] *Baltimore & Potomac Railroad v. Fifth Baptist Church* 108 U.S. 335.

[69] *Ibid.*

forbade government from "mutilation of the body"[70] in addition to outright homicide. This extended the right to life to prohibit torture and many acts of physical harm. Government could not infringe on the right to life by threatening physical safety, not just by terminating existence. But this right at the same time empowered state governments to protect persons against similar threats from non-governmental sources.

With this link in mind, Field repeatedly upheld regulations intended to ensure public safety. Contrary again to certain portrayals of his jurisprudence, his opinions at times involved siding against business owners and corporations.[71] The case of *Mather v. Rillston*[72] makes both points. A miner suffered terrible injuries when an explosion involving dynamite occurred in a company's engine house. The man sued his employers for negligence, demanding damages for the incident. Writing for a unanimous Court, Field declared that "[a]ll occupations producing articles of necessity, utility, or convenience may undoubtedly be carried on…."[73] But this right to work and production was not without regulation. Field noted that some jobs were "attended with danger to life, body, or limb…." This case included such employment. Field found that, for example, the "heat and concussion" of the engine house "were a continuing danger to the safety of the persons employed in the mine…."[74]

These dangers, therefore, threatened the safety, up to the life, of the workers involved. In such cases, "it is incumbent on…the employers of others thereon to take all

[70] *Munn v. Illinois* 94 U.S. 142.

[71] Kens, 225-226.

[72] 156 U.S. 395 (1895).

[73] *Mather v. Rillston* 156 U.S. 398.

[74] *Ibid*.

reasonable and needed precautions to secure safety to the persons engaged in their prosecution."[75] The owners held a legally enforceable obligation to assure that all dangerous tasks included reasonable procedures and training to maintain a safe environment. To this end, those employed in these tasks must be "competent persons, familiar with the business and having sufficient skill therein…."[76] Furthermore, the stockpiling of explosives must not be done in a manner that could reasonably lead to explosions like that which occurred in the case. If these precautions could not be taken, then the work, "however important…should not be prosecuted."[77] Precautions, in fact, were not taken in this instance. Field noted "the confused and disorderly position" in which explosives were stored in places prone to cause accidents, with no effort made by ownership to address the danger.[78] Furthermore, the injured man testified that in addition to not knowing "the first part of mining," he also "had never handled any powder in blasting…that he did not know what dynamite or giant powder was made of" and had never been told the dangers they posed.[79]

If the work occurred anyway, then the owners could "be held responsible…to the extent of the injury inflicted."[80] Field therefore upheld the damages awarded to the miner. The Justice's interpretation here, far from restraining government regulation against

[75] *Mather v. Rillston* 156 U.S. 398.

[76] *Ibid.*

[77] *Ibid.,* 156 U.S. 399.

[78] *Ibid.,* 156 U.S. 398.

[79] *Ibid.,* 156 U.S. 397.

[80] *Ibid.*

business, enforced negligence claims for the purpose of protecting persons' safety from the threat of endangering employers.

Another example of such safety regulations came in relation to railroad companies. In *Minneapolis & St. Louis Ry. Co. v. Beckwith,*[81] a train ran over three hogs which wandered from a local farm onto the tracks. The state of Iowa had passed legislation requiring railroad companies to build fencing on either side of their tracks to keep animals away from oncoming trains. The legislation stated that failure to construct these fences made the railroad company liable for any animals killed or injured. When the farmer sued for damages, the railroad company objected that such action violated the Due Process Clause. Writing for the Court, Field denied this claim. The laws were part of the state's "police power" which "may be exercised for the protection of its citizens."[82] In this case, Field noted that the "tremendous force brought into action in running railway cars renders it absolutely essential that every precaution should be taken against accident by collision not only with other trains, but with animals." Preventing such accidents comprised part of the police power because "a collision with animals may be attended with more serious injury than their destruction; it may derail the cars and cause the death or serious injury of passengers."[83] Here again Field connected police power to the right to life. The accidents this legislation prevented threatened derailments that could lead to death.

This case furthermore showed Field's expansive definition of the right to life. Life's protection did not stop at guarding against fatalities. Nor, therefore, did regulatory

[81] *Dent v. West Virginia* 129 U.S. 26 (1889).

[82] *Ibid.,* 129 U.S. 33.

[83] *Ibid.,* 129 U.S. 33-34.

reach. The police power could justify legislation "in numerous cases providing against accidents, disease, and danger in the varied forms in which they come."[84] Field recognized varied threats as well as varied forms for each threat. Such recognition granted states expansive regulatory power. For if any dangerous tasks were being performed, "legislation for the security of society may prescribe the terms" by which those jobs could be conducted.[85] Once again, the expansive right to life, seen as so restrictive to states in Due Process, proved empowering for police regulations.[86]

Liberty

Following the right to life, liberty comprised the next Due Process enumerated right. Justice Field described liberty as "to act in such a manner, not inconsistent with the equal rights of others, as his judgment may dictate for the promotion of his happiness."[87] The exception involving others' equal rights formed the basis for police power regulations of and for individual liberty. Whenever the actions of an individual or group threatened others' rights, the state could regulate to stop such infringement.

As with life, health and safety concerns attached to this right. Travel, for instance, constituted a form of liberty. People should be able to move from one area to another if they so desired. Unsafe conditions inhibited that liberty. Thus, in measures meant "to

[84] *Dent v. West Virginia.,* 129 U.S. 29.

[85] *Ibid.*

[86] For a case involving the same railroad and similar circumstances, see *Minneapolis & St. Louis Ry. Co. v. Emmons* 149 U.S. 364 (1893). Field here notes that police power should regulate "with a view to protect life from its dangers…." 149 U.S. 366.

[87] *Munn v. Illinois* 94 U.S. 142-143.

secure the safety of passengers and freight"[88] freedom to travel and to transport received governmental protection.

The concepts of peace and good order, often associated with safety, provided a bulwark for liberty, too. Violence and disorder posed threats to the safety, even the lives, of the people. Such threats thereby inhibited their liberty to act as they saw fit. Much criminal legislation fell under this area. Thus, Field wholeheartedly agreed to police regulations involved in the case of *Ex Parte Wall*.[89] There, a mob had entered a jail and murdered a suspected criminal. Such violence threatened not only the accused but other persons caught in the midst of the lawless action. In his opinion, Field chastised those who participated. He also argued that regulations could be utilized to disband and punish the mob in various ways so as to protect the liberty of all involved.

Even religious liberty could receive protection from health and safety regulations. The previously discussed case of *Baltimore & Potomac Railroad v. Fifth Baptist Church* showed Field's understanding on this matter. In addition to the health concerns noted above, Field declared the effects of the railroad building to constitute a "nuisance" to the church. The putrid odors and noises emanating from the building of course could constitute a "nuisance" for any nearby building. But the church was unique. Field noted that the railroad building "created a constant disturbance of the religious exercise of the church."[90] The disturbances were so great that "[a]s a consequence, the congregation decreased in numbers, and the Sunday school was less numerously attended than

[88] *Charlotte v. Gibbs* 142 U.S. 394.

[89] 107 U.S. 265 (1883).

[90] *Baltimore & Potomac Railroad v. Fifth Baptist Church* 108 U.S. 329.

previously."[91] Those wishing to attend religious services at Fifth Baptist were kept from going by the noises and odors emitting from the railroad building. By these actions, the railroad company more than damaged property or health. In so doing, it inhibited the liberty of religious practice for those attending Fifth Baptist Church.[92] Thus, for Field, health and safety regulations could protect religious practice also as a particular form of the greater right: the right to liberty.

Property

The final enumerated right concerned property. Field's *Munn* dissent argued that the property right included protection for possession and use. But the right to property, like liberty, must be possessed and used in a manner "not inconsistent with the equal right of others to like use."[93] The state's role consisted in regulating to ensure the possession and use of property did not infringe on others' rights.

As with life and liberty, the state here held expansive regulatory power. Police legislation could regulate to protect others' property. The railroad cases concerning the killing of livestock, discussed earlier, exemplified this use of police power. In these cases, the railroad companies were liable to the owners of the hogs to recompense them for their losses. In killing the hogs, the railroad company had not only endangered passengers but had destroyed the farmers' property, infringing on their rights. Holding the companies

[91] *Baltimore & Potomac Railroad v. Fifth Baptist Church* 108 U.S. 329.

[92] Field did not tie this liberty to the First Amendment right to free exercise. However, as discussed below in the case of *O'Neil v. Vermont,* Field did believe the protections of the Bill of Rights applied to state and national governments insofar as the rights stated therein comprised basic rights of all citizens.

[93] *Munn v. Illinois* 94 U.S. 137.

liable fell under the states' police power, which Field said included the power "to regulate the carrying on of any business liable to be injurious to the property of others…."[94]

In another cattle case, *Kimmish v. Ball,* Field further held that states could regulate the entrance of out-of-state livestock to ensure against the spread of disease to local cattle.[95] In guarding against the spread of disease, the police regulation protected health concerns for those who might consume infected meat. But they also guarded property rights for those locals owning the livestock. The death of that livestock meant the destruction of the owners' property. In regulating the influx of interstate cattle, the state protected these owner's property rights.

But Field still supported regulating property's use when dangerous to others' rights as well. In *Weber v. Virginia,* Field noted that patents could be granted for dangerous materials. He used the example that a "patent for dynamite does not prevent the state from prescribing conditions of its manufacture, storage and sale so as to protect the community from the danger of explosion."[96] Whatever property right extended from the patent, or even the manufacture, did not preclude all needed regulations for the health and safety of others. This is because "Congress never intended that the patent laws should displace the police power of the states….Whatever rights are secured to inventors must be enjoyed in subordination to this general authority of the state over all property within its limits."[97]

---

[94] *Minneapolis & St. Louis Ry. Co. v. Emmons* 149 U.S. 366.

[95] *Kimmish v. Ball* 129 U.S. 217 (1889).

[96] *Webber v. Virginia* 103 U.S. 347 (1880).

[97] *Ibid.,* 103 U.S. 347-348.

Justice Field argued that this subordination went so far as to make some property capable of complete confiscation and destruction. For some property proved inherently dangerous and thus incapable of possession or use without threatening the life, liberty, and property of the public. The Justice argued that "whenever the use of an article cannot be regulated and controlled so as to ensure the health and safety of society, it may be prohibited and the article destroyed."[98] Such circumstances would be rare. But in them Field gave the utmost regulatory power to states when seeking to protect rights. Whether to protect property or protect against its wrongful use, Field again tied regulation to his broad definition of private rights.

Morals

Thus far, I have addressed the connection between life, liberty, property and the traditional police power categories of health and safety. One crucial police power category is notably absent from the discussion. This last classification pertains to regulations concerning the people's morals.

Field consistently upheld regulations under the morals category, arguing it to be a legitimate component of state police power. This legitimacy rested on the same grounds as regulations of health and safety: the protection of rights. Yet the link was not as immediate or direct. For example, one could connect a safety regulation to the right to life fairly easily. If a threat existed to safety, then that threat could infringe on a person's

[98] *Bowman v. Chicago & Northwestern Ry. Company* 125 U.S. 504 (1888).

life, both in the narrow sense of causing death and in the broad sense of impairing living. A similar connection could be made for health. The same could not be said for morals.[99]

The morals category was more indirect because, for Field, morals were a necessary condition for a truly free, rights' protecting society. In *Butcher's Union Company v. Crescent City Company,*[100] Field argued that "in our intercourse with fellow men, certain principles of morality are assumed to exist without which society would be impossible."[101] The first point to note is the social nature of humanity. Human beings interact. They marry, establish friendships, exchange money, goods, and ideas. Men and women do so in the context Field calls society. These interactions with fellow persons are necessary. Relationships with others form an essential component to the rights to life, liberty, and property as enumerated in the Due Process Clause. In part through interaction with others, life is sustained and enjoyed, liberty is exercised more fully, and property is put to more varied use. Most of all, society contains the ingredients for the pursuit and possible attainment of happiness in the exercise of these rights.[102]

But just as society forms the context in which to fully exercise our rights, it also forms a context in which they are threatened. It is in this intercourse with fellow men that rights are infringed. Infringements on life by maiming and murder involve interactions among human beings. Liberty is threatened by coming into contact with others who would restrict or deny legitimately chosen human action. Through interaction with other

---

[99] It is in part for this reason that Randy Barnett refers to the morals category as the most dubious of police power classifications. See *The Lost Constitution,* 334.

[100] 111 U.S. 746 (1884).

[101] *Butcher's Union Company v. Crescent City* 111 U.S. 756.

[102] See Chapter Six's discussion of the pursuit of happiness for more on this topic.

human beings, property can be stolen, damaged, or destroyed. Human beings, in short, can threaten rights as much as they enhance their exercise.

The need for and the threat within community formed the basis upon which Field linked morality to society and to rights' protection. Government could regulate to stop infringements of life, liberty, and property. However, the extent of regulation necessary to do so would vary according to the respect individuals willingly accorded to these rights in others. Thus, regulation to protect these rights could itself pose a threat to rights. For if rights' infringement became pervasive, then the means required by government to protect those rights could themselves more easily slip into threats to individual liberty.

Field believed morals' legislation helped to encourage the habits of societal living needed to avoid these potential problems. Such laws would further social honors encouraging good action. They would encourage stigma for those who violated others' liberty. They would, in sum, help to mold individuals who respected the rights of others. By these laws, humans would conform more and more to the norms needed to protect liberty apart from legal sanction. Put another way, the habituation of law would lead to less need for its enforcement.[103]

This argument comes out in the most common cases pertaining to morals' legislation in Field's time: state regulations of alcohol. In *Bartemeyer v. Iowa,* Field approved of "regulation of the sale or use [of alcohol] so as to protect the health and morals of the community."[104] This statement pointed out that alcohol's restriction, even prohibition, rested not only on health grounds but on moral grounds, too.

---

[103] See James Q. Wilson, *Thinking About Crime* (New York: Vintage, 1985).

[104] *Bartemeyer v. Iowa* 85 U.S. 138.

Field, however, said the legislation also specifically protected a certain type of morals, namely those of the community. The designation of community as opposed to individual morals related to Field's understanding of police power's purpose. Morals' legislation, including alcohol, did not regulate morals for their own sake. Instead, they addressed when immoral action proved threatening to rights. Such action did so because human beings live in community where their interaction enables such infringement. Protection of the "morals of the community," therefore, protected individual rights of persons as they engaged in society.

The focus on community morals meant, therefore, that not all manifestations of immorality fell under the police power. Field's "public" language invoked the distinction between public and private. Returning to issues raised in *Munn,* the question concerned what moral action was private and what was public.

The purpose of moral habituation, and its connection to rights' protection, deeply affected the public and private divide for Field. The Justice saw the extent of public morality reaching far into personal actions as a necessary means to instill rights' respecting morality. In *Crowley v. Christensen,* Field detailed how far such legislation may go and why. The case involved whether a state's regulation of saloons could encompass outright prohibition.[105] Some objected by arguing the public versus private divide. Writing for a unanimous Court, Field summarized this argument as follows: "[i]t is urged that as the liquors are used as a beverage, and the injury following them, if taken in excess, is voluntarily inflicted, and is confined to the party offending, their sale should

[105] Darryl K. Brown, "*Yick Wo* and the Constitutional Regulation of Criminal Law *University of Illinois Law Review* Vol. 2008(5)(2008): 1411.

be without restrictions….There is in this position an assumption…that when the liquors are taken in excess, the injuries are confined to the party offending."[106]

Field left room open for the existence of purely private actions, just as he had in *Munn.* If the injury, moral or otherwise, occurred only to the offending party, then morals' legislation could not touch it. Yet he said such purely private actions did not pertain in this case. The assumption that excessive alcoholic consumption bore purely private injuries was "a fact which does not exist."[107] Field continued by conceding that the problem often began as a purely private one. He allowed that "[t]he injury, it is true, first falls upon him in his health, which the habit undermines, in his morals, which it weakens, and in the self-abasement which it creates."[108]

But to Field, the moral problems of alcohol did not remain private. Its consumption could and often did lead to infringements of others' rights. The drinker could first affect the rights of those "immediately connected with and dependent upon him."[109] Family and business partners both possess rights which he can infringe. The alcoholic's allegedly private excess can lead him to do so through "neglect of business and waste of property and general demoralization."[110] Neglect of business and waste of property can deprive his family of the sustenance that maintains their life, health, and safety. His immoral habits can go beyond provision to assault, as his "general demoralization" can be a source of violence or other forms of abuse. Additionally, his

---

[106] *Crowley v. Christensen* 137 U.S. 90 (1890).

[107] *Ibid.,* 137 U.S. 90.

[108] *Ibid.,* 137 U.S. 90-91.

[109] *Crowley v. Christensen,* 137 U.S. 91.

[110] *Ibid.*

"general demoralization" can pose the threat of example, encouraging similar habits in children and spouse. The same neglect, waste, and demoralization can further extend to vocation, including ways a man can break faith with his employer, co-workers, or employees, threatening their livelihood, health, and safety as well. In these cases, the state has an obligation to protect these persons as possessors of the rights police power is tasked to guard.

But the threat of alcoholism even goes beyond dangers to immediate family or the workplace. Field declares "there are few sources of crime and misery to society equal to the dram shop….The statistics of every state show a greater amount of crime and misery attributable to the use of ardent spirits…than to any other source."[111] Intoxication can aid a negative moral habituation, threatening the moral assumptions necessary to society. It can do so by creating desperation in its consumer who desires nothing more than satisfying a thirst. The drinker no longer cares about, or maybe does not even consider, the dishonor, infamy, and criminal punishment accompanying such behavior. For Field this led to violations of rights. Crime in the form of murder, assault, theft, and destruction of property can all receive aid from excessive alcoholic consumption. Alcohol can thereby put at risk life, liberty, and property because the "assumed principles of morality" essential to society are ignored.

Governments may regulate, therefore, to the extent needed to address these threats. States may do so to provide basic protection to those in danger. This approach aligned with regulation of property in Field's *Munn* dissent. But states may also regulate to help instill the opposite habituation, reaching deeply into otherwise private action. The

[111] *Crowley v. Christensen,* 137 U.S. 91.

difference lay in the power needed to protect rights. As alcohol's threat proved broader than grain elevators, for example, so did its regulation.[112] Such habituation would encourage a self-government which allows, even demands respect for the life, liberty, and property of others. In this way, the morals category did more than address particular issues like alcohol. Its tenants protected all rights and formed the basis for all other police categories as the basis for a free, rights' respecting society.

The addition of morals' legislation completes the basic content and extent of Field's police power jurisprudence. The content of police power protections concerned the rights to life, liberty, and property enumerated in the Due Process Clause. Health, safety, and morals' legislation all sought to protect these rights from extra-governmental threats. Furthermore, these cases show Field's expansive definition of rights translating into a comparably broad definition of state police power. Far from an opponent to regulation, Field's jurisprudence here supported substantial state regulatory schemes.

Adjudicating the Cooperation

Thus far, my argument claims that Field's vision saw cooperation between Due Process and police power in protecting rights. Field, in fact, claimed to see no conflict between the two. The Justice stated in *Barbier v. Connelly* that "the [Fourteenth] Amendment—broad and comprehensive as it is…" was not "designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations…."[113] He even went so far elsewhere as to declare that, "[n]o one has ever pretended…that the

[112] In fact, for Field alcohol presented an almost singular case in the pervasiveness of its ill effects. Its sale did not constitute "a business harmless in itself and useful to the community" but one which constantly encouraged immoral action dangerous to public morals and thereby individual rights. See *Crowley,* 137 U.S. 94.

[113] *Barbier v. Connolly* 113 U.S. 31.

Fourteenth Amendment interferes in any respect with the police power of the state."[114] Field understood the principles to be clear. As both provisions protected rights, so neither would interfere with the other.

But clear distinctions in principle do not always translate to simple decisions in practice. Although Field believed these provisions cooperated when properly followed, parties before the Court often asserted them against each other. Where one side saw legitimate police power regulation, the other saw an infringement on Due Process rights. Completing Field's cooperative vision requires addressing how he handled these situations.

In short, Field's approach extended from the common goal to protect rights which he saw in the Due Process Clause and police power. Therefore, Field focused on determining the manner in which competing claims touched upon life, liberty, and property. Looking to the particulars of each case, Field sought to support the claim which most surely or directly protected a private right. In so doing, Field also reinforced the broad reach he gave to police power regulations even as he protected rights against state overreach.

These distinctions Field made varied according to the different facts involved. At times, one of the competing claims held no connection to a right. The case of *Powell v. Pennsylvania,* discussed above, is one example. There the legislature of Pennsylvania placed great restrictions on oleomargarine, claiming to do so to protect health and combat fraud. Field agreed with such aims, asserting that the state held power to make "all regulations affecting not only the health, but the good order, morals, and safety of

[114] *Bartemeyer v. Iowa* 85 U.S. 138.

society."[115] Yet the Justice continued that just because the legislature claimed it acted under its police power did not make it true. Instead, a law "must have in its provisions some relation to the end to be accomplished."[116] Field did believe the Court should give a certain level of deference to state legislatures. But this deference could only go so far. If the law blatantly did not actually address a health, safety, or moral concern, then "it derives no validity by calling it a police or health law."[117]

Field then declared that "in this case" the police power claim was "by a false title, purporting to protect the health" of the people when it really sought to protect the dairy industry.[118] The supposed dangers of oleomargarine and of fraud carried no weight. Instead, actual rights' claims resided on the other side. As discussed above, the people possessed "[t]he right to procure healthy and nutritious food."[119] Furthermore, the maker and seller of oleomargarine held the right "to follow such pursuits as…will give him the highest enjoyment."[120] Field therefore argued that "[w]hatever name it [the legislation] may receive, it is nothing less than an unwarranted interference with the rights and the liberties of the citizen."[121] In this case, no right existed for police power. The rights to life and property, on the other hand, resided with the Due Process claims. Therefore, Field sided with the Due Process claim as the only one protecting an actual right.

---

[115] *Powell v. Pennsylvania* 127 U.S. 695.

[116] *Ibid.*

[117] *Ibid.*

[118] *Ibid.*

[119] *Ibid.,* 127 U.S. 692.

[120] *Ibid*.

[121] *Ibid.*

This same basic argument supported police power regulations as well. In the previously discussed case of *Mather v. Rillston,* the issue concerned the possession and usage of explosives. Field had found the owners liable for injuries suffered by workers on the claim of negligence. This case could possibly consist of legitimate, competing rights' claims: the right to life, protected by safety, for the worker and the right to property for the business owners.

Here, however, Field did not think two rights' claims existed. His logic in such cases went back to the concept that no right exists to act in a manner destructive of others' rights. The right to life, liberty, and property only went so far as to "not be inconsistent with the equal rights of others."[122] The moment use or possession crossed the line into infringing others' rights, the property right to that extent ceased to be. In this case, the owners' negligence did not fall under their property rights. Instead, they held no right to act in the dangerous, rights' infringing manner they did. Once again, Field saw a right claimed by one party and no right by the other. But in siding with the rights' claim here, he sided in favor of the police power.[123]

Yet at other times the distinction between claims was not so stark. In such cases, both sides' claims held some relationship to a protected right. However, whereas one side sought to protect a right from infringement, the other sought a convenient aid to a right, one whose absence did not truly impair its exercise.

The case of *Butcher's Union v. Crescent City* displays this reasoning. Decided in 1884, the case concerned the Crescent City Slaughterhouse Company, the same entity

---

[122] *Butcher's Union v. Cresent Union Co.* 111 U.S. 758; *Munn v. Illinois* 94 U.S. 142

[123] See also *Weber v. Virginia,* discussed before as well, where Field argued that no property rights were infringed by true police regulations for the protection of rights. See 103 U.S. 37.

upon which Louisiana bestowed the monopoly at issue in *The Slaughterhouse Cases.* In 1879, Louisiana added an amendment to its constitution banning monopolies in the meat process business.[124] Crescent City sued to force the state to adhere to its prior monopolistic agreement, a claim which the Court rejected.

In this case, Field's concurrence revisited the arguments of *Slaughterhouse*. The Justice affirmed that "the states possessed the fullest power … to prescribe regulations affecting the health, the good order, the morals, the peace, and the safety of society within their respective limits."[125] Part of the legislation under review in *Slaughterhouse* pursued these goals. As noted before, Field approved of the law's components requiring that slaughtering be done outside of New Orleans as well as that slaughtered animals should be inspected before going onto the food market. The Justice declared that he and his fellow dissenters in that decision "found no fault with these provisions…."[126] In fact, Field noted that so long as "such regulations do not conflict with any constitutional inhibition or natural right, their validity cannot be successfully controverted."[127] In making this claim, the expanse of Field's police power is further revealed. Field's police power was broad due to the nature of its ends—the expansive rights to life, liberty, and property. But here the Justice also declared that the means must be extensive as well. Governments should possess significant discretion in realizing their legitimate police power goals. They were not relegated to use only means the Court

---

[124] Timothy Sandefur, *The Right to Earn a Living: Economic Freedom and the Law* (Washington, DC: Cato Institute, 2010), 73; *Political Thought and the American Judiciary,* edited by H. L. Pohlman (Boston: University of Massachusetts Press, 1993), 117 n50.

[125] *Butcher's Union v. Crescent Union Co.* 111 U.S. 754.

[126] *Ibid.,* 111 U.S. 755.

[127] *Ibid.,* 111 U.S. 754.

thought absolutely necessary. Instead, legislative and executive officials could make decisions on the basis of what regulations they thought most effectively realized police power goals.

The monopoly in question comprised a convenient means for the state to enforce its legitimate police power ends. It also centralized the location where slaughtering could legally occur, limiting the needed resources for sanitary oversight. It furthermore limited who could run a slaughterhouse to one group, thereby streamlining enforcement. On the sole question of seeking convenient means to accomplish health and safety purposes, the legislature acted well within its legitimate power.

However, Field argued that the particular means—a monopoly—"went way beyond"[128] the great discretion allowed to government. It went beyond because this merely convenient means infringed upon the liberty and property rights of individuals. Field spoke of their "oppressive nature" because "they interfere with the liberty of the individual to pursue a lawful trade or employment."[129] This right to pursue trades and employments stemmed both from the right to possess and use property as well as the general liberty to do as one saw fit so long as others' rights were not violated. In establishing a legal monopoly, the legislature criminalized any other person attempting to do the same job. No other person could make use of his own property and liberty as a result of this legislation.

In this case, therefore, Field believed one of the competing claims directly involved a right while the other did not. The Due Process claim concerned the right to

[128] *Butcher's Union v. Crescent Union Co.* 111 U.S. 754.

[129] *Ibid.,* 111 U.S. 756.

liberty and property, as realized through pursuing a trade or vocation. The police power claim in the monopoly was at best convenient to protecting health. When faced with such a choice, Field sought to protect the right most directly threatened. The convenient monopoly should not stand. The right to follow one's desired vocation should.

These situations occurred in reverse as well. Rights often more directly involved police regulations while convenience better defined opposing Due Process claims. This circumstance occurred in the opinion where Field described the Due Process Clause using the language of substance. In the 1885 case of *Barbier v. Connolly,* Field had declared that "no substantial right" could be "impaired" by police regulations.[130] But Field wrote for a unanimous majority upholding the law in question. The case's facts regarded a San Francisco ordinance that prohibited "the washing and ironing of clothes in public laundries and washhouses, within certain prescribed limits of the city and county, from 10 o'clock at night until 6 o'clock in the morning of the following day."[131] This ordinance particularly affected the city's Chinese population, who comprised a substantial portion of the owners and workers in the laundry business.[132] Some of these owners and workers sued, saying that the ordinance violated the Due Process as well as the Equal Protection clauses of the Constitution.

Field wrote the opinion denying any discrimination in the statute and thus upholding the ordinance as "purely a police regulation." The running of these laundries required the use of fire to create the needed heat. Field noted that constant fires at night increased the chances of accidents. Many of the surrounding buildings in San Francisco,

[130] *Barbier v. Connolly* 113 U.S. 32.

[131] *Ibid.,* 113 U.S. 30.

[132] Burrell, 144.

Field continued, were made of wood.[133] Therefore, the regulation "may be a necessary measure of precaution in a city composed largely of wooden buildings."[134] The increased likelihood of fire could injure or kill nearby residents. It could destroy adjacent property. The ordinance under review took sensible steps to protect against these threats, making it a reasonable police regulation to protect individuals' rights. Field here reiterated the discretion which government possessed in choosing the means by which police power would protect rights. In speaking of these rights, he argued that since "no discrimination against anyone be made, and no substantial right be impaired by them, they [police regulations] are not obnoxious to any constitutional objection."[135] San Francisco, therefore, could choose these means among others at its pleasure to address the threats to life and property posed by the laundry business.

The contrasting claim of the laundry owners, however, did involve a right. The owners held the right to pursue their trade, just as Field argued in *Slaughterhouse* and numerous other cases. Yet unlike these other cases, these regulations did not impair that right. Persons still could enter into the laundry business and conduct their work. Their businesses still could operate in a successful manner.[136] Field argued that these regulations consisted at worst of "[t]he inconveniences arising in the administration of the

---

[133] In fact, though Field did not note it, 310 out of 320 laundries in the city were themselves in buildings made of wood. See Charles J. McClain and Laurene Wu McClain, "The Chinese Contribution to the Development of American Law" *Chinese Immigrants and American Law* edited by Charles J. McClain (New York: Routledge, 1994), 147.

[134] *Barbier v. Connolly* 113 U.S. 30.

[135] *Ibid.,* 113 U.S. 32.

[136] The real debate in subsequent scholarship on this case regards whether this ordinance, while equal on its face, was discriminatory in its application by targeting an industry so heavily involving Chinese workers. See George Rutherglen, *Civil Rights in the Shadow of Slavery: The Constitution, Common Law, and the Civil Rights Act of 1866* (New York: Oxford University Press, 2013), 116; McClain and McClain, 146-147.

laws."[137] It was certainly inconvenient to cease burning fires during the proscribed hours. But for Field it did not deny these persons their rights. Quite the contrary: the laws themselves protected rights to life and property. Once again, one claim directly involved a right. The other involved a convenience. Once again, Field sided with the right, with liberty. However, in this case his siding with liberty entailed siding with police power. This distinction between right and convenience described many more instances Field sided with government regulation.[138] In many cases, Due Process claims represented nothing more than convenience against the protection of life, liberty, and property police regulations afforded. Whichever claim Field thought directly protected a right, the Justice sought to uphold.

Together, the previous examples covered many of the cases which came before the Court. Either one claim did not involve a right, infringing on the legitimate right claimed, or a right faced infringement from a mere convenience. At the same time, two other sets of circumstances arose which these cases do not fully address. First, certain situations involved no direct claim to liberty on either side. Instances of public improvements often came under this area. In the case of *Miller v. Mayor of New York,*[139] for example, Field rejected Due Process claims against the construction of a suspension bridge. The man suing argued that it would impair commerce and damage his business in

[137] *Barbier v. Connolly* 113 U.S. 32.

[138] In *Dent v. West Virginia,* for example, Field upheld the regulation requiring a medical license for the sake of protecting life. Dent's Due Process claim, on the other hand, only protected a convenience in forgoing the license. The same could be said for *Baltimore & Potomac Ry. Co. v. Fifth Baptist Church,* where Church attendee's rights were impaired while the moving of the engine house was no more than a "private inconvenience" which "must be suffered for the public accommodation." See *Baltimore & Potomac Ry. Co. v. Fifth Baptist Church,* 108 U.S. 331.

[139] 109 U.S. 385 (1883).

coastal warehouses standing beyond the new bridge.[140] Field acknowledged the problem. Such construction could "affect more or less injuriously the interests of some."[141] But here Field chose his words carefully. He declared the injury occurred to persons' "interests," not to their rights. He continued to make this distinction by arguing that the owner "is not deprived of his property nor of the enjoyment of it."[142] The owner retained both possession and effective use of his property, the two requirements Field argued for in *Munn*.

However, the building of the bridge did not hold a close relation to the rights of the public, either. It would merely be convenient for the public to possess this new means of transportation. In this case of convenience versus convenience, Field sided with the public. Here Field argued for the primacy of the public good without drawing out his reasoning. However, his reasoning in the cases just discussed points again toward wide discretion for regulations pertaining to rights. The bridge in question, like many public works, did not directly protect rights' from infringement. Instead, it would aid in liberty's exercise. It provided a more convenient means of travel for trade and personal enjoyment. These actions were enhancements of the rights to life, liberty and property. Therefore, Field here extended regulatory discretion even further, allowing wide range of choice to encourage rights' exercise in addition to protecting against their infringement. So long as

---

[140] *Miller v. Mayor of New York* 109 U.S. 392. The bridge's height was 135 feet. The owner claimed that many ships whose masts were over 135 feet would not exert the effort to lower their height and pass through to his warehouse. Field's response included deference to legislative decisions. But he also emphasized that no other business near the owner's location agreed to join him in the lawsuit, questioning the validity of the owner's assertions. Furthermore, Field argued that changes in modes of public transportation, such as bridge construction, did not generally or in this case so directly affect private rights as to necessitate judicial protection. See 109 U.S. 394-395.

[141] *Ibid.,* 109 U.S. 395.

[142] *Ibid.*

such aids did not directly infringe on individual rights, the state could act to make such projects a reality.

The second, and final, set of circumstances not previously covered involved instances where both sides actually claimed rights legitimately. This circumstance occurred in *Mugler v. Kansas.*[143] In 1877, Mugler obtained a charter from the state of Kansas to build a brewery and invested $10,000 in the business. A subsequent amendment to the Kansas constitution as well as resulting legislation declaring alcohol to be a "nuisance" rendered Mugler's investment and his brewery of little value.[144] Mugler sued, claiming in part that his Due Process right to property had been violated. The Court's majority, led by Justice John Marshall Harlan, denied his claim.[145]

Justice Field wrote his own opinion which mixed concurrence and dissent. In this case, the Justice thought both sides held legitimate rights' claims. Field recognized the legitimacy of the state's ban on alcohol.[146] Alcohol, as discussed before, posed serious threats to rights which he thought appropriate to aggressively address. But Field also thought Mugler's legitimate property rights under the Due Process Clause were at stake. The brewery itself and some of the property in it were made "under the sanction of state law,"[147] before the prohibitions went into effect. Because of this situation, Mugler retained certain property rights in them despite later legislation.

---

[143] 123 U.S. 623 (1887).

[144] James W. Ely, *The Fuller Court: Justices, Rulings, and Legacy* (Santa Barbar, CA: ABC—CLIO, 2003), 228.

[145] Owen M. Fiss, *The History of the Supreme Court of the United States, Vol. 6* (New York: Cambridge University Press, 2006), 264.

[146] *Mugler v. Kansas* 123 U.S. 675.

[147] *Ibid.,* 123 U.S. 678.

Police power and Due Process thus demanded some protection for both. The question concerned not which side was right but what particular claims of each were legitimate. Field articulated his approach through the common law rules for abating a nuisance, which the alcohol had been declared. Field argued that, based on "established principle…the abatement must be limited by its necessity, and no wanton or unnecessary injury can be committed to the property or rights of individuals."[148] In other words, the nuisance must be addressed as far as necessary to protect the rights undergirding health, safety, and morals' regulations. But past that point, the Court must guard individual property rights from government intrusion.

Field therefore agreed that under the states' "police power," it could both "close the brewery" and thereby "[put] an end to its use in the future for manufacturing spirits."[149] Doing so prohibited Mugler from using the brewery to make more alcohol. Even more, it banned Mugler from using any other means to produce additional alcoholic beverages. In these ways police actions legitimately protected rights from alcoholic dangers.

However, Mugler's property rights still existed, placing obligations and limits on the state under "due process of law."[150] The Justice argued that since Mugler had legally constructed the building as a brewery, its subsequent ban for those purposes should require "compensation to the owner."[151] This action would retain the legitimate police power purpose of banning production while recognizing Mugler's legitimately secured

[148] *Mugler v. Kansas,* 123 U.S. 678.

[149] *Ibid.,* .

[150] *Ibid*.

[151] *Ibid.*

property right. Furthermore, Field did not see how the new laws "can order the destruction of the liquor already manufactured" when its original production was perfectly legal and the legislation "admits…[it]may be valuable for some purposes."[152] The state may ban harmful uses of the alcohol already produced. But regulation could not cross the line into its confiscation as long as Mugler possessed admittedly valid options for using it. Finally, the destruction of "bottles, glasses, and other utensils" that occurred was unnecessary destruction of property whose use held other, non-alcoholic potential. Mugler should be allowed to use this property for whatever non-harmful purposes he saw fit. Through such painstaking examination, Field believed cases involving legitimate rights' claims for both sides could be rightly decided.

By these principles, Field adjudicated between the competing claims of the Due Process Clause and state police power. Doing so required constant appraisal of the rights involved and the possible protection or infringement produced by litigants' actions. While Field posited a consistent approach to examining these claims, they often contained unique and intricate facts. How directly an action touched upon rights was not always susceptible to broad, bright-line tests. Instead, these facts moved the line sometimes toward regulation, at others toward Due Process. Field understood this task to comprise the very essence of judicial power, part of what distinguished it from legislative and executive functions. For, echoing Hamilton's argument in *Federalist 78*, the Justice claimed in *Ex Parte Virginia* that duties which are "judicial in their nature….involved the

[152] *Mugler v. Kansas,* 123 U.S. 678.

exercise of discretion and judgment."[153] Legislatures would make broad rules in the act of lawmaking. Executives would exercise discretion in applying those laws but be disposed toward swift action, often thereby simplifying a complex reality. The Judicial power, in exercising judgment, could best apply principle to circumstance in a manner which addressed the complexities that general laws and swift action could not. Exercising judgment could often look messier than the deeds of other branches. But Field understood judgment to be the role tasked to the Court and the one, necessary to protect liberty, that the judiciary was best fitted to accomplish.[154]

Conclusion

In this chapter, I detailed the nature of due process in Field's cases after *Munn* and how he understood its relation to state police power. As in his *Munn* dissent, Field saw the Due Process Clause as protecting one form of rights—private rights—against all forms of state infraction, whether in legislation or its enforcement. I thereby completed my discussion of how Field understood the relationship between the Due Process Clause and state police power. Throughout his Supreme Court tenure, he held to expansive interpretations of both, each cooperating with the other to protect rights from various threats. Deciding which claim most needed assertion in which case was not always easy.

---

[153] *Ex Parte Virginia* 100 U.S. 359; Alexander Hamilton, "No. 78," *The Federalist Papers,* ed. Clinton Rossiter (New York: Signet Classics, [1961] 2003).

[154] For further discussion of these concepts beyond the focus on Justice Field, see David K. Nichols, "'Merely Judgement': The Supreme Court and the Administrative State" *The Supreme Court and American Constitutionalism,* ed. Bradford P. Wilson and Ken Masugi (Lanham, MD: Rowan & Littlefield Press, 1998).

American Constitutionalism edited by Bradford P. Wilson and Ken Masugi (Lanham, MD: Rowan & Littlefield Publishers, 1998), 211-232.

But Field's approach included a principled distinction between rights and convenience, one with which he exercised judgment to apply to particular cases.

Field believed this combination of state police power and judicial enforcement of the Due Process Clause went far to protect liberty. Anyone's rights threatened by state government or from private action within a state's jurisdiction possessed a means for protection. Due Process broadly guarded against state infringements of rights. Police power acted expansively to protect persons from the many non-governmental threats. For Field, life, liberty and property would find security in these cooperating means, means essential to his Constitutional cooperation for liberty.

CHAPTER FOUR

"Civil" Rights

In Field's understanding, the Due Process Clause and police power would cooperate to protect liberty. The former would guard against state regulation impairing such liberty. The latter would wield regulation to thwart other rights' violations. Together, liberty would be protected from all threats stemming from state power and all other threats arising within state jurisdiction.

Or so it seemed in theory. Thus far I have described the core principles of Field's cooperative jurisprudence of liberty. I also have discussed many of his applications of this theory in his opinions. But the whole of the story remains untold. No discussion of liberty's protection in this era could be complete without looking at the issue of race. During Field's time on the bench, the nation ratified the Civil War Amendments ending slavery (Thirteenth), protecting against unjust and unequal treatment by states (Fourteenth), and securing the franchise regardless of race (Fifteenth). Yet their enforcement in the former Confederacy proved elusive if not non-existent. Pockets of military and legal protection soon disintegrated after 1877 into terror and suppression. Thus an incomplete Reconstruction eventually gave way to a comprehensive, repressive system of Jim Crow.[1] The judiciary's record on these matters proved at best mixed.[2] In

[1] See Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (New York: Harper-Collins, 1988).

[2] See Frank J. Scaturro, *The Supreme Court's Retreat from Reconstruction: A Distortion of Constitutional Jurisprudence* (Westport, CT: Greenwood Press, 2000). Bernard Schwartz claims that early

some instances the Court sought to protect African Americans—often with small effect—from the harsh oppression visited upon them. In others, the Court stood aside, implicitly or explicitly condoning the effects of and complements to Jim Crow.

Justice Field's votes and opinions on rights in relation to race cases partook of this mixed record.[3] In this chapter I will examine how that record further explains but also fails to follow his principled understanding of Due Process, police power, and liberty. On the one hand, as we would expect, Field's opinions on these matters maintained the division of labor between Due Process and police power, where the former protected against state action while the latter addressed non-governmental deeds. On the other hand, we shall see how he distinguished between inalienable (which he called civil) rights and vested (which he called political) rights, with the former protected by the Due Process Clause and the latter left wholly to state discretion. Moreover, in interpreting the Fourteenth Amendment, Field excluded the concept of neglect from his definition of state action. In limiting state action to exclude neglect and in overly compartmentalizing inalienable and vested rights, the Justice left a large gap in the system that had pernicious consequences allowing for the extensive repression of African Americans.

Alternative Explanations

Justice Field's voting and opinion writing record, at least in its effects, leaves little room for praise. Field did vote to uphold national power to protect African-American

---

concern for civil rights gave way to "economic concerns" revolving around industrialization. See Schwartz, *A History of the Supreme Court* (New York: Oxford University Press, 1993), 148.

[3] I avoid referring to these cases generally as Civil Rights cases. As I noted below, Field uses such language but does so in a way incongruous with contemporary usage. Rather than refer to all cases pertaining to the rights of minority groups, Field and others at the time used the term to refer to a particular set of rights applicable to all persons. See below for a fuller description of Field's usage.

voting rights against attacks by the Ku Klux Klan in *Ex Parte Yarbrough,* though in that case he did not write an opinion.[4] Yet the Justice also voted to severely limit the national enforcement of civil rights' protections in two of the era's most infamous cases, *United States v. Cruikshank*[5] and in the *Civil Rights Cases*.[6] Field furthermore wrote opinions denying that the Fourteenth Amendment guarded against discrimination in state jury selection and allowing for legal segregation.[7]

These decisions present a serious issue for Field's Constitutional conception of liberty. They seem to negate the full protection Field understood that the Due Process Clause and police power should offer to individual rights' within state jurisdiction. Both in state actions and those of individuals, rampant rights' infringement occurred, seemingly with the Justice's allowance if not approval.

Race and Political Opportunism

Most scholars offer two broad explanations for Field's civil rights' decisions. First, a minority give racism as the major determinant.[8] This accusation faces mixed evidence. Prior to the Civil War, Field did object to assertions that he was an abolitionist. His claimed position on slavery at the time seemed to resemble that of Stephen Douglas,

[4] 110 U.S. 651 (1884).

[5] 92 U.S. 542 (1875).

[6] 109 U.S. 3 (1883).

[7] *Ex Parte Virginia* 100 U.S. 339; *West Virginia v. Strauder* 100 U.S. 303 (1880); *Virginia v. Rives* 100 U.S. 313 (1880); *Neal v. Delaware* 103 U.S. 370 (1880). See *Plessy v. Ferguson* 163 U.S. 537 (1896); see also *Alabama v. Pace* 106 U.S. 583 (1883).

[8] See Mary Frances Berry, "Judging Morality: Sexual Behavior and Legal Consequences in the Late-Nineteenth Century South" in *Black Southerners and the Law, 1865-1900* edited by Donald J. Nieman (London: Routledge, 1994), 18.

who argued for individual states or communities to decide the slavery question.[9] At the same time, Field appeared to hold anti-slavery preferences, supporting ratification of the Thirteenth Amendment as a requirement for Southern states to re-gain self-control of their governments. Furthermore, Field's brother, David Dudley Field, was a prominent opponent of slavery, first in the Democratic Party and then as a supporter of Abraham Lincoln.[10]

In addition to his thoughts on slavery and abolition, Field also presided over other kinds of cases involving race. On both the Supreme and district courts, the Justice participated in numerous decisions regarding Chinese Americans. His written opinions involving this group seem to further complicate the charge that racism determined his jurisprudence. In these cases, Field did often use racist language well beyond anything found in his African American decisions. He complained of "vast hordes of its [China's] people crowding in upon us"[11] who stubbornly "retained the habits and customs of their own country."[12] He furthermore attacked them for not accepting Christianity and played into negative stereotypes regarding their work habits and living conditions.[13]

At the same time, Field regularly sided with Chinese litigants. One of his more famous opinions in this matter was a district court case, 1879's *Ho Ah Kow v. Nunan.*[14]

---

[9] Swisher, *Stephen Field,* 45.

[10] Lincoln's relationship with David Dudley is thought to be a significant reason for his consideration of Stephen Field for the Supreme Court. Lincoln is reported to have asked, after agreeing to Field's qualification for the office, "Does David want his brother to have it?" Upon being told in the affirmative by another New Yorker, Lincoln is said to have declared, "Then he shall have it." See Swisher, *Stephen J. Field,* 116-117.

[11] *Chinese Exclusion Cases,* 130 U.S. 606.

[12] *Ibid.*

[13] *Chew Heong v. U.S.* 112 U.S. 565.

[14] 12 F. Cas. 252 (1879).

This case began with a San Francisco ordinance punishing overcrowding in residences by either a fine or a short jail sentence.[15] Though officials desired violators to pay the fine, Chinese offenders disproportionately accepted jail. To discourage this choice, jail officials imposed a rule that male prisoners' hair must be closely cropped. Doing so involved the cutting off of the "queue," the hair Chinese males wore braided in the back of the head.[16] The queue held great religious significance with grave social and eternal consequences for its cutting. One Chinese person receiving such treatment sued. In his opinion, Field sided with the Chinese litigant, proscribing the act as a "disregard of his rights."[17] In so doing, he castigated the offending official for his conduct. He noted the religious meaning of the queue among the Chinese community and the "great mental anguish" the recipient suffered from the fear of eternal punishment, being "disgraced in the eyes of his friends and relatives…ostracized from association with his countrymen," and suffering the subsequent loss of income in his work.[18] Field argued that such action "operates as 'cruel and unusual punishment'" and that it "is not credible to the humanity and civilization of our people, much less to their Christianity, that an ordinance of this character was possible."[19]

Field here and elsewhere based these arguments in part on the Due Process Clause, saying that "[a]s men having our common humanity, they [Chinese persons] are

---

[15] John S. W. Park, *Elusive Citizenship: Immigration, Asian-Americans, and the Paradox of Civil Rights* (New York: New York University Press, 2004), 59.

[16] Donald R. Burrill, *Servants of the Law: Judicial Politics on the California Frontier, 1849-89: An Interpretive Exploration of the Field-Terry Controversy* (Lanham, MD: University Press of America, 2010), 164.

[17] *Ho Ah Kow v. Nunan* 12 F. Cas 253.

[18] *Ibid.*

[19] *Ho Ah Kow v. Nunan* 12 F. Cas. 255.

protected by all the guarantees of the Constitution"[20] in the same manner as any white resident.

Thus, his Chinese cases certainly do not refute the racism charge in those decisions involving blacks. However, they do present an important question: Why did Field decide in favor of one non-white racial group he openly disparaged and not another which he did not so viciously denigrate, at least not openly?

More scholars then look to a second explanation for Field's African-American decisions—political opportunism. Field's ambitions stretched beyond the nation's highest judicial body. In 1880, his supporters made a serious bid to nominate him for the Presidency at the Democratic National Convention in Cincinnati, Ohio. Essential to any Democrat's hopes to win the nomination and the general election rested in maintaining the Party's dominance in the South.[21]

Field's previous record gave some inroads to Dixie. Many Southerners cheered Field for his opinions striking down restrictive loyalty oaths shortly after the Civil War.[22] His other votes to restrict the reach of Reconstruction also won him Southern favor. In light of this established goodwill, Field's jury selection opinions came at an opportune time. In 1879-1880, soon before the Democratic National Convention, Field voted several times against national power to stop racial discrimination in selecting jurors. Though he failed to gain more than 65 votes (out of 728) toward the nomination on any ballot,[23] the jury opinions have been pointed to as possible political posturing to gain the support of

---

[20] *Fong Yue Ting v. United States* 149 U.S. 754.

[21] Burrill, *Servants of the Law,* 184-187.

[22] See *Ex Parte Garland* 71 U.S. 333 (1866); *Missouri v. Cummings* 71 U.S. 277.

[23] Swisher, *Stephen Field: Craftsman of the Law,* 296.

Southern Democrats.[24] Kens, in fact, declares that "Field's 1880 opinions definitely were intended to provide a boost to his political campaign."[25]

Yet this answer also seems incomplete. To prove determinative, a distinct shift in voting and reasoning would need to be shown. The votes on jury selection would clearly stand out from those that came before or after, decisions made when Field's hopes for Chief Executive either were in their infancy or past any reasonable plausibility.

They in fact do not. Field's vote in the *Civil Rights Cases* and in the infamous *Plessy v. Ferguson* came years after failing to secure the 1880 nomination. Meanwhile, his vote in *Cruikshank* came in 1874, before significant signs of Presidential ambition arose. One may search for rhetorical flourishes aimed at particular constituencies. But significant disparities in voting or reasoning do not arise. Furthermore, Field's Chinese cases also conflict with the theory of political opportunism. The Justice's decisions in these cases brought recrimination from the press and the public in his home state of California while gaining him no public support in any other region. Some scholars even claim that it was his votes in the Chinese cases that sank his Presidential chances.[26] Given the open and pervasive animus toward the Chinese on the West Coast and beyond, Field could hardly have been surprised by such reaction to his opinions.

Thus, Kens, too, expresses doubts that Field "altered his views to fit the cases into his presidential campaign plans,"[27] even if he wrote with a certain style or emphasis to

---

[24] Swisher, 285; D. Grier Stephenson, *The Waite Court: Justices, Rulings, and Legacy* (Santa Barbara, CA: ABC-ClIO, 2003), 87.

[25] Kens, 190.

[26] *Ibid.,* 216-217.

[27] Kens, 195.

gain more support. Political opportunism may have played some part in his rhetoric. But both his general consistency and willingness to stake out other unpopular opinions on race complicates the claim that such opportunism primarily explains his votes on race.

Constitutional Cooperation

Thus, the question remains whether constitutional arguments help explain Field's views in these cases. Furthermore, did such an explanation in some way align with his cooperative, rights' protecting view of the Constitution? To address these questions, I turn to the Justice's particular opinions pertaining to African Americans. I argue that they do sustain Field's cooperative, rights' protecting Constitutional vision. At the same time, they expose serious, harmful flaws in its application.

Field's opinions repeatedly asserted that Fourteenth Amendment protections, including the Due Process Clause, applied to African-Americans. In *Bartemeyer v. Iowa,* Field said that the Fourteenth Amendment was passed "to obviate objections to the legislation adopted for the protection of the emancipated race."[28] Therefore, the Amendment applied to "all persons, which necessarily included those of every race and color."[29] The same expansive Due Process protections assured to all other persons applied as well to African-Americans.

Furthermore, Field was certainly aware of the potential for states to infringe on African-Americans' rights. In *Ex Parte Virginia,* Field noted part of the reasoning for the passage of the Fourteenth Amendment was the inadequacy of merely abolishing slavery. He wrote that "notwithstanding the amendment abolishing slavery…the freedmen were,

[28] *Bartemeyer v. Iowa* 85 U.S. 140. This legislation included the Civil Rights Act of 1866.

[29] *Bartemeyer v. Iowa* 85 U.S. 140.

by legislation in some of the Southern States, subjected to such burdensome disabilities in the acquisition and enjoyment of property and the pursuit of happiness as to render their freedom of little value."[30] This language parallels Field's discussion of possession and use in *Munn.* Possession was for the purpose of use. Liberty is not liberty unless exercised. Therefore, the Fourteenth Amendment assured that the mere possession of freedom guaranteed in the Thirteenth Amendment could also be exercised apart from debilitating state infringement of rights.[31]

These positions would appear to give African-Americans the same protections as white persons in guarding individual liberty. But as noted before, the reality proved far different. African-Americans suffered extensive infringements of their life, liberty, and property during this period. A gap in Field's cooperative relationship, therefore, existed in their protection.

State Action

This gap stemmed from two important distinctions Field made regarding what kind of infringements the Fourteenth Amendment (including Due Process) could prohibit and what rights it could protect. These two distinctions, in turn, grew partly out of Field's concerns for the future of federalism after the Civil War. Addressing each of these matters posits a flawed application of Field's principles in cases involving racial minorities.

The first distinction pertained to the relationship between the Due Process Clause and police power. The Due Process Clause declared that the rights to life, liberty, and

[30] *Ex Parte Virginia* 100 U.S. 364.

[31] However, Field's dissent in *Slaughterhouse* also appears to see significant protection to the exercise of rights within the Thirteenth Amendment, though he turns to the Fourteenth as more definitive. See *Slaughterhouse Cases* 83 U.S. 89-91.

property may not be deprived. But who specifically is forbidden to deprive persons of such rights?

The Court most famously addressed this issue in *The Civil Rights Cases* of 1883. In that case, the Court reviewed the Civil Rights Act of 1875. This law, passed by Congress, banned racial discrimination in public accommodations such as inns or public transportation.[32] The Constitutional controversy stemmed from the fact that these accommodations included those which were privately owned and operated. Field joined the majority which found that "[i]ndividual invasion of individual rights is not the subject matter of the amendment."[33] The private actions of individuals did not come under the Fourteenth Amendment's scope. Instead, the Fourteenth Amendment only applied to the actions of state governments.[34]

Though the most famous case to make this argument, the *Civil Rights Cases* was not the first. Field articulated his reasoning for distinguishing private and state action three years earlier in *Virginia v. Rives*.[35] In his concurrence, the Justice inserted his own italics when quoting Section One of the Fourteenth Amendment. He noted that Section One declared "*No State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall *any State* deprive any persons of life, liberty, or property without due process of law…."[36] Field's emphasis highlighted that the Amendment specified not only who could not have their rights infringed but also

---

[32] Rutherglen, 88.

[33] *Civil Rights Cases* 109 U.S. 11.

[34] *Ibid.,* 109 U.S. 11, 23-25 (1883). David W. Blight, *Beyond the Battlefield: Race, Memory, and the American Civil War* (Amherst, MA: University of Massachusetts Press, 2002), 95.

[35] *Virginia v. Rives* 100 U.S. 313 (1880).

[36] *Ibid.,* 100 U.S. 334 (emphasis original).

by whom they could not be impaired. "No state" could abridge privileges or immunities and "nor shall any State" violate life, liberty, and property without due process. Therefore, for Field section one's prohibition "is directed against the State"[37] and it alone.

This prohibition applied to all departments of state government. Field noted that "[a]s the State, in the administration of its government, acts through its executive, legislative, and judicial departments, the inhibition applies to them."[38] As discussed in Chapter Three, if states infringed on rights, they could do so in the passage, enforcement, and application of laws. Such action could "be reviewed and corrected or reversed by this Court."[39]

But "no state" did not equate with "no person." Specifying states as the object of Fourteenth Amendment prohibitions excluded all non-state actors and their actions. National legislation and judicial oversight could not under the Fourteenth Amendment reach infringements of rights by individuals. The *Civil Rights Cases*, coming three years later, merely confirmed this "state action doctrine" limiting the reach of the Fourteenth Amendment to state laws, their enforcement, and their application.[40] The Court, including Justice Field, declared the Civil Rights Acts passed by Congress that banned racial discrimination in privately-owned accommodations and transportation unconstitutional. While this interpretation maintained Due Process vigilance against state

---

[37] *Ibid.,* 100 U.S. 333.

[38] *Ibid.,* 100 U.S. 334.

[39] *Ibid*.

[40] Mark Elliot, *Colorblind Justice: Albion Turgee and the Quest for Racial Equality from the Civil War to* Plessy v. Ferguson (New York: Oxford University Press, 2006), 268; Steven A. Shull, *American Civil Rights Policy from Truman to Clinton: The Role of Presidential Leadership* (Armonk, NY: M.E. Sharpe, Inc., 1999), 34.

laws and official deeds, it left the vast sphere of private action free from Fourteenth Amendment censure.

Viewed in isolation, the "state action doctrine" seems to conflict with Field's general argument. After all, Field's jurisprudence saw threats to persons' rights beyond the actions of state governments. Private individuals and groups could and did also infringe on life, liberty, and property.

Yet we must remember that Field's vision was cooperative. The Due Process Clause was not alone in protecting rights. It was to cooperate with state police power for that purpose. The nature of this cooperation did not place restrictions on the rights protected or the persons possessing them. Life, liberty, and property protections existed for all. Instead, it restricted what threat to persons' rights each power could guard against. The "No State" wording in the Due Process Clause's text delineated the threat it was supposed to meet. The Due Process Clause protected against any state action which infringed on any persons' rights as specified in the Clause. It was the defender of liberty *against* government infringement only.

This state action limit did not deny any remedy for nongovernmental attacks on individual rights. It meant the remedy rested in state police power, not the Fourteenth Amendment. It was police power regulations over health, safety, and morals which sought to protect individual rights from private infringement. Any offense to life, liberty, or property by private persons could be proscribed under this power. Thus state legislatures could pass laws against discrimination by private persons, but not the national government. In explicating this point, Field mentioned the example of murder. Murder involved the taking of a life against the law by a private individual. Unless

occurring in a place where the national government held exclusive jurisdiction, "[t]he offense charged is against [state] authority and laws, and she alone has the right to inquire into its commission and to punish the offender."[41] Protecting life, liberty, and property in such circumstances was the state's sphere, not the Fourteenth Amendment's.

The state action doctrine helps to explain some of Field's distinctions between cases involving Chinese persons and those involving African-Americans. In every case where Field supported Chinese litigants, state laws or state officials acted. Field wrote in *Ho Ah Kow,* for example, that Fourteenth Amendment restrictions "upon the state applies to all the instrumentalities and agencies employed in the administration of government, to its executive, legislative, and judicial departments, and to the subordinate legislative bodies of counties and cities."[42] The San Francisco jailer was a state official perpetrating state violations of rights. He therefore came under the state prohibitions found in the Fourteenth Amendment generally and in the Due Process Clause in particular.

The cases regarding African-Americans, on the other hand, often contained no state action as Field defined it. The *Civil Rights Cases,* which came years after the serious end of Field's political aspirations, struck down legislation insofar as it touched upon private actors who operated private businesses such as theatres and inns. Though their actions may infringe upon rights, they were not acting as part of the state government. They were not under the Fourteenth Amendment's prohibition. The same logic applied to Field's vote in the infamous case of *U.S. v. Cruikshank,* decided six years before his Presidential run. In that case, several white men were prosecuted for murdering nearly

[41] *Virginia v. Rives* 100 U.S. 336.

[42] *Ho Ah Kow v. Nunan* 12 Cas. 256.

100 black Republicans during a disputed election. Under the Enforcement Act of 1870, these men were charged with conspiring to deprive persons of their constitutional rights. With Field's vote, the Court struck down their convictions. In so doing, the Majority declared that the Fourteenth Amendment applied only to the actions of states, not to the deeds of these private citizens. If African-Americans wished protection, then Chief Justice Waite said they "must look to the States."[43] Field certainly saw these attacks as violating rights. But the remedy rested with state police power, not with the Fourteenth Amendment.

Categories of Rights

The concept of state action explains several of Field's civil rights' cases. It cannot explain them all. The jury cases in particular remain open. These cases in question clearly contained some kind of state action. In *Strauder v. West Virginia,* the Court struck down convictions of African-American defendants where their juries had been legally restricted to only white members.[44] This restriction, based as it was in law, was state action in its clearest form. *Ex Parte Virginia* and *Neal v. Delaware,* furthermore, saw the Court treating the absence of blacks on juries as proof of discrimination on the part of judges selecting potential jurors.[45]

---

[43] *United States v. Cruikshank* 92 U.S. 552 (1875).

[44] Ken. I. Kersh, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* (New York: Cambridge University Press, 2004), 70. The manner of exclusion differed, however. West Virginia explicitly prohibited African-Americans from serving on juries. Delaware restricted jury service to voters, who then by law could only be white.

[45] Abraham L. Davis, Barbara Luck Graham, *The Supreme Court, Race, and Civil Rights: From Marshall to Rehnquist* (Thousand Oaks, CA: Sage Publications, 1995), 18.

Yet Field voted against African-American petitioners in all three cases. In *Strauder,* he dissented from the majority, arguing that states could actively prohibit potential African-Americans from jury service. In both *Virginia* and *Neal,* Field argued that the absence of African-Americans on juries presented no issue for the Court, either. In supporting his position in each case, Field articulated a second distinction beyond state action inhering in the Fourteenth Amendment, including the Due Process Clause. For Justice Field here argued for a distinction between different kinds of rights with crucial consequences for which of them the Fourteenth Amendment protected.

This rights' distinction did not touch upon race any more than did state action. The protections afforded by the Fourteenth Amendment applied equally to "all persons, of every race, color, and condition."[46] The difference rested in the office of juror itself. Field argued that jury duty was not a right protected by the Fourteenth Amendment.

To reach this conclusion, Field distinguished between three categories of rights: civil, political, and social. These categories were typical for the time. However, their meanings do not easily translate to contemporary usage, especially regarding civil rights. In Field's time, civil rights were neither connected so closely to race nor so broad in which rights were included as they are today. [47]

Field defined civil rights as both "absolute and personal."[48] As personal, all humanity possessed them as a necessary consequent of their personhood. As absolute,

[46] *Ex Parte Virginia* 100 U.S. 368.

[47] See Pamela Brandwein, "A Judicial Abandonment of Blacks?: Rethinking the 'State Action' Cases of the Waite Court" *Law & Society Review* 41(2007): 353-354.

[48] *Ex Parte Virginia* 100 U.S. 366.

civil rights "are never to be withheld…."[49] Government can never infringe upon them. In fact, government is instituted most essentially for their protection.[50]

The second category—political rights—were neither absolute nor personal. They were those rights that "arise from the form of government and its administration."[51] Governments must make, administer, and judge laws. The people as a whole do not accomplish these tasks. Instead, they choose officers to fulfill legislative, executive, and judicial functions. Choosing them, as well as holding these political or legal offices and discharging their duties, constituted political rights.[52]

Social rights, third and finally, concerned private interactions among individuals. Various decisions concerning voluntary association and personal decorum fell within this category. Individuals' choice whether or not to enter into contracts, for example, or who to include in a religious or recreational body, comprised a part of social rights.

On the question of social rights, Field saw consensus on the Court. As these rights "do not rest on any positive law,"[53] they presented no Constitutional question. The Fourteenth Amendment had nothing to say on such matters, offering no prohibitions or protections. However, he declared that "much confusion has arisen from a failure to distinguish between the civil and political rights of citizens."[54] These categories each held some connection to the law and thus related in some manner to state action.

---

[49] *Ibid.*

[50] *Ibid.,* 100 U.S. 366.

[51] *Ibid.,* 100 U.S. 367-368.

[52] *Ibid.,* 100 U.S. 368.

[53] *Ex Parte Virginia* 100 U.S. 368.

[54] *Ibid.*

Their proper distinction mattered because of their differing relationships to the Fourteenth Amendment. Field argued that "[t]he Thirteenth and Fourteenth Amendments were designed to secure…civil rights."[55] These rights must receive protection if the new Amendments were to realize their purpose. This was not the case with political rights. The Fourteenth Amendment instead "leaves political rights…as they stood before its adoption" meaning that "[i]t has no more reference to them than it has to social rights and duties…."[56] Regarding political rights, the Fourteenth Amendment posed no enforceable restriction against state action.

To explain his reasoning, Field next sought to define civil rights' content. To do so, the Justice turned to the Amendment's text. The Justice argued that civil rights were "those fundamental privileges and immunities which of right belong to citizens of all free governments."[57] This statement's language immediately appealed to the Fourteenth Amendment's Privileges or Immunities' Clause. It spoke of citizens and their privileges and immunities.

At the same time, the Court's *Slaughterhouse* decision continued to severely limit this Clause's reach. But as he had done after the *Slaughterhouse* case, Field connected this clause with Due Process.[58] In *Ex Parte Virginia,* Field did so regarding the content of "fundamental privileges or immunities." The phrase itself does not specify privileges or immunities' content. Yet as he had done before, Field asserted their enumeration in the

---

[55] *Ibid.,*

[56] *Ibid.,* 367-368.

[57] *Ex Parte Virginia* 100 U.S. 365.

[58] See my discussion of Field's mixing of P or I and Due Process language after *Slaughterhouse* in Chapter Two.

Due Process Clause. Examples of civil rights included "the right to acquire and enjoy property" as well as "the security of [one's] person."[59] These articulations closely paralleled the rights listed under Due Process. Government must protect both the possession and enjoyment of property. An individual's security, which surely included his life and liberty of action, was also included in civil rights.

Field further confirmed the connection by appealing to the wording of the Due Process Clause to explain civil rights in distinction from political rights. He argued that the assertion that "no State 'shall deprive any person of life, liberty, or property without due process of law'" asserted civil rather than political rights.[60] The rights to life, liberty, and property thus formed a shorthand for the fundamental, absolute, and personal civil rights which the Fourteenth Amendment in general protected.

With civil rights' content addressed, the Justice then appealed to both logic and text to show political rights' difference from civil and its exclusion from the Fourteenth Amendment. Logically, holding state offices is a feat only some obtain. Not everyone serves as a state legislator, city mayor, or any other political position. Field denied that this fact entailed rights' violations. For, logically, civil and political rights possessed two distinct origins. Civil rights, as absolute and personal, stemmed from mere personhood. In this manner they were universal and, as absolute, incapable of being justly denied. Political rights were different. A political right is not created co-extensively with personhood. It is bestowed on other grounds. Instead of mere personhood, "their possession depends on [the holder's] fitness…."[61] Offices go to those who are qualified

[59] *Ex Parte Virginia* 100 U.S. 365, 367.

[60] *Ibid.,* 100 U.S. 366.

[61] *Ex Parte Virginia* 100 U.S. 368.

to exercise their functions. Moving from this basis, Field proceeded to articulate the manner of determining fitness. Determining fitness was "conditioned and dependent upon the discretion of the elective or appointing power, whether that be the people acting through the ballot or one of the departments of their government."[62] The people or their chosen leaders determined who is fit to hold a political office. Once they chose a person thought fit, that person holds all the rights inhering in that office. But until that time, offices and their attendant political rights were assured to no one.

Field saw these logical distinctions supported by the text of the recent Constitutional amendments. The Fourteenth Amendment spoke of persons in declaring the rights to life, liberty, and property. These are the civil rights all possess by their common humanity. Field found no place in the text, however, for political rights. In naming life, liberty, and property, Field argued that it would "not be contended that this clause confers upon the citizen any right to serve as a juror in the state courts."[63]

To show that even his expansive conception of Fourteenth Amendment rights excluded this category, the Justice pointed to the example of the most essential political right: the right to vote. Surely if the Due Process Clause included any state political rights, this would be one. Yet not only does the Fourteenth Amendment fail to mention voting explicitly, the subject is explicitly addressed elsewhere. Field points out that "when it was desired to confer political power upon the newly made citizens of the States, as was done by inhibiting the denial to them of the suffrage on account of race, color, or previous condition of servitude, a new amendment was required."[64] This new

---

[62] *Ibid*.

[63] *Ex Parte Virginia.* 100 U.S. 366.

[64] *Ibid.,* 100 U.S. 368.

amendment, the Fifteenth, states "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[65] Field believed this made "manifest" the fact that the Thirteenth and Fourteenth Amendments "left to the States to determine to whom the possession of political powers should be entrusted."[66] For if the right to vote formed part of the fundamental rights protected by the Fourteenth Amendment, then the nation would not have felt the need to protect it in an additional, separate amendment.

Therefore, the logic of civil and political rights, along with the text of the new amendments, denied political rights' protection in the Fourteenth Amendment. Political rights remained the exclusive prerogative of the states. States could give them at their discretion without the possibility of national government interference.

Field then applied these logical and textual arguments to the jury cases at hand. Logically, jury service comprised a political right. A juror held a judicial office with a judicial function. Not everyone held this office. Virginia's law, for example, denied foreigners, women, and all over the age of sixty the chance to serve.[67] Other qualifications for fitness existed as well, such as being of sound mind and moral character.[68] Still others would never be called upon due to the happenstance of lottery systems for jury selection. The right was not, therefore, absolute and personal. It did not apply to human beings as such.

---

[65] U.S. Constitution, Amendment XV.

[66] *Ex Parte Virginia* 100 U.S. 368.

[67] *Ex Parte Virginia* 100 U.S. 366.

[68] See *Neal v. Delaware* 103 U.S. 401.

Textually, if the political right to vote was not included in the Fourteenth Amendment, Field reasoned, then neither could jury service. Field noted that not even the Fifteenth Amendment, which did pertain to a political right, protected jury service. The Justice argued that this Amendment only "excludes one ground of limitation upon the qualification of voters" and therefore "relates to no other subject" including "the selection of jurors."[69] All other political matters, including jury selection, remained under state power. As a political right, the states retained complete discretion regarding the selection of jurors in their own judicial system.

This distinction further explains the difference between Chinese and African-American litigants. In no case in which Field voted for a Chinese litigant did a political right, as he defined it, arise. Instead, Field sided with Chinese litigants each time he saw a civil right in danger. The cutting of the queue infringed on liberty and property. In another case involving Chinese women restrained on an immigrant boat, their confinement without good reason denied them their liberty.[70] The African-American cases involved none of these rights. Instead, Field found at stake only the political right of serving on a jury. Again, Field continued to follow these distinctions, regardless of Presidential possibility or political fallout, in a consistent manner.

Federalism

These two distinctions show Constitutional arguments for Field's civil rights' decisions. The Justice believed that the Fourteenth Amendment, including the Due Process Clause, only applied to state action. State police power must regulate to curb

[69] *Ibid.,* 103 U.S. 405.

[70] See *In Re Ah Fong* 1 F. Cas. 213 (1874).

private rights' infringements. In addition, Due Process Clause protection did not extend to all rights. Instead, they only pertained to civil rights—those enumerated in the Clause as life, liberty, and property. All other rights, including the political right to jury service, remained under exclusive state control.

Yet Field's distinctions also pertained to another concern: the maintenance of federalism. The Justice perceived that ignoring the boundaries he articulated in these cases would seriously damage federalism and thereby fatally undermine the cooperative relationship between state police power and the Due Process Clause.

Field's federalism concerns were far from unique on the Court. The Civil War decisively answered the question of state versus national supremacy in the latter's favor. The war thus began massive nationalizations of power, both political and economic. Politically, this nationalizing force continued after the war in the form of the new amendments, the Fourteenth in particular giving massive new authority to the federal government over the states.[71]

The question for the Court was what role the states still held. Were they doomed to morph into the servants of an exclusively national government? If not, what independence did they retain? The Court proved very concerned to maintain federalism by asserting a continued sphere of state independence. Miller's majority opinion in *Slaughterhouse* has been interpreted in this manner.[72] If the Privileges or Immunities

[71] Thomas Gais and James Fossett, "Federalism and the Executive Branch," in *The Executive Branch* edited by Joel D. Aberbach and Mark A. Peterson (New York: Oxford University Press, 2005), 489; Richard Franklin Bensel, *Yankee Leviathan,* 1-10.

[72] Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven, CT: Yale University Press, 1997), 331.

Clause was really as broad as Field and the other dissenters imagined, then state power would be squeezed more tightly than Miller and the rest of the majority felt acceptable.

Field himself understood the Civil War Amendments to bestow extensive new powers upon the national government. He argued that "the reach and influence of the [Fourteenth] amendment are immense."[73] The states could not actively infringe upon the vast domains of life, liberty, and property as the Justice broadly understood them. In many ways, the Justice celebrated this fact, seeing it as an expansion of liberty and a better fulfillment of the Constitution's purposes.[74] But Field also held the same concern for federalism as his colleagues. He believed that the Constitution provided an answer to this potential problem. The answer stemmed from the manner of enforcing the new amendments.

Field argued that these new amendments should be enforced primarily through the judicial branch. The Courts would review and correct state action violating rights to life, liberty, or property. This approach plays into claims that Field sought judicial supremacy over the political branches.[75] Judges would dictate to state legislatures and executives how they could and could not regulate. But the Justice believed this approach actually restrained expanding national power better than the alternative.

Field began by painting a bleak picture of the alternative. As an example, in *Ex Parte Virginia*, he argued against Congress enforcing the Due Process Clause's protections by passing laws criminally prosecuting state officials for violations. Under this approach, the national government would indict, try, and punish state officers when

[73] *Ex Parte Virginia* 100 U.S. 367.

[74] See the discussion of these purposes in detail in Chapter Six.

[75] See Swisher, *Stephen J. Field,*

suspected of violating the Due Process Clause or any laws made under it. For Field, this approach threatened the very continuance of federalism. The problem began with the expansive nature of Due Process rights. The Justice argued repeatedly that government's purpose rested in protecting life, liberty, and property. The state's regulatory power stemmed from this purpose, as it grounded its health, safety, and morals' legislation in guarding these rights. Therefore, Field argued that "there are few subjects upon which legislation can be had besides life, liberty, and property."[76] To control these subjects meant to control government power.

Field continued that uniting this expansive reach with criminal prosecutions could thereby co-opt the states' lawmaking, judicial, and executive functions, making them independent in name only. As nearly all legislation related to life, liberty, or property, Field noted how the national government could co-opt each sphere of regulatory power, resulting in complete dominance.

First, Field argued that, "[i]n determining what constitutes a deprivation of property" the national government "might prescribe the conditions upon which property shall be acquired and held, and declare as to what subjects property rights shall exist."[77] The national government may not make property laws directly. But in prosecuting state governments for perceived violations, the national government could force states to pass, enforce, and apply any and all kinds of regulations regarding property it so desired. Prosecutions concerning liberty posed the same kind of threat. The prosecutorial power could allow the national government "to prescribe in what way and by what means the

[76] *Ex Parte Virginia* 100 U.S. 366.

[77] *Ex Parte Virginia* 100 U.S. 366.

liberty of the citizen shall be deemed protected."[78] Again this power, effectively used, could allow the states to either conform to national wishes for regulating action or be crippled in the administration of their governments.

Finally, prosecuting deprivations of the right to life could result in a nationally mandated "code of criminal procedure."[79] The national government may not define murder, assault, and other crimes against a person. But through its enforcement power in the Fourteenth Amendment, the national government could force states to do so in the forms it so desired.

Field's objection here perhaps even went beyond criminal prosecutions. Field concluded that the national government "cannot prescribe punishment without defining crime, and therefore must give expression to its own views as to what constitutes protection of life, liberty, and property."[80] But the national government would give its own views in the act preceding prosecution: the actual passage of legislation. While not outright denying national legislative power regarding the Fourteenth Amendment, this statement posited serious questions regarding it. Field seemed to imply that national legislation itself could cause the same problems as zealous prosecution.

Taken together, these national prosecutions and their underlying legislation could undermine state regulations across the entire sphere of legitimate governmental power. Doing so thus could force states to conform in a *de facto* national legal code. Such a circumstance would effectively eliminate state independence, enveloping its power within those of the national government. While Field's hopes for votes in the South

[78] *Ibid.*

[79] *Ibid.*

[80] *Ex Parte Virginia* 100 U.S. 367.

certainly could have fueled his focus on this fear, here he still appeared genuinely concerned for the states' long-term, post-bellum future.

Field believed a better way existed, that judicial enforcement would achieve Fourteenth Amendment ends without the preceding pernicious baggage. This minimizing of intrusion stemmed from the nature of judicial power. First, Courts worked with legislation already in existence. They did not impose new laws upon the states but merely interpreted those already in place. Second, national legislation, even when constitutional, placed general, broad restrictions on the states. It forced the universal command down to the particular state officials. Judicial decisions, on the other hand, proved narrower in application. They moved from particular decisions toward broader principles. Third, even with national legislation, Field seemed to prefer the cases and controversies stemming from individual suits which claimed infringement. Doing so still protected the rights involved without pitting the national and state governments so directly against each other. In these ways, the judicial power better policed state infringements on life, liberty, and property without enveloping the states in the national government's grip.

Furthermore, Field believed this position well aligned with the actual intent of the Fourteenth Amendment. First, the Justice argued that such a mode constituted the manner by which "previous prohibitions upon the States had always been enforced."[81] The Court had adjudicated state violations of the obligation of contracts, coining money, and other Constitutional prohibitions by means of cases and controversies. Second, Field pointed to the language of the Due Process Clause, saying that its protection of due process of law meant that any acceptable action against rights must be made "in the course of the regular

[81] *Ex Parte Virginia* 100 U.S. 367.

administration of the law in the established tribunals."[82] For Field, therefore, the inclusion of due process of law pointed toward judicial enforcement. In fact, he claimed that its existence "is, to me, a persuasive argument" that the amendment "never contemplated that the prohibition was to be enforced in any other way than through the judicial tribunals…."[83] Here, again, Field is not clear as to the status of national legislation. Enforcing through the judicial branch does not necessarily mean Congress legislation could not pass legislation supporting Fourteenth Amendment prohibitions. But he is clear that any violations must be handled by the Courts apart from national prosecutions. The concept of due process of law demanded that the Courts address these violations as put forward by those persons claiming impairment by the states.

Field's Civil Rights Record Critiqued

We cannot determine with absolute certainty Field's exact intentions in voting and writing as he did in civil rights' cases. Racism surely might have been a contributing factor, as might have political ambition. At the same time, Field's reasoning possessed principles separable from such accusations. Cases involving African-Americans in the South entailed questions of the division of power between police regulations and the Fourteenth Amendment, civil versus political rights, and federalism more generally. His reasoning appeared consistent with the overall cooperative vision he articulated in numerous other cases involving white or Chinese persons.

But legitimate reasoning does not equal just application. In these instances, Field's understanding of cooperation between police power and the Due Process Clause

[82] *Ibid.,* 100 U.S. 366.

[83] *Ibid.*

failed in practice to bring about its stated purposes. Millions of African-Americans saw their fundamental rights trampled upon by states utterly unwilling to protect them from intense, perpetual, and savage violations of life, liberty, and property.

In each distinction, as well as in his concern for federalism, Field's approach left gaps in rights' protection which he either failed to see or refused to accommodate. First, Field deserves criticism for his articulation of the state action doctrine. A certain understanding of such a doctrine contains strong textual support. The Fourteenth Amendment did specify state actors for restriction, not individuals. This distinction does place individual actions outside the power of national legislation. The national government therefore should not create its own criminal codes to prosecute violations of life, liberty, and property by nongovernmental threats. Field's worry that to interpret otherwise would do damage to the Constitutional text therefore was reasonable.

But state action doctrine could remain concentrated on the states while still requiring better protection of individual rights. Field's cooperative vision demanded more from states than mere non-infringement. The text said that "No State" shall deprive persons in its jurisdiction of life, liberty, or property. As Field affirmed, these words certainly denied states any active role in such deprivation. No laws which themselves acted to deprive rights could stand. Yet Field's own description of these rights seemed to go further. The Justice had declared that civil rights "are never to be withheld, and may always be judicially enforced."[84] Withholding appears more encompassing than active deprivation. Withholding can be passive as well as active. Rights may be withheld not

[84] *Ex Parte Virginia* 100 U.S. 368.

only by states acting to infringe them but also by ignoring their impairment by other threats.

This passive possibility receives reinforcement when re-visiting the states' role in Field's cooperative vision. In his view, states are called to activity; not just to any activity, but to protect against myriad threats to liberty posed by private individuals. In fact, Field asserted that "[e]very State owes protection to its own citizens…."[85] Otherwise, the state does not fulfill its purpose and fails in the obligation for which it was created.
Thus, states could deprive persons of liberty in passive ways, too, utilizing what Pamela Brandwein terms "state neglect."[86] Southern states in particular exhibited a persistent, willful, and systematic negligence of private infringements of liberty. Such negligence went beyond occasional or partial passivity, which might not rise to the level of Fourteenth Amendment infringement. Instead, the states incubated and sustained the very threats to liberty that states' police power was intended to address. Since their police power role lay in protecting against private threats, sustained, systematic inaction on states' part did deprive persons of life, liberty, and property. Once again, if such rights were never to be denied and could always be judicially enforced, then the Court could certainly intervene against systematic state indifference.

Field's own jurisprudence in other cases we have discussed suggests this possibility. In *Mather v. Rillston,* Field argued that the Courts could enforce suits for holding employers liable for negligence whether or not a particular state law existed. The

[85] *Pennoyer v. Neff* 95 U.S. 723.

[86] Pamela Brandwein, *Rethinking the Judicial Settlement of Reconstruction* (New York: Cambridge University Press, 2011), 31.

protection of the workers created a duty enforceable by the Courts.[87] In a similar manner, the case of *Baltimore and Potomac v. Fifth Baptist* allowed for liability based on the concept of public nuisance to protect rights even in the absence of explicit police regulations.[88] The obligation to protect the public was assumed and the Courts could act accordingly.

These cases could be seen as involving a form of state neglect, as no law seemed to address its particular circumstances. Such neglect was far from systemic and pervasive. Yet Field still thought these matters cognizable in Court and necessary to protect rights from private infringement.

At the same time, the legal concepts of negligence and nuisance formed another basis for acting apart from the Fourteenth Amendment. Thus Field likely would deny a connection between them and the civil rights cases previously discussed. Still, in both cases, the Courts could act to protect rights enumerated in the Due Process Clause even when the government had failed to do so. Though not an exact parallel, failure to apply such principles to state action cases in the South formed the core of Field's failure to realize his cooperative vision in practice as it was supposed to work in theory. The circumstances of state neglect, in their intensity and pervasiveness, were unique and beyond what anyone including Field should have considered acceptable state behavior. Identifying action in the neglect on the part of the southern states was demanded in the circumstances, and required vigorous enforcement for the realization of Field's vision of a government that protected liberty.

---

[87] *Mather v. Rillston* 156 U.S. 399.

[88] See *Baltimore and Potomac v. Fifth Baptist* 108 U.S. 330-331.

Second, Field's distinction between civil and political rights is sound in some cases. The right to hold office, including to serve on a jury, does not apply to all persons, but must be earned. Restrictions and qualifications therefore are valid on political rights.

Yet Field articulated the division between political and civil rights so rigidly that he failed to acknowledge ways the infringement of one could reveal the infringement of the other. We can see this failure by comparing Field's reasoning in the jury cases to his Due Process cases relating to a fair trial. As discussed before, for Field fair trial rights extended from life, liberty, and property as a means to their protection. Doing so required adequately impartial means to accurately weigh guilt, innocence, and punishment. Juries and judges in particular must be as impartial as possible if judicial proceedings were to protect as it should. Field supported these claims even in the jury selection cases, arguing that the Fourteenth Amendment guaranteed the "same rules of evidence and modes of procedure" in the Courts to all persons, regardless of race.[89]

But the Justice failed to acknowledge the underlying problem in these cases between jury service and Fourteenth Amendment civil rights. The underlying problem was the effect of racism on civil rights' judicial protection. Persistent racism denying African-Americans places on juries also affected the ability of judges and juries to execute their offices. If racism could exclude a black man from jury service, then racism could just as easily deny another black man the impartial proceedings which helped fulfill his rights to life, liberty, and property.[90] Far from resting on the mere discretion of the people and their chosen officers, the protection of civil—and therefore absolute,

[89] *Ex Parte Virginia* 100 U.S. 367.

[90] Field, in fact, proved deaf to such pleas when he refused to support the petitions of African-American defendants to change venues from prejudiced, southern state courts to federal district courts. See *Virginia v. Rives* 100 U.S. 333.

personal—rights demanded that the standard of fitness for officers whose functions affected such rights not be based on an arbitrary standard like the color of a man's skin. Such arbitrary selection could too easily result in arbitrary weighing of evidence and conduct of trial. Since Field asserted an "impartial tribunal"[91] as essential to civil rights, he should have understood and articulated the implications jury selection had for minority defendants. His very concern to protect civil rights should have led him to question the violation of political rights.

Because of his failure to acknowledge this effect of racism on civil rights, Field did not apply his broad principles correctly to the particulars of the cases at hand. He refused to understand the lack of black jurors as so systematic as to show state action threatening civil rights to life, liberty, and property. [92] Thus, in his refusal to see the civil rights involved, Field subverted liberty and thereby his own cooperative vision. His approach coincided with his larger view of rights' protection. But his application only maintained fidelity to this view if one ignores the facts and context of the particular cases. Ignoring conditions in the South not only undermined the stated purposes of Field's jurisprudence but wrongly diminished the use of judgment Field called so essential to judicial power.

Third and finally, Field's federalism concerns deserve critique. Threats did exist to the future of federalism and thus an independent existence for the states. The national government could potentially overreach in the manners against which Field warned. But ultimately, the states' failure to protect its inhabitants threatened federalism as much or

[91] *Missouri v. Hayes* 120 U.S. 70-71 (1887). .

[92] *Ex Parte Virginia* 100 U.S. 369.

more than an intrusive national government. The utter failure of one extensive portion of the Constitutional system of government to fulfill its most basic purpose formed the core problem. States' failure in this area thereby placed into question federalism's ability to address rights' protection and therefore gave impetus to potential national overreach. Thus, Field at best considered only half of the problem, the threat to federalism from a strong national government, while neglecting the states' unwillingness to protect individual rights.

Furthermore, Field's judicial remedy, applied fully to state neglect, is problematic. Such a plan certainly comprised a useful means to protect federalism's boundaries. But Field's interpretation is difficult to align with the Fourteenth Amendment's text, which explicitly states in Section 5 that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[93] Following the text, Field certainly could have allowed space for Congressional legislation without the destruction of state independence. Congressional legislation, like judicial action, could have operated only to correct systematic state infringements, both passive and active. If in doing so Congress acted merely to enforce the Fourteenth Amendment, then it did not deny to the states any power not already denied them. Such national power therefore did not necessitate co-opting the states and creating *de facto* national criminal codes as Field feared.

Any overreach on the national government's part in these matters, moreover, could be judicially negated. The Courts could police the boundaries of federalism on both sides, not just regarding the states. Michael Zuckert concurs in this reading, arguing that the Fourteenth Amendment's original meaning did see Congressional and judicial action

[93] U.S. Constitution, Amendment XIV, sec. 5.

as corrective against active or passive state infringement of rights.[94] When states failed to guard liberty, Congress and the Courts could intervene to prosecute and protect.[95] By keeping to these rules, Field could have better adhered to Section Five while also maintaining the continuing boundaries of federalism.

Conclusion

Together, aggressive Congressional and judicial action may have mitigated and shortened the gross injustices visited upon African-Americans in this period. So doing would have better realized Field's own cooperative vision, one grounded in the protection of liberty of all persons from all threats to life, liberty, and property.

But Field did not take this approach. His limited definition of state action and of Due Process rights left African Americans exposed to extensive state violations of their life, liberty, and property rights. His broader conception of liberty did not necessitate these particular applications. If anything, fulfilling his own greater goal of protecting rights demanded more extensive national power than Field seemed willing to exercise.

In the cases pertaining to race, Field's decisions showcase the difficulty in consistently bridging basic principles and their application to particular circumstances. Justices do not vote and write in a vacuum. Numerous factors may have contributed to the tensions and inconsistencies in particular opinions, including racism and political opportunism. Furthermore, simple misappropriation of facts likely contributed as well.

---

[94] See Michael P. Zuckert, "Congressional Power Under the Fourteenth Amendment—The Original Understanding of Section 5," *Constitutional Commentary* 3(1986): 123-156.

[95] Brandwein notes the presence of such a remedial reading on the Court, too, upon which Field could have drawn. This debate, she claims, occurred mostly among factions of the Republican Party, both in Congress and on the Courts. This debate saw Radical Republicans willing to bypass Federalism to protect rights while "centrist" GOP members sought national intervention only when gross, persistent state neglect was present. See Brandwein, 28-31.

Field may have consistently articulated general principles but still failed always to see how they must be applied in the extraordinary and unique circumstances following the Civil War. While not denying Field's general adherence to his conception of liberty, race cases show the effect of these all-too-human errors.

CHAPTER FIVE

The Cooperative Constitution and Federalism

My focus in the preceding chapters concerned the relationship between state police power and the Due Process Clause. When properly applied, in Field's view, the two protected liberty against threats from both state regulation and individual action. This protection formed a central component of Field's cooperative Constitution of liberty, whereby particular components worked together to preserve individual rights.

In this chapter, I turn to the role federalism played in Field's vision. First, I argue that, for Field, the national government exercised a police power as well as the states. Thus, national and state regulation cooperated, not as different types of power, but as different spheres of the same police power. This convergence of state and national power, I explain, stems from Field's understanding of the origins and foundations of both. Unlike the popular will-based views of his colleagues, Field argued that each government was created and contracted to protect individual rights, limiting each one's legitimate police power.

Next I turn to how Field discerned the boundaries between national and state power by looking at the Commerce Clause. Following precedent, Field articulated intricate distinctions between exclusive and concurrent spheres of state and national regulation. These distinctions, he argued, further helped guard liberty from potential infringement. I then conclude by addressing the extent of national power as Field articulated it. While I agree with critics that the power that Field attributed to the national government was inadequate to accomplish the tasks to which he assigned it, his failure stemmed in part from the pace and

extent of the economic changes he faced and in part from his continuing, legitimate worries about federalism's future.

Police Power: State and National

Thus far, my examination of Field's police power only has concerned the states. Field clearly articulated a state police power to regulate health, safety, and morals for the purpose of protecting individual rights. While Field scholarship addresses the states' use of this power, it says almost nothing regarding police power's place in the national government.[1]

Ignoring this issue may stem from assumptions regarding police power commonly made today. Many scholars see the states as the sole possessor of the police power. Richard Levy speaks for this group when he declares, "[I]f a matter is within the scope of the federal power…it is *by definition* beyond the scope of police power."[2] The state and national governments, therefore, do not merely exercise different particular powers. They exercise different kinds of power, one police and the other not.[3]

---

[1] See Kens, 249-251; Thomas R. Haggard, "Work, Government, and the Constitution: Determining the Proper Allocation of Rights and Powers" in *Liberty, Property, and the Future of Constitutional Development* edited by Ellen Frankel Paul and Howard Dickman (New York: SUNY Press, 1990), 257. The most I have found is a passing reference to the possibility of a national police power from Field in Tiber B. Machan, *Private Rights and Public Illusions* (Oakland, CA: The Independent Institute, 1995), 296.

[2] Richard E. Levy *The Power to Legislate* (Westport, CT: Praeger Publishers, 2006), 37 (Emphasis added). See also Cal Jilson, *American Government: Political Development and Institutional Change, 6th ed.* (New York: Harcourt-Brace, 2011), 64; Dubber, 86; Timothy S. Huebner, *The Taney Court: Justices, Rulings, and Legacy* (Santa Barbara, CA: ABC—CLIO, 2003), 258.

[3] This opinion also holds great sway on the present Supreme Court. Chief Justice Roberts, for example, says that "the police power" is a "general power of government possessed by the States but not by the Federal Government." *NFIB v. Sabelius* 567 U.S. 4 (Roberts, C.J.). Robert's argument echoes nearly two decades of descriptions by the Court of police power as one that "the Founders denied the National Government and reposed in the States." See *U.S. v. Morrison* 529 U.S. 618 (2000). See also *U.S. v. Lopez* 514 U.S. 567 (1995)*; U.S. v. Comstock* 560 U.S. 149 (2010).

Scholars appear to assume this interpretation was accepted during Field's time on the Court. William J. Novak's study of 19th century regulatory schemes, for example, declares that police power then was a "state" power only.[4] Markus Dubber goes back to the Founding, arguing that from its break with England, America "denied the national government any police power of its own."[5] In speaking only of state police power, Field scholars appear to place Field's jurisprudence within these lines of interpretation.

However, Field's understanding of police power differed significantly from the state-exclusive interpretation. Where many scholars and judges saw a distinction in kind between state and national power, Field saw the same power exercised separately by state and national governments. All government possessed a police power, regardless of its role within federalism. Therefore, the national government wielded a police power similar to that exercised by the states.

To explain Field's position, I will show how he described national power in police terms. This national police power did not rest on one Constitutional clause. The Justice asserted that several powers given to the national government each enabled police regulations.

The most salient power for Field's time and our own was the Commerce Clause. The Clause, found in Article I, Section 8, states that Congress holds the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the

[4] Though he adds that often these powers were exercised most directly by even more local governments, though he does not mention such entities are considered, constitutionally, as part of the states. See William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth Century America* (Durham, NC: University of North Carolina Press, 1996), 13, 81.

[5] Dubber, *The Police Power,* 86. Though Dubber does continue that the national government has gotten around this prohibition by enacting the equivalent of police regulations without calling them by the name. See Dubber, 87-88.

Indian tribes."[6] This Clause established a divide between intrastate and interstate commerce that defined in practice much of federalism.

Field's Commerce Clause jurisprudence both calls this clause a police power and speaks of its goals in the language of police categories. The Justice declared the Commerce Clause a police power in *Gloucester Ferry Company v. Pennsylvania.*[7] The ferry company involved transported passengers and cargo across the Delaware River between Gloucester in New Jersey and the city of Philadelphia. The question arose whether the ferry company, though domiciled in New Jersey, must pay taxes to the state of Pennsylvania because of its Philadelphia wharf.[8] While Pennsylvania insisted it must, the ferry company objected that the wharf constituted part of interstate commerce beyond the scope of state legislation. The decision, therefore, hinged on what of the ferry company was intra or inter-state commerce.

Writing for a unanimous Court, Field sided with the ferry company. The taxes hampered the train of commerce which only the national government could regulate. In so doing, Justice Field reiterated that the states possessed the power "to establish police regulations for the better protection and enjoyment of property."[9] He was careful to add that the Commerce power "was not intended…to supersede or interfere with [this state] power…."[10]

---

[6] U.S. Constitution, Article I, Sec. 8.

[7] 114 U.S. 196 (1885).

[8] G.W.K., "Interstate Commerce. State Regulation. Ferries," *University of Pennsylvania Law Review and Register* 63(2) (Dec. 1914): 128.

[9] *Gloucester Ferry Company v. Pennsylvania* 114 U.S. 215.

[10] *Ibid.*

His caution did not mean, however, that the police power was exclusive to the states. Quoting Thomas Cooley's work, *Constitutional Limitations,* Field declared that under its commerce power, "Congress may establish police regulations as well as the states."[11] Here Field described the power Congress exercised within interstate commerce as including police regulations. The police power was a power of all government, not merely one for the states.

Commercial regulations touched upon particular police power categories as well. Primary among these categories concerned safety. Items of commerce may be "subject to such regulations as may be necessary for the...safety of the community through which its cars pass, and to insure safety in the carriage of the freight."[12] Regulations could also insure the "safe navigation" of waterways or other avenues of commercial movement.[13]

Health and morals regulations also fell under Commerce Clause power. One example of both concerned the case of *United States v. Forty-Three Gallons of Whiskey.*[14] The Commerce Clause included in national power regulation of commerce with Native American tribes. The case here pertained to a treaty stipulation made with the Chippewa nation promising full enforcement of bans on the importation and sale of alcohol to the tribe. Field discussed the purpose of these Congressional prohibitions. First, they were considered of "vital importance to the peace" of the Native Americans.[15] Peace is a police power category closely linked to safety, for violence which Field often attached to

---

[11] *Gloucester Ferry Company v. Pennsylvania* 114 U.S. 215.

[12] *Bowman v. Chicago & Northwestern Ry. Co.* 125 U.S. 500.

[13] *The Daniel Ball* 72 U.S. 564.

[14] 108 U.S. 491 (1883).

[15] *Ibid.,* 108 U.S. 496.

alcoholic consumption could result in the injury of persons and of their property. In addition, Congressional regulation, up to and including prohibition, sought to protect "the material and moral wellbeing" of the tribe.[16] Field considered material wellbeing among the health concerns to which overconsumption of alcoholic beverages may be detrimental, as disease and death could certainly result. He also took into account the moral degradation associated with such habits. This reasoning, therefore, differed in no substantial manner from his discussion of alcohol as a state police power. Within its sphere, the national government possessed the power to regulate the deleterious effects of alcohol as much as state governments. In so doing, it exercised a national police power within its use of the Commerce Clause.

Thus, we see that a national police power was most often manifested in regulations under the Commerce Clause. But it did not end with this provision. The power of Congress to "[t]o establish Post Offices and post Roads,"[17] found also in Article I, Section 8, was another example. Field addressed this issue in the case of *Ex Parte Jackson,* which concerned the 1873 federal statute known as the "Comstock Law." This law "was the first systematic attempt of the federal government for the legislation of morality."[18] The law banned possession, publication, and advertisement of many items deemed immoral. Jackson faced charges for using U.S. mail service to transmit one of those immoral objects— lottery advertisements.[19]

---

[16] *United States v. Forty-Three Gallons of Whiskey* 108 U.S. 496.

[17] U.S. Constitution, Article I, Sec. 8.

[18] Shahid M. Shahidullah, *Crime Policy in America: Laws, Institutions, and Programs* (Lanham, MD: University Press of America, 2009), 161

[19] Thomas N. McInnis, *The Evolution of the Fourth Amendment* (Lanham, MD: Rowan & Littlefield, 2009), 21

Field wrote a unanimous opinion upholding Jackson's conviction. In that opinion, he described the regulatory reach of government's power over mail service. First, the power was geographically extensive. It "embraces the regulation of the entire postal system of the country,"[20] thereby including the entire nation. Second, the power to regulate was extensive in its means. Congressional regulation could go beyond prescribing the conditions and instruments to include "the right to determine what shall be excluded"[21] from mail carriage entirely.

Field justified the extensive power exercised here using police language. The Justice said that "[i]n excluding various articles from the mail" Congress intended "to refuse its facilities for the distribution of matter deemed injurious to the public morals."[22] The power to regulate for the public morals, of course, is a classic police power category. The power over post roads gave the national government means to pursue moral protections of the public as would any state police power.

One final example of police power categories resided in national power over immigration. Textually, Field located the power over immigration in several clauses, including the power to make treaties and set rules for naturalization.[23] The Constitution's placement of these powers recognized a fundamental reality. The United States comprised one nation in a world filled with nations. At the core of nationhood stood the concept of independence or sovereignty. Not to be independent or sovereign meant "to be

---

[20] *Ex Parte Jackson* 96 U.S. 732.

[21] *Ibid.*

[22] *Ibid.,* 96 U.S. 746.

[23] Article II, Section 2; Article I, Section 8. See Field's opinion in *Chinese Exclusion Cases* 130 U.S. 604-605, 609 (1889).

subject to the control of another power."[24] Therefore, a truly independent or sovereign nation did not suffer such outside controls. To maintain sovereign independence, all nations possessed powers "which can be invoked for the maintenance of its absolute independence...throughout its entire territory."[25] As the United States comprised "one nation" in its relations to other countries, it possessed these powers to maintain its sovereign independence in the world. This included immigration. The power to exclude or include persons wishing to immigrate "is a part of its independence."[26]

Sovereign independence, though, was a means not an end. The ultimate goal did not rest in controlling one's own affairs, including who could and could not immigrate. Its maintenance came so that the United States government could pursue its purposes un-dictated to by outside entities.

Field declared these purposes to be police in nature. He did so first by appropriating police power categories to describe the immigration power. Often these applications took on an insidious racial component. As discussed in Chapter Four, Field on several occasions employed racial stereotypes and language when discussing Chinese residents. However, Field justified national regulation regarding these immigrants by grounding them in the more benign categories of safety, health, and morals.

For example, in his immigration opinions, the Justice spoke of the "irritation and discontent" which occurred due to battles over scarce labor jobs between incoming Chinese and already-resident white workers. This tension led to "frequent conflicts between them and our people" which "disturbed the peace of the community in many

[24] *Chinese Exclusion Cases* 130 U.S. 604.

[25] *Ibid.*

[26] *Ibid.,* 130 U.S. 603.

portions of the state."[27] Promoting the peace is a traditional police power category attached to safety. The conflicts disturbing the peace posed a threat to the safety of those involved and those innocent bystanders caught in-between.

Field furthermore declared that "the exclusion of...persons afflicted with incurable diseases" was legitimate because they seemed "injurious or a source of danger to the country."[28] Immigration law could therefore protect the health of the public, another traditional police power category. Field believed restrictions on Chinese immigration directly related to issues of health. He noted that the larger number of persons "termed Chinese laborers were imported under the labor contract system."[29] This labor contract system resulted in cheap labor, as Chinese immigrants often worked for less pay under less protected conditions. Field thus noted that "competition with them tended to degrade labor, and thus to drive our laborers from large fields of industry."[30] Competition with these immigrants would push down the wages and drive up the working hours of those already here supporting families. Such a situation would affect the health of the white workers now forced to work longer and in less optimal conditions. It also would hurt the families for whom they must provide. Thus Field said that "[a] restriction upon their further immigration was felt to be necessary to prevent the degradation of white labor."[31] As health reasons could restrict those immigrating with incurable diseases, so they could do so for the injurious effect stemming from the competition of cheap labor. Once again,

---

[27] *Chew Heong v. United States* 112 U.S. 566.

[28] *Chinese Exclusion Cases* 130 U.S. 608.

[29] *Chew Heong v. United States* 112 U.S. 568.

[30] *Ibid.,* .

[31] *Ibid.,* 112 U.S. 569. This argument, of course, could apply to the Chinese laborers as well, though Field does not make this argument in his opinions.

these arguments included much racially demeaning language and assumptions. At the same time, the justification for national legislation ultimately appealed to the broader principles of health and safety inherent in a police power.

These perceived threats extended further to morals. Field noted that appeals to Congress to limit Chinese immigration came from the claim that "the presence of Chinese laborers had a baneful effect upon the...public morals."[32] The basis of this objection, like those before, contained an inflammatory racial element. Field lamented that the Chinese immigrants "will not assimilate with our people" despite "the more than thirty years they have been in our country."[33] This situation did constitute a threat to safety, as Field noted that the government could find "the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security."[34] Lack of assimilation gave ground for tensions to erupt into violence.

But the cultural invasion also affected morals due to the breakdown of an ethical consensus based in Christianity. As discussed in the last chapter, Field considered some basic moral consensus necessary to maintain liberty in all its forms. Thus limiting immigration was done in part "to preserve to ourselves the inestimable benefits of our Christian civilization"[35] Safety, health, and the limits on such legislation relied on these mores, legitimating some broad measure of protection.

Therefore, however we judge Field's view of the effect of Chinese immigration on the health, safety, and morals of the community, he clearly connected the national

---

[32] *Chinese Exclusion Cases* 130 U.S. 595.

[33] *Chew Heong v. United States* 112 U.S. 567.

[34] *Chinese Exclusion Cases* 130 U.S. 606.

[35] *Chew Heong v. United States* 112 U.S 569.

government's authority over immigration with these police power considerations, connecting them to health, safety, and morals' purposes.

Beyond using the language of police power, Field showed his thinking in a second, even more explicit, manner. In one instance, the *Chinese Exclusion Cases*, he approvingly quoted Frederick Frelinghuysen, Secretary of State to President Arthur, when he said, "government cannot contest the right of foreign government to exclude, on police or other grounds, American citizens from their shores."[36] Here we see that the use of police power categories cannot be coincidence. Field described the immigration power as containing police purposes. In regulating immigration, the national government made police regulations for the sake of the health, safety, and morality of its people.

Field's assertion of a national police power, therefore, persisted across several Constitutional clauses and throughout his Supreme Court tenure. Clauses as diverse as those regarding commerce, post offices, and immigration each included the power to make police regulations. Each should seek to protect the health, safety, and morals of the people within its sphere. Thus, for Field, police power was a power of all government, state and national.

Police Power and the Purpose of Government

Yet Field's claims of a national police power are controversial. Though they do not address Field's references to a national police power, scholars rightly point to a strong judicial tradition that places such power only in the states.[37] How, then, did Field understand police power as state and national while many of his contemporaries did not?

---

[36] *Chinese Exclusion Cases* 130 U.S. 608.

[37] See footnotes 2 and 3 above.

The difference stemmed from the justices' contrasting conceptions of police power's purposes, and with it, government in general. Chapter Two discussed that justices such as Chief Justice Waite and Samuel Miller described police power as regulating for the "public good."[38] This description's defining element was its lack of definition. The justices refused to define the public good or, therefore, the police power which pursued it.[39] Chapter Two, however, did not fully discuss *why* these justices refused to define the police power. Understanding why, and Field's differing position, helps to explain their divergent views regarding police power's place within federalism.

For a number of Field's colleagues, the undefined police power equated to what they understood the purpose of government in general to be: exercising the popular will. Roger Taney, the first Chief Justice with whom Field served, provided a helpful example of this position. Taney spoke of the "political body…who hold[s] the power" as "the 'sovereign people.'"[40] The connection between power and sovereignty was crucial for Taney. He declared sovereignty "is a question of power"[41] and to possess sovereignty meant to be unquestioned in power's exercise.[42] In calling the people sovereign,

[38] *Munn v. Illinois* 94 U.S. 126.

[39]Justice Miller in *Slaughterhouse,* for example, declared "it is much easier to perceive and realize the existence and sources of it than to mark its boundaries, or prescribe limits to its exercise." See *Slaughterhouse Cases* 83 U.S. 62 (1873).

[40] *Dred Scott v. Sanford* 60 U.S. 404 (1857).

[41] *License Cases* 46 U.S. 583 (1847).

[42] Charles William Smith, *Roger B. Taney: Jacksonian Jurist* (Chapel Hill, NC: University of North Carolina Press, 1936), 42. Smith connects Taney's views of sovereignty to those of French philosopher Jean Jacque Rousseau. See *The Social Contract,* Chapter IV. Taney goes on to say that "every citizen is one of this people, and constitutes a member of this sovereignty."

therefore, Taney declared them corporately to possess un-qualified, absolute authority to do as they pleased.[43]

Taney then equated this sovereign power with the police power. He argued that police power is "nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions."[44] The people's exercise of their sovereign power through government to enact their will was the exercise of the police power.

Taney's formulation helps to explain why Field's colleagues were so reticent to define the police power. As sovereign, the people define the public good police power pursues and the means by which that good is pursued. Thus, Taney declared that, regardless of possible "fixed and immutable principles of justice," the people "are the best judges of what is for their own interest…."[45] No outside standard beyond their will can intrude. Thus, for the judiciary to define police power's reach would limit that power outside of its only true source. Field's colleagues did not define the police power because they saw doing so as beyond their authority.

Chief Justice Taney also helps to explain why the police power, for these justices, ultimately rested in the states alone. In Taney's view, the state and national governments did not hold the same relationship to the people's sovereign, and hence police, power. Instead, only the states directly exercised it. In fact, Taney saw the state governments as extensions of the people itself. Speaking of the state governments, the Chief Justice argued "that the people may, by the form of government they adopt, confer on their public servants and representatives all the power and rights of sovereignty which they

[43] See Smith, *Roger B. Taney,* 42.

[44] *License Cases,* 46 U.S. 583.

[45] *Ohio Life Insurance & Trust Company v. Debolt* 57 U.S. 429 (1853)

themselves possess…."[46] State governments, therefore, could exercise the sovereign power of the people wholesale.

Taney appeared to think that the state governments did originally hold this sovereign power in its entirety. He spoke of state governments as the people exercising their sovereign will. He declared of "sovereignty" that "[i]t is by virtue of this power that it [the state] legislates…."[47] Sovereignty is the basis of state legislation. The people, however, are the ones who hold sovereignty, not the state government. The Chief Justice clarified by arguing that the people who form the sovereign power then "conduct the Government through their representatives."[48] A unity therefore existed for Taney between the people's sovereign will and the acts of the state government.

In exercising the people's sovereignty, the states' power equated to the police power. In legislating they merely realized the popular will which alone established police power's definition. Therefore, for the Chief Justice as well as many of Field's other colleagues, state power *is* police power and police power *is* state power.

The national government for Taney operated on different terms. The national government did not directly exercise the people's sovereign power. Instead, the national government was the creation of the states. The states granted existence "to the general government"[49] in ratifying the Constitution.[50] Because the state governments created the

---

[46] *Ohio Life Insurance & Trust Company v. Debolt,* 57 U.S. 429.

[47] *Ibid.,* 46 U.S. 583.

[48] *Dred Scot v. Sanford.,* 60 U.S. 404.

[49] *Martin v. Waddell* 41 U.S. 410.

[50] Prior to its ratification, Taney argues "there was no Government of the United States in existence" but merely "a league or confederation" of "sovereign, independent States." See *Dred Scott* 60 U.S. 434.

national government, not the people directly, the national government did not really exercise the people's sovereign power. Taney argued instead that "[c]ertain specified powers, enumerated in the Constitution, have been conferred upon it [the national government], and neither the legislative, executive, nor judicial departments of the Government can lawfully exercise any authority beyond the limits marked out by the Constitution."[51] As Constitutionally-created by the state governments, the national government was one of enumerated—specified—powers. Thus, in enumeration, the national government did not exercise the people's sovereign power but instead acted through declared powers delegated from the power of the states.

This description denied the possibility of a national police power, inasmuch as in Taney's understanding, shared by Miller and Waite, police power possessed no specific definition and therefore could not be an enumerated one. Enumerated powers existed through their definition. The national government possessed the power to regulate interstate commerce, collect taxes, and review cases and controversies because the Constitution specified them as among its powers. These same justices, however, repeatedly affirmed police power's existence in spite of the alleged difficulty, if not impossibility, of defining it with any precision.[52] The police power, therefore, existed *apart from* enumeration for these justices. No constitution or other form of lawmaking brought it into existence. In fact, these justices tended to see definition as impossible for police power, as when Justice Miller expressed concern, "not to mark its boundaries, or

[51] *Dred Scott v. Sanford,* 60 U.S. 401.

[52] Randy Barnett, "The Proper Scope of the Police Power," *Notre Dame Law Review* 79(2003-2004): 475.

prescribe limits to its exercise."[53] Because these justices held that the national government possessed only enumerated powers, it could never contain a police power, whose definition tended only to curtail it.

Thus, we see how justices such as Taney both rejected police power as national while accepting it as the very definition of state power. The state governments exercised the sovereign power of the people to enact their will, a power the same as the police power. This power's definition thus changed with changes in the people's will. The national government, however, was one of non-sovereign, enumerated power, an impossible combination with these justices' view of police power.

Field's differences with Taney and other colleagues began with the definition of police power itself, a definition he also connected to government's broader purposes. Unlike Taney, Field argued that this purpose did not ultimately reside in fulfilling a sovereign popular will. Popular will was not sovereign, at least in the absolute sense described by Taney. Instead, Field argued that popular will was restrained by government's more fundamental purpose: the protection of individual rights. Quoting the Declaration of Independence, Field argued that human beings possess "inalienable rights" and that "governments are instituted among men" to "secure them."[54] Field declared that such protections provided content to the Constitution's Preamble when it said that the government was "ordained, among other things, 'to establish justice.'"[55] Therefore all government—national and state—wielded its power first and foremost to guard rights.

---

[53] *Slaughterhouse Cases* 83 U.S. 62 (1873).

[54] *Butcher's Union Co. v. Crescent City Co.* 111 U.S. 757.

[55] Field echoed the Tenth Amendment in saying that "[a]ll other powers not prohibited to the states are reserved to them or to the people." See *Legal Tender Cases* 79 U.S. 634 (1870).

Government's larger purpose then defined police power's particular aims. As discussed in Chapter Two, Field argued that police power was "legislation which secures to all protection in their rights…."[56] Police power's goal, like government in general, was to protect life, liberty, and property. The many regulations of health, safety, and morals sought to further this goal to protect individual rights.

In so doing, Field's position did not eliminate popular will. The people whose rights the government secured still possessed unrivaled power to determine how to achieve this purpose. A vast number of choices in how to protect life, liberty, and property remained open for the people to decide. What Field declared outside popular choice was the purpose such means pursued. Governments existed and police power was exercised to protect inalienable rights.

Field's understanding of government power in general and police power in particular distinguished his view of the latter's place within federalism. Like Taney, Field declared that the state governments possessed reserved powers while the national government exercised only enumerated.[57] But unlike Taney, Field's definition of government and police power's purpose left room for a national police power. The purpose of all government was the protection of rights. This restricted the exercise of power similarly in the case of the national and state governments. Police power, too, served and was limited by government's purpose in protecting the individual rights comprising liberty.

[56] *Munn v. Illinois* 94 U.S. 145.

[57] *Sinking Fund Cases,* 99 U.S. 763 (1878).

No conflict therefore existed between the exercise of national power and of the police power. When the national government exercised its enumerated powers to regulate commerce, for example, it could and should do so for the police power purpose of protecting rights. The same proved true of the states' reserved powers. Though not enumerated, their proper role also rested in protecting life, liberty, and property from infringement.[58] Therefore, the result of Field's reflections about the fundamental purpose of government was to diminish the distinction between the (police) powers of the national and state governments made by Taney and his followers on the Court.

Field's differences with his colleagues over police power touched upon their fundamental understandings of government's purpose. Did government exist primarily to fulfill the people's will or to protect their rights? The way this difference affected federalism made police power exclusively state power on one hand and the power of all government on the other. Field's own articulation stemmed from his broader understanding—a liberty both from and through government permeating all of the Constitutional system.

The Commerce Clause: Federalism, Police Power, and Liberty

So far I have discussed the existence and foundation of a national police power in Justice Field's jurisprudence. This examination unites the purposes of national and state governments as well as the general means used. All government wielded police power to protect liberty. Now I turn to this power's distribution. The national police power and its state counterpart, though cooperating toward liberty as a common end, occupied distinct

[58] In *Missouri Pacific Railway v. Humes,* for example, Field argued that the "general police power of the state" was meant "to provide against accidents to life and property…." See *Missouri Pacific Railway v. Humes* 115 U.S. 522.

spheres within federalism. Field believed this distribution important for liberty's protection.

To address this division, and its implications for liberty, I return to Field's Commerce Clause jurisprudence. In these cases, Field defined commerce as well as describing the exclusive and overlapping regulatory spheres state and national power exercised over it. In each sphere, Field returned to the theme of liberty, as he saw these boundaries protecting individual rights.

Commerce Defined

Understanding Field's position begins with defining commerce itself. He stated that "[c]ommerce is a term of the largest import."[59] Following Chief Justice Marshall's famous definition in *Gibbons v. Ogden,* Field declared that commerce consisted of more than mere trafficking of goods, instead including all "commercial intercourse,"[60] including all means "for the purposes of trade in any and all its forms…."[61] Thus, any activity included in the process of exchanging goods fell within the Constitutional understanding of commerce.

This process first included "the purchase, sale, and exchange of commodities."[62] The item itself must be included in interstate commerce. Field's opinions dealt with any

[59] *Welton v. State of Missouri* 91 U.S. 280.

[60] *Gibbons v. Ogden* 22 U.S. ; Jean Edward Smith, *John Marshall: Definer of a Nation* (New York: Henry Holt & Company, 1996), 478.

[61] *Welton v. State of Missouri* 91 U.S. 280.

[62] *Gloucester v. Pennsylvania* 114 U.S. 203.

number of these commodities, from sewing machines[63] to alcohol[64] to even birds killed for game.[65] Field argued that these items were not inherently commercial. However, he declared that "whenever a commodity has begun to move as an article of trade" it entered the commercial realm.[66] He therefore looked to the purpose of an action. If the action formed part of the movement distinctly aimed at a commodity's trade, then that commodity and all attendant actions constituted commercial intercourse.

Field's definition therefore also extended to the means by which commodities came to be sold. In order to be exchanged, commerce usually must be transferred from one location and person to another. Thus the power over interstate commerce also included "traffic [that is] the transportation of persons and property."[67] By traffic, Field included both the avenues and forms of transportation. An example of both could be found in the case of *The Daniel Ball*.[68] Here, Field defined commercial bodies of water as distinct from noncommercial. Commercial waterways were those which were "navigable" in the sense of being "susceptible of being used in their ordinary condition as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water."[69] In the same case, Field also defined the means of transportation as commercial. The ship itself was considered "as an instrument

---

[63] *Welton v. Missouri* 91 U.S.

[64] *Downham v. Alexandria Council* 77 U.S. 173; *Mugler v. Kansas* 123 U.S. 623; (1887)*; O'Neil v. Vermont* 144 U.S. 323.

[65] *Greer v. Connecticut* 161 U.S. 519 (1896).

[66] *The Daniel Ball* 77 U.S. 565.

[67] *Gloucester v. Pennsylvania* 114 U.S. 203.

[68] *The Daniel Ball* 77 U.S. 557 (1870).

[69] *Ibid.,* 77 U.S. 563.

of that commerce"[70] since it carried commodities intended for trade. Together, the item in the process of trade and the means by which that trade came about constituted commercial intercourse.

Field then divided those subjects deemed commercial between interstate and intrastate. The national government held power over commerce "between the states."[71] Field argued that "the power of Congress to regulate interstate commerce is plenary."[72] Concerning interstate regulation, no state law could impair Congressional action. Other commerce, that which was not interstate, was under the control of individual states. Field thus noted that "[t]he internal commerce of a state—that is, the commerce which is wholly confined within its limits—is as much under its control as foreign or interstate commerce is under the control of the general government."[73] Here the states held the power while the national government could not interfere.

Drawing the line between state and national commercial power was not always clear. Field acknowledged that "[t]here is difficulty…in drawing the line precisely where the commercial power of Congress ends and the power of the state begins."[74] Field in fact argued that inter and intrastate commerce, while "quite distinguishable when they do not approach each other, may yet, like the intervening colors between black and white, approach so nearly as to perplex the understanding…."[75] Distinctions often were very

[70] *Ibid.,* 77 U.S. 565.

[71] U.S. Constitution, Article I, Sec. 8 (emphasis added).

[72] *Nashville, Chattanooga, and St. Louis Railway Company v. Alabama* 128 U.S. 99.

[73] *Sands v. Manistee River Improvement Co.* 123 U.S. 295 (1887).

[74] *Welton v. State of Missouri* 91 U.S. 281.

[75] *Ibid.,* 91 U.S. 281-282.

difficult to make. Field said, still, that "as the distinction exists, it must be marked as the cases arise."[76] To do otherwise would subvert the system of federalism the Constitution envisioned.

In drawing these lines, Field accepted the precedent of *Cooley v. Board of Wardens.*[77] This 1852 Supreme Court case divided commerce into three categories. The first two comprised exclusive regulatory spheres for national and state governments. When subjects fell into one of these categories, either the state or the national government alone could regulate. A third admitted an overlapping sphere. These subjects could be regulated by the states until the national government chose to pass superseding legislation. Field followed this tri-fold division in his opinions, consciously seeing in it a proper system to guard individual rights.

Exclusively National

The first sphere formed part of interstate commerce and fell exclusively under national power. The Justice argued that "where the subject" of regulation "is national in character" such legislation "can only be made by Congress."[78] What made a subject national in its character consisted in whether it would "admit and require uniformity of regulations affecting alike all the states…."[79] Regarding such subjects, the national government alone could regulate.

---

[76] *Ibid.,* 91 U.S. 282.

[77] 53 U.S. 299 (1852). Field cites this case frequently. See *County of Mobile v. Kimball* 102 U.S. 71; *Steamship Co. v. Jollife,* 69 U.S. 457 (1864); *Bowman v. Chicago & Northwestern Ry.* 125 U.S. 508 (1888).

[78] *Bowman v. Chicago & Northwestern Ry. Co.* 125 U.S. 501.

[79] *Cardwell v. American Bridge Company* 113 U.S. 210.

This concept posited both a standard for *what* is exclusively national as well as pointing toward a reason *why* those subjects should be so categorized. What would admit uniformity included all "which consists in the transportation, purchase, sale, and exchange of commodities."[80] These separate entities either crossed state lines themselves or formed part of an unbroken movement that included interstate activity. The avenues of transportation—roads and waterways for instance—could extend into multiple states. The means of transportation—whether railroads, ships, horses, etc.—took commodities along these routes across state lines. The commodities, themselves the reason for such movement, traveled on interstate avenues using an interstate means of transportation. Finally, Field's exclusively national sphere also included, in certain instances, the sale of commodities traveling within interstate commerce upon their importation.[81]

Why this exclusive sphere existed stemmed from the harmful treatment persons or things in interstate trade could receive from particular states. Field argued that a reason for the Clause's existence stemmed from the possibility of "conflicting regulations of different states, each discriminating in favor of its own products and citizens, and against the products and citizens of other states."[82]

These discriminations brought significant problems. Field argued that, prior to the Constitution's ratification, states enacted such discriminatory legislation, leading to "[t]he depressed condition of commerce and…obstacles to its growth."[83] In making these

---

[80] *County of Mobile v. Kimball* 102 U.S. 697.

[81] See, for example, Field's disagreement with Justice Harlan's majority opinion in *Mugler v. Kansas* which is discussed regarding this matter below. See 123 U.S. 623.

[82] *County of Mobile v. Kimball* 102 U.S. 697.

[83] *Welton v. State of Missouri* 91 U.S. 280. For example: under the Articles of Confederation, states with significant trading harbors, such as New York and Massachusetts, set duties on imports, exports,

arguments, Field articulated the concept of a "Dormant Commerce Clause," one whose history pre-dated Field's arrival on the Court.[84] This concept declared that granting the national government power to regulate commerce also denied states the ability to discriminate against that commerce within their own borders.[85]

Field saw the depressed state of commerce, though distressing in itself, as pointing to the more fundamental issue of liberty. State discriminations on interstate commerce he regarded as perniciously affecting individual rights. Commerce involved the use and enjoyment of property. Goods, money, benefits—all of these entities were possessions involved in commercial exchanges. As property, government must protect and not infringe upon the reasonable use and enjoyment of these commercial objects. This protection, of course, extended to commercial property regardless of its status as interstate or intrastate. The states' perspective, however, encouraged them to guard their own internal commerce while infringing on the liberty of any outsiders. With state regulation alone, interstate commerce might resemble the insecurity of foreign travel. Though in the same nation, protection could terminate at any state line. Thus, under these conditions any interstate travel could result in impairments of life, liberty, or property.

Field argued that the concept of an exclusive national sphere addressed this problem. An example of such protection arose in the case of *Bowman v. Chicago &*

---

and tonnage. Doing so drove up prices to import or export for other states making use of these ports, hurting their commerce with other states and with foreign nations. See Cathy Matson, The Revolution, the Constitution, and the New Nation" in *The Cambridge Economic History of the United States, Vol. 1* edited by Stanley L. Engerman and Robert E. Gallman (Cambridge University Press, 1996), 380.

[84] It is most prominently attributed to *Cooley v. Board of Wardens,* noted above. See footnote 77.

[85] Christopher N. May, Allan Ides, *Constitutional Law National Power and Federalism: Examples and Explanations, 4th Ed.* (New York: Aspen Publishers, 2007), 346-347.

Julian N. Eule, "Laying the Dormant Commerce Clause to Rest" *Yale Law Journal* 91(3) (1982): 425-426.

Northwestern Ry. Co. There, the majority struck down an Iowa statute banning the importation of alcohol within its territory even though such importation was approved by Congress. Field concurred, writing separately to also take up the issue of sale upon importation. In *Munn,* Field had argued that the Due Process Clause protected property's use in addition to its possession. Field thought this principle was at stake here in allowing the sale of imported commercial objects. He reiterated his *Munn* principle by stating that "[t]he framers of the Constitution never intended that a right given should not be fully enjoyed."[86] But importation of commercial property did not comprise full use and enjoyment. Importation was a means, not an end. The importer does not find his full enjoyment in the process of transporting a commercial object. Such sale or purchase constituted the reason "transportation [is] sought."[87] That was the end pursued for purposes of use and enjoyment. Thus, Field asserted that "the right of importation carries with it the right to sell the article."[88] To do otherwise, to restrain states from prohibiting importation but not sale, "is to declare that the right which the Constitution gives is a barren one."[89] In other words, such action protected the means of importation without guarding importation's purpose: the sale of the item. True protection of property rights could not stop protection at this penultimate point. Until "the importer had so acted upon the thing imported that it had become incorporated and mixed up with the mass of property" in the state, it could not face prohibiting state regulation.[90]

---

[86] *Bowman v. Chicago and Northwestern Ry. Co.* 125 U.S. 505.

[87] *Ibid*.

[88] *Ibid.,* 125 U.S. 504-505.

[89] *Ibid.,* 505.

[90] *Welton v. Missouri* 91 U.S. 282.

In so doing, Field did not deny that such sale could be regulated. The national government could make regulations, as Field says elsewhere, "of infinite variety"[91] and thereby prescribe and proscribe its conditions in minute detail. But in leaving such regulations to the national government, alone, Field believed the property rights of interstate actors—and thus their liberty—received better, more reliable, protection.

Exclusively State

While numerous entities fell within the national sphere, the Justice declared that "[t]here is undoubtedly an internal commerce which is subject to the control of the states."[92] This commerce was defined as that "which is carried on entirely within the limits of a state and does not extend to or affect other states."[93] As with interstate commerce, this principle applied to commodities as well as to the avenues and means of transportation.

The question of avenues, for example, proved important for the case of *The Montello.*[94] There, the national government sought to penalize the owners and operators of The Montello for failing to register and license the ship as well as for not following certain safety procedures.[95] The case came down to a factual question about the status of Wisconsin's Fox River, on which the ship operated. The factual question, which the Court remanded to a lower body for determination, was whether or not the river "is only

[91] *County of Mobile v. Kimball* 102 U.S. 697.

[92] *The Daniel Ball* 77 U.S. 564 (1870).

[93] *Ibid.* 77 U.S. 565.

[94] 78 U.S. 411 (1870).

[95] *Ibid.,* 78 U.S. 412.

navigable between different places within the state…"[96] or is part of interstate travel. Field's majority opinion argued that if the river's navigable waters began and ended within the state of Wisconsin, it could not constitute a part of interstate commerce and ships on it could not come under the national regulations The Montello supposedly violated.[97]

Field believed this exclusively state realm also guarded liberty. On one hand, this realm protected liberty from too intrusive government. The national government could suffer from a combination of discrimination and ignorance in making such regulations. This infringement could be intentional, by preferring interstate entities to intrastate. It could also be unintentional, pertaining to ignorance of local conditions.[98] The previous case of *The Montello* could serve as an example. If the Fox River only operated within one state, the national government's regulations could saddle commerce occurring on it with onerous penalties that made it less profitable than interstate travel. As a national government would possess greater interest in interstate means, such a circumstance was more than plausible. At the same time, even well-meaning regulation of intrastate commerce would not possess the knowledge of local circumstances that state governments did, either. The regulations of licensing and safety in this case, therefore, could fail to address the particular circumstances of that commercial waterway.

---

[96] *Ibid*.

[97] The case returned to the Supreme Court in 1874 with the factual question answered. Fox River was found to be navigable beyond the confines of one state and The Montello thus liable for their violations of national law. See *The Montello* 87 U.S. 430 (1874).

[98] Field strongly implied this point in cases such as *County of Mobile v. Kimball,* where he argued for the superiority of local regulations over national in that sphere, discussed below, where overlapping legislation can occur. See 102 U.S. 699.

On the other hand, an exclusive state sphere also could better protect liberty through government. In the *Bowman v. Chicago & Northwestern* case, Field had denied Iowa's power to ban importation or sale of the alcohol being transported through interstate commerce. As noted above, Field here sought to protect a property right in selling imported items. But did such items ever become intrastate and therefore subject to particular state regulation?

Though declaring sale of alcohol in this case to be purely within the national government's regulatory control, Field also considered when the alcohol might move from this sphere to that of exclusive state control. In regulating intrastate commerce, Field consistently argued that the states should "authorize legislation touching on the health, morals, good order, and peace"[99] of its people. With so much of life bound up in commercial transactions, such police regulations touched constantly upon commercial matters. If imported items at no point could receive state regulation, then states could face a significantly growing number of actions within its own borders standing outside its regulatory power. The state may see various reasons such action infringed on individual rights, affecting others' health, safety, and morals. But they would be powerless to act, with the protection of rights within its own borders left to the action of the national government even though the issue might very well affect only one or a few states.

Field's remedy was to say that an item remained part of interstate commerce so long as the importer had not "so acted upon the thing imported that it had become incorporated and mixed up with the mass of property."[100] A point, therefore, could be

[99] *Bowman v. Chicago & Northwestern Ry. Co.* 125 U.S. 503.

[100] *Ibid.,* 125 U.S. 506.

reached where the item crossed from interstate to intrastate. The sale of imported alcohol would not be off-limits to Iowa's regulation under all circumstances. Adhering to the 1827 precedent of *Brown v. Maryland,*[101] Field declared that a commodity had become so mixed when it was no longer "the property of the importer" as well as not "in the original form or package in which it was imported."[102] The change in ownership completed the stream of activity for which the commodity crossed state lines. If those importing alcohol sold it to another distributor or another buyer, then it could be subject to Iowa's restrictive laws. The change in packaging or form was less obvious. Doing so did not terminate a stream of commerce in the same definitive manner as a sale. However, Field agreed with precedent that such a rule provided a workable standard, known to states and importers alike, to recognize when an item ceased to hold interstate status. If the importer also owned the local store selling the item publicly, such changes could signal the modified status and allow for state police power regulations.

This change in the status of an item from an object of interstate commerce to an object of intrastate commerce gave clear limits to what could be considered interstate sale, maintaining its protection while allowing states a recognizable line to impose its own regulations. Again, Field kept liberty in view. As an exclusively national sphere protected rights, so did the same sphere for state governments.

Overlapping Sphere

These exclusive categories covered numerous items and circumstances in commercial intercourse. However, they did not exhaust them. Following *Cooley,* Field

[101] 27 U.S. 419 (1827).

[102] *Bowman v. Chicago and Northwestern Ry. Co.* 125 U.S. 506. See also *Low v. Austin* 80 U.S. 32-33.

argued for a third category where state and national power each might regulate. This sphere was in essence interstate. But Congress's power over it, while plenary, was not exclusive. In these interstate areas, "states may prescribe regulations" but only "until Congress intervenes and assumes control of them."[103] Therefore, states may act, but Congress held the final word.

In this category, the lines of distinction blurred most. They blurred because the objects falling within this group often held a dual status within the commercial world. Entities of this nature included items such as "pilots, wharves, harbors, roads, bridges, tolls, freights, etc."[104] On one hand, these entities took part in interstate commerce. Items for sale, persons moving, and modes of transportation all used these means in the process of interstate travel.

But these subjects differed from those under exclusive Congressional power. They did not move in the stream of interstate commerce. Wharves, harbors, roads, bridges—these did not travel from one state to another. Instead, they partook of interstate commerce from a set location within a particular state. Pilots, tolls, and freights likewise were attached to these stationary objects. Commodities, persons, and means of transportation may make interstate use of them. But these objects did not themselves cross state lines.

Their stationary status changed their relation to interstate commerce. As they did not move between states, they did not face the same prospect of discriminating state legislation. What applied to bridges, roads, and harbors could affect equally all items of

[103] *Gloucester Ferry Company v. Pennsylvania* 114 U.S. 204.

[104] *Pittsburgh and Southern Coal Company v. Louisiana* 156 U.S. 587 (1895).

commerce passing through or on them, intrastate or interstate. As Field objected to discrimination and lack of protection "by reason of its [interstate or international commerce's] foreign character,"[105] such regulations of these stationary persons or things did not pose the same threat.

For example, in *Escanaba Company v. Chicago,*[106] Field wrote for the Court regarding the status of a bridge operating within the city of Chicago. The city had set a schedule whereby at certain times the draw of the bridge, which must be opened if ships were to pass under it, would remain closed to allow for pedestrian traffic to cross over the structure. A shipping company sued, saying that the schedule interfered with and discriminated against interstate commerce.[107] Field acknowledged that the waterway beneath the bridge was part of the "navigable waters of the United States" and therefore included interstate traffic.[108] But he refused to consider the bridge to be under the exclusive regulatory power of Congress. The bridge's participation in interstate commerce came in one, set location within one, particular state. The regulations regarding this bridge, therefore, did not distinguish items based upon their interstate or intrastate travel. All ships seeking passage at restricted times were blocked. All ships passing at other times were allowed. The bridge's position within the commercial world made its regulation less likely to include legislation discriminating against interstate or intrastate commerce. Instead, Field noted that the regulation followed the principle that

[105] *Welton v. State of Missouri* 91 U.S. 282.

[106] *Escanaba Company v. City of Chicago* 107 U.S. 678 (1883).

[107] *Ibid.,* 107 U.S. 679-682.

[108] *Ibid.* 107 U.S. 683.

"[t]he rights of each class [inter and intrastate] are to be enjoyed without invasion of the equal right of others."[109]

But these distinctions were not easily applied in practice. Complicating matters was that fact that these subjects mixed their usage between interstate and intrastate commerce. The same bridge could accommodate trade across county or state lines. The same harbor could dock purely in-state or multi-state travel. At certain moments, a bridge, road, or harbor could service interstate and intrastate commerce simultaneously.

Under these circumstances, making the distinctions necessary to preserve the regulatory power of both state and nation proved no simple matter. When did supposedly overlapping state regulations encroach into Congress's exclusive sphere? When did allegedly overlapping national statutes creep into purely internal matters?

The Justice posited two standards for adjudicating when a subject within interstate commerce could be regulated by the state. The first standard pertained to extent. Field argued that states could regulate means of interstate commerce which were "local in their nature or operation."[110]

An example of a purely local nature and operation concerned improvements of intrastate commercial means, such as "the construction of bridges" or their management and repair.[111] Bridges fit well within the standard of being local in nature and operation. They were incapable of movement, at least as a function of commercial travel, and therefore only operated in a distinct, intrastate location. In constructing, maintaining, and repairing these bridges, moreover, a state did not discriminate between interstate and

[109] *Ibid.,* 107 U.S. 682.

[110] *Cardwell v. American Bridge Company* 113 U.S. 210.

[111] *Ibid.,* 113 U.S. 208.

intrastate traffic. Therefore, Field argued that "until Congress intervenes and supersedes their authority," states could regulate regarding these local subjects which at times partook in interstate commerce.[112]

As part of these efforts, states could exact tolls in order to maintain or improve these means of commercial traffic. In the case of *Huse v. Glover,* Field upheld the state of Illinois' collection of tolls on ships going down the Illinois River. Field declared that Illinois "is interested in the domestic as well as in the interstate and foreign commerce conducted on the Illinois River, and to increase its facilities and thus augment its growth it has full power."[113] To raise revenue for such projects, Field argued that "[t]he exaction of tolls for passage through the locks is as compensation" for the improvements.[114] So long as all passing must pay the toll, the focus of the legislation was on the local object, not the status of the user, keeping it within the realm of legitimate, though not exclusive, state regulation.

The second standard addressed the regulations' purpose. Field argued that regulations may be made "incidentally affecting interstate commerce"[115] or that "are mere aids to commerce."[116] One example of this principle came in *Steamship Company v. Joliffe.*[117] This case reviewed California laws regulating pilots in San Francisco Bay. The regulations required that ships in the Bay include a pilot who had acquired a license from

---

[112] *Cardwell v. American Bridge Company* 113 U.S. 208.

[113] *Huse v. Glover* 119 U.S. 548 (1886).

[114] *Ibid.*

[115] *Pittsburgh and Southern Coal Company v. Louisiana* 156 U.S. 587.

[116] *County of Mobile v. Kimball* 102 U.S. 697.

[117] *Steamship Company v. Joliffe* 69 U.S. 450 (1864).

the newly created "Board of Pilot Commissioners."[118] San Francisco Bay, opening as it did into the Pacific Ocean, easily qualified as part of both an interstate and international highway. At the same time, traffic also occurred solely within its waters, and Field argued that the regulation addressed the particular issues related to the Bay, regardless of which kind of traffic entered it.

Field argued here that state legislation may, in pursuing a different purpose, also touch upon interstate commerce. These other purposes, he argued, fell within police power protections of health, safety, and morals. Thus Field said in *Joliffe* that there were "frequent accidents, occasioning in some instances great loss of life" in San Francisco Bay occurring due to untrained pilots or unsafe ships.[119] The license requirement sought to address this problem. Though it may incidentally affect interstate commerce, the direct intention of the law touched upon the state's more general, non-commercial, police power to protect the right to life.

Another example was the case of *Nashville, Chattanooga, and St. Louis Railroad v. Alabama.*[120] This case concerned a clearly interstate subject of commerce. The railroad in question traveled through Tennessee, Kentucky, Georgia, and Alabama. The state of Alabama passed a law stating that colorblind persons could not serve on railroad lines within the state if working a particular job "which requires the use or discrimination of form or color signals…."[121] To enforce the statute, those filling these positions must

---

[118] *Ibid.*

[119] *Steamship Company v. Joliffe* 69 U.S. 460.

[120] 128 U.S. 96 (1888).

[121] *Nashville, Chattanooga & St. Louis Railway v. Alabama* 128 U.S. 97. These jobs included "locomotive engineer, fireman, train conductor, brakeman, station agent, switchman, flagman, gate tender, or signalman."

acquire a "certificate of fitness" which tested ability to discern color. When the railroad company was fined for not following this law, it sued, saying in part that the statute violated Congressional power over interstate commerce.

Field wrote for a unanimous Court saying it did not but instead fell under the "incidental effects" standard that allowed overlapping regulation. Field argued the distinction lay not in the object regulated but in the combination of purpose and reach of the regulation itself. Such laws "were not strictly regulations of interstate commerce, but parts of that body of the local law" that pertained to the relationship between carriers and "the public who employ them."[122] In other words, the primary objects concerned the broader needs of the public under Alabama's care as residents of or travelers in the state. It could step in, in other words, to protect the life, liberty, and property of those traveling on the railroads while in the state of Alabama.

In these ways, Field attempted to draw lines within which this concurrent sphere of legislation operated. Though distinct in operation, the reasons for this often complicated category showed the same focus as the other categories: protecting liberty. The national government's plenary power stemmed from its purpose in protecting the "freedom…that is essential to the exercise of its commerce."[123] As these subjects operated within interstate commerce, Congress could step in whenever such regulation would best secure the possession and use entailed in individual liberty. Whether the reason for Congressional action was that nationalization worked better in a particular

[122] *Nashville, Chattanooga, and St. Louis Railroad v. Alabama* 128 U.S. 101.

[123] *County of Mobile v. Kimball* 102 U.S. 699.

instance, or that state legislation's discriminatory effects must be stopped, the national government's actions should seek to guard individual rights.

At the same time, giving states a subordinate power here also protected liberty. The subjects falling within this overlapping sphere were tied to very particular locations and circumstances. The bridges, roads, and waterways of individual states and parts of states were far from uniform in their needs. Therefore, Field argued that they "can only be properly regulated by provisions adapted to their special circumstances and localities."[124] States and their local governments most often would know these circumstances best. They, therefore, would best know how to regulate so as to ensure the protection of all persons and objects using them. Congress could still intervene if necessary. Congress would possess "the power at all times to interfere and supersede their authority whenever they act arbitrarily and to the injury of commerce."[125] The Justice therefore placed significant responsibility on the national government to actively protect within this sphere. Where any kind of local regulation in this category affected interstate commerce, Congress could and should aggressively protect the rights at stake. Field still thought, however, that the Constitution allowed this subordinate state power because of the necessary role regulation played in protecting individual liberty.

These three spheres and their distinctions conclude this summary of Justice Field's Commerce Clause jurisprudence. Commerce was intercourse. Spheres of regulating this intercourse divided into mutually exclusive and overlapping categories. As Field admitted, these concepts did not lead to simple application. The connections

[124] *County of Mobile v. Kimball* 102 U.S. 697.

[125] *Escanaba Company v. Chicago* 107 U.S. 688.

between intra and interstate commerce instead necessitated many difficult choices. But Field believed such choices to be necessary to preserve federalism and to protect liberty. National and state power, properly cooperating, would properly guard the life, liberty, and property of individuals.

The Adequacy of National Commercial Power

The Justice thought his understanding rightly distinguished state and national spheres. Each possessed adequate power that together could regulate to protect liberty. Later scholarship and jurisprudence concluded differently. Field is often placed within a discarded, discredited line of judicial interpretation.[126] This jurisprudence, rejected by the Modern Court since 1937,[127] is thought to have placed too stringent restrictions on the national government's Commerce Clause power.

Much of this criticism for Field stems from his vote in the infamous case of *United States v. E.C. Knight.*[128] There the Court negated the Cleveland Administration's use of the Sherman Antitrust Act to combat a sugar refining monopoly. This monopoly accounted for 98% of sugar refining in the United States.[129] The corporation controlling this monopoly was chartered in one state—Pennsylvania. The majority opinion, written by Chief Justice Melvin Fuller, argued that this intrastate refining comprised part of

---

[126] Gary Gershman, *The Legislative Branch of the Federal Government: People, Process, and Politics* (Santa Barbara, CA: ABC—CLIO, 2008), 38.

[127] Beginning with *NLRB v. Jones & Laughlin Steel* 301 U.S. 1 (1937); Charles Fried, *Saying What the Law is: The Constitution in the Supreme Court* (Harvard University Press, 2004), 26.

[128] 156 U.S. 1 (1895).

[129] James W. Ely, Jr., *The Chief Justiceship of Melville W. Fuller: 1888-1910* (Colombia, SC: University of South Carolina Press, 1995), 129; Craig R. Ducat, *Constitutional Interpretation, 10th Ed.s* (Boston: Wadsworth, 2012), 313.

manufacture, and that "[c]ommerce succeeds to manufacture, and is not a part of it."[130] Production in one state, in other words, was not part of interstate commerce and hence not susceptible to national regulation. While the government argued that production monopolies greatly inhibited interstate commerce, the Court countered that production's effect was indirect, meaning the Sherman Antitrust Act could not touch it.[131]

Critics argue that due to this decision, corporate monopolies were left too wide of a sphere to do as they pleased, free from effective state and national legislation.[132] Proper regulation was subverted to liberty's detriment. Scholars accuse the Court, including Field, of allowing this subversion by refusing to adjust Constitutional interpretation to changing economic realities. Swisher, for example, says that "Field…and for the most part the Court as a whole, labored stubbornly to keep the country chained to the old order of legal relationships, in spite of the new social and economic conditions…."[133] Furthermore, Field is seen as acting, not to interpret the Constitution itself, but to read his own economic views—and fears—into it.[134] His Commerce Clause understanding was said to create "a constitutional barrier to reform" in protection of *laissez-faire* economics and the business interests doing so would benefit.[135]

---

[130] *United States v. E.C. Knight* 156 U.S. 12 (1895).

[131] Kelly, Harbison, and Belz, 378.

[132] Edward S. Corwin, *The Twilight of the Supreme Court* (New Haven, CT: Yale University Press, 1934), 20; Corwin, "The Antitrust Act and the Constitution," *Virginia Law Review* 18(1932): 355.

[133] Swisher, *Stephen J. Field,* 431; McCloskey, *American Conservatism,* 88.

[134] Mendalson, "Justice Field and *Laissez-Faire*," 48; Howard Jay Graham, "Justice Field and the Fourteenth Amendment," 854-870; Kens, 268; Swisher, 432.

[135] Kens, 268; Swisher, 432.

These criticisms pose serious issues for Field's conception of liberty. I will respond to them first by examining Field's writings which question his *laissez-faire* reputation on commerce and show willingness to adjust to economic change. Second, I will address *E.C. Knight* itself. Critics, I will argue, overstate its deficiencies, including eschewing the means Field articulated to curtail corporate power. In spite of his efforts, however, I do conclude that Field's jurisprudence did not respond sufficiently to the pace and degree of economic change. In pointing to problems with his jurisprudence, finally, I consider both Field's difficulty in applying his principles in radically changing circumstances and his concerns for federalism's preservation.

Regarding the *E.C. Knight* case, we must remember that Field, though voting with the majority, did not write an opinion. A better starting place for understanding Field's position, therefore, would be his own statements. These views certainly question his unswerving dedication to *laissez-faire* business, including corporate, interests. As already discussed, Field's concern for liberty was not limited to government infringement. Instead, his opinions gave wide-ranging power for government regulation, including over corporations.[136] Furthermore, Field personally expressed concerns for maintaining government control over corporate power. In 1893, the Justice wrote to Don Dickinson, advisor to President Cleveland, cautioning that a vacant Supreme Court seat should not go to a man "who would be made easily subservient to that overwhelming corporate power which is laying its grasp upon the great interests of the country."[137] To appoint such a man "[i]n my eyes would be a calamity" and "would be a triumph for the side I

[136] See especially my discussion of Field in Chapters Two, Three, and the preceding section of this chapter.

[137] Stephen J. Field to Don M. Dickinson, June 30, 1893 (quoted by McCurdy, "Sugar Knight Case," 341.

have *most to fear* for the successful maintenance of sound constitutional views."[138] These words do not fit the picture of a Justice simply wedded to *laissez-faire* interests. Field feared *both* overextended corporate power and the possible reaction to it. In other words, he committed to a cooperative pursuit of liberty that encouraged strong but limited regulation.

Critics' accusation of an overly rigid, unchanging jurisprudence requires more discussion. Field did articulate a divide between manufacturing and commerce, defining commerce as "trade in any and all its forms."[139] While this definition comprised all "commercial intercourse," it did not include all economic activity. Commerce commenced only "whenever a commodity has begun to move as an article of trade."[140] Production, however, was not trade but a precursor to it. Thus, the Justice wrote an opinion denying interstate status to alcohol that could not be proved to have been manufactured outside the state of sale. Field argued there that "[i]f manufactured within the state," special taxes upon it would not violate the Commerce Clause.[141] The making of the alcohol, in and of itself, did not constitute an interstate commercial activity.

Yet these lines were neither rigid nor immovable. Field's Commerce Clause jurisprudence rested on the principle that the national government must possess adequate means to accomplish its enumerated ends. Field elaborates on this issue in his discussion of the Necessary and Proper Clause. This Clause, concluding the list of Congressional powers in Article I, Section 8, asserts that Congress may "make all laws which shall be

---

[138] *Ibid* (emphasis added).

[139] *Welton v. State of Missouri* 91 U.S. 280.

[140] *The Daniel Ball* 77 U.S. 565.

[141] *Downham v. Alexandria Council* 77 U.S. 175.

necessary for carrying into execution" both the previously listed powers and "all other powers vested by this Constitution in the government of the United States."[142] Among the previously listed powers was the Commerce Clause. Congress therefore held the power to do whatever was "necessary and proper" to realize its power over interstate commerce.

Field approached this Clause by noting the debate over the national reach the words "necessary and proper" bestow.[143] The debate most famously occurred between Alexander Hamilton and Thomas Jefferson. Hamilton argued that "necessary" meant the broad terms "*needful, requisite, incidental, useful,* or *conducive to*."[144] Jefferson countered that "necessary" meant the much narrower "without which the grant of the power would be nugatory."[145]

Field sided with Hamilton, saying that "Mr. Hamilton favored a more liberal and in my judgment a more just interpretation."[146] Field explained his support by arguing that the Necessary and Proper Clause established a way of reasoning about means and ends for constitutional interpretation. He quoted Hamilton's saying that "whenever the end is required the means are authorized, whenever a general power to do a thing is given, every particular power necessary for doing it is included."[147] In other words, the bestowing of a purpose entailed the means to accomplish that purpose. If the Constitution granted the

---

[142] U.S. Constitution, Article I, sec. 8

[143] *Legal Tender Cases* 79 U.S. 611.

[144] Alexander Hamilton, "Opinion on the Constitutionality of the National Bank," *American Political Thought,* ed. Isaac Kramnick and Theodore J. Lowi (New York: W. W. Norton & Company, 2009), 306.

[145] Thomas Jefferson, "Opinion on the Constitutionality of the National Bank," *American Political Thought,* ed. Isaac Kramnick and Theodore J. Lowi (New York: W. W. Norton & Company, 2009), 351.

[146] *Legal Tender Cases* 79 U.S. 641.

[147] *Ibid.,* 79 U.S. 640. Alexander Hamilton, "Federalist 44."

power to regulate interstate commerce, then it also granted whatever means were needed to effectively regulate. The only exceptions, which Field both asserts and quotes from Hamilton at different points, are those "restrictions or exceptions expressed or necessarily implied" in the Constitution, or those "contrary to the essential ends of political society."[148]

This logic existed throughout Field's Commerce Clause cases. In *The Daniel Ball,* for example, the question concerned wholly intrastate instruments partaking in transporting interstate commodities. The Daniel Ball, a steamship operating on Michigan's Grand River, remained permanently in that state as part of a series of transfers that shipped commodities across several state lines. Field wrote for a unanimous Court that interstate commercial power did extend to such vessels. In making the case, the Justice argued that unless Congressional authority extended to the agency operating the Daniel Ball which was "confined within the limits of a state, its entire authority over interstate commerce may be defeated."[149] To do otherwise would mean "the federal jurisdiction would be entirely ousted and the constitutional provision would become a dead letter."[150] The fact that the vessel and its operating agency only moved within one state could not allow them to thwart a duly enumerated national power. The power extended as far as needed to make it effective, including entities only operating in one state, so long as they participated in interstate commerce.[151]

---

[148] *Legal Tender Cases* 79 U.S. 641.

[149] *The Daniel Ball* 77 U.S. 66.

[150] *Ibid.*

[151] Richard Epstein sees this case as a possible outgrowth of the Necessary and Proper Clause, one where the Court preferred to err on the side of protecting national over state power. See Richard Epstein,

In this determination to ensure adequate national commercial power, Field displayed significant openness to changing circumstances. This openness began with determining interstate commerce's extent. The Justice did not waver in defining commerce in terms of trade. But he declared that the subjects included in it are not fixed. Nor are they determined by government. Instead, "[w]hat is an article of commerce is determinable by the usages of the commercial world, and does not depend upon the declaration of any state."[152] The practices of the market determined what was included in commerce. These practices, of course, could and did change over time. Thus, economic activity that once stood outside interstate commerce could later become a part of it.

Field applied this type of adjustment in the 1875 case of *Welton v. State of Missouri.*[153] In this case, Missouri imposed a tax in the form of a license on those selling out-of-state products, in this case sewing machines. Such taxes, unless contravened by explicit Congressional legislation, previously had been considered acceptable regulation.[154] Writing for a unanimous Court, Field rejected precedent, striking down the state tax as interference with interstate commerce. In so doing, he recognized the changing modes of commercial intercourse. Before, manufacturers depended largely on in-state wholesalers to sell their goods to retail stores. By the mid-1870s, the manufacturers had increasingly pushed out these wholesalers, assuming the role of seller

---

"The Proper Scope of the Commerce Power," *Liberty, Property, and Government: Constitutional Interpretation Before the New Deal* 135-136.

[152] *Bowman v. Chicago & Northwestern Ry. Co.* 125 U.S. 501.

[153] 91 U.S. 275 (1875).

[154] See, for example, *Brown v. Maryland* 25 U.S. 419; *License Cases* 46 U.S. 504 (1847). For other precedent, including from state courts, see Charles W. McCurdy, "American Law and the Marketing Structure of the Large Corporation, 1875-1890," *Journal of Economic History* 38 (1978): 631-645.

and distributor by retailing themselves through traveling salesmen.[155] State licensing fees on out-of-state products directly affected only the use of salesmen by the companies who must purchase their licenses. But as this means of sale comprised a growing part of national trade, it now deeply impacted interstate commerce in a manner it had not before. In light of these changes, Field led the majority in striking down the legislation.

In his openness to changing circumstances, Field here recognized both nationalization of the market and consolidation of economic activity. More commerce occurred across states lines, increasing the sphere of national power. In addition, the companies who before had only produced products now took up the task of selling them in the commercial market as well. These trends made the distinguishable components of economic activity—interstate and intrastate, production and trade—more interdependent. Kelly, Harbison, and Beltz assert that cases like this "reflected the willingness of the Court to adapt constitutional law to changing social and economic circumstances in a flexible, pragmatic way."[156] Here, Field was the voice of the Court's adaptability, articulating how new economic conditions demanded different applications.

The question remains as to whether Field's adaptability would go so far as to include production within interstate commerce. His opinion in *Mugler v. Kansas* seemed to cross this line. As discussed previously, in this case Field objected on Due Process grounds to Kansas's treatment of Mugler's property in his brewery business when the state passed a law banning the manufacture and sale of alcohol. However, Field also objected on interstate commerce grounds, denying that a "state can prohibit the

[155] Glenn Porter and Harold C. Livesay, *Merchants and Manufacturers: Studies in the Changing Structure of Nineteenth Century Marketing* (Chicago: Ivan R. Dee, 1989); McCurdy, "Sugar Knight Decision," 310.

[156] Kelly, Harbison, and Beltz, *The American Constitution, Volume II,* 392.

manufacture of such liquors within its limits if they are intended for exportation."[157] The basis of this concern, he continued, rested in the fact that "Congress has authorized their importation"[158] across state lines. If Congress approved interstate commerce in alcohol, in other words, then production intended for such interstate commerce could come under national protection. Here, therefore, Field objected on Commerce Clause grounds to a state banning production taking place wholly within its own borders. To do so, the Justice had to acknowledge the importance production had for interstate commerce. If the object was intended for interstate trade, then assuring its production was necessary if Congress chose to protect that trade.[159] Thus, at least in *Mugler,* Field included production within the "stream of commerce." To adequately realize its Commerce Clause power, this case demanded production be considered within the scope of national power.

Therefore, Field did display adaptability to changing circumstances. Based on the Necessary and Proper Clause, the Justice asserted that means should be adequate to fulfill Commerce Clause ends. Based on this logic, he showed a willingness to move the line separating intra and interstate commerce, even to the point of protecting in-state production.

With this context in mind, I return to Field's participation in *E. C. Knight.* In light of the preceding arguments, why might the Justice have joined Chief Justice Fuller's majority opinion? To begin, the case's reputation may be worse than its reality. Charles McCurdy persuasively argues that critics greatly misunderstand the decision's

---

[157] *Mugler v. Kansas* 123 U.S. 675.

[158] *Ibid.*

[159] This in fact contradicted a statement by Fuller in *E.C, Knight,* specifically that "the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce." 156 U.S. 13.

circumstances and logic. Regarding circumstances, McCurdy says, "[t]he Justice Department hardly could have chosen a weaker case."[160] Section One of the Sherman Antitrust Act banned "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States."[161] But unlike other corporate monopolies, the sugar company's distributors were all independent wholesalers, making a claim of combination in restraint of trade weak. McCurdy also delves into the legislative record, showing that in debating the bill, Congress had rejected language regulating such independent entities as unconstitutional. Therefore, the sugar refining monopoly did not appear to fit with the law's text or the intent of Congress. Instead, the choice to prosecute was made more on the publicity of this particular monopoly, not its conformity to the prohibitions of the Sherman Antitrust Act.[162] Other combinations in restraint of trade would presumably be prohibited by the Act, and the national government could have proceeded against them.

McCurdy further argues that, logically, the Court in *E. C. Knight* left no gap in regulatory power. The gap was created by the state and national governments' own responses to the case. For the national government, a flawed reading of the decision led Washington to do nothing, rather than follow the Court's suggestion to fight production monopolies when they extended to contracts for interstate trade.[163]

For the states, the problem was lack of coordination and will, not Constitutional prohibition. McCurdy sees the Court assuming the existence of state tools to fight

---

[160] McCurdy, 328.

[161] Sherman Anti-Trust Act 26 Stat. 209.

[162] *McCurdy,* 328.

[163] *United States v. E.C. Knight* 156 U.S. 16; McCurdy, 330.

monopolies often ignored by scholarship. These tools he traces to Justice Field in the 1869 case of *Paul v. Virginia.*[164] In that case, Justice Field argued that corporations were "the mere creation of local law" in each state.[165] Their status as state creations provided the states with two important weapons in combating monopolies. First, as a creation of the state, the corporation could be constructed in any manner the state desired. They possessed no powers outside those granted and could be prosecuted for going beyond them in any way.[166] Furthermore, this created status subjected the corporation to amendment or revocation at the state's will. States could thereby legislate to restrict the size of corporations or their ability to combine, both during their creation and in later legislative adjustments to their charters.

Second, the states could protect themselves against corporate encroachment from other states, a "foreign" corporation, as Field termed it. A corporation, Field argued, "can have no legal existence beyond the limits of the sovereignty where created."[167] With no interstate legal existence, these corporations could not do business in another state without that state's permission. States "may exclude the foreign corporation entirely…or restrict its business.....The whole matter rests in their discretion."[168] This discretion extended to the trust combinations whereby one corporation bought into the stock of another, creating massive consolidations of economic power. States could prosecute and

---

[164] 75 U.S. 168 (1869).

[165] *Ibid.,* 75 U.S. 181.

[166] This same point Field made in *Oregon Ry. & Nav. Company v. Oregonian Ry. Co.* 130 U.S. 1 (1888).

[167] *Ibid.* In this argument, Field drew upon Chief Justice Taney's precedent in *Bank of Augusta v. Earle,* 38 U.S. 519 (1839).

[168] *Paul v. Virginia* 75 U.S. 181.

disband such action both as going beyond chartered powers and as operating within a non-consenting state.[169]

To go against this system, to extend interstate regulatory power to production, would subvert this state means of control over corporations without extending similar power to the national government. To nationalize regulation of corporate production meant severing the connection between creation and control. As its creator, the state could regulate the corporation in every particular, even down to its very existence. The national government, on the other hand, "did not create industrial corporations; thus, their structure and general powers lay outside its jurisdiction."[170] The national government, therefore, possessed certain limitations in its regulatory reach as compared to the states. From the national perspective, the corporation's interstate trade could be regulated; but its basic existence and functions were untouchable. Allowing national regulation of corporate entities therefore "entailed acceptance of the modern corporation as a fact of life."[171] Making production a part of interstate commerce thereby also denied states the ability to defend themselves against outside corporations. For when considered part of the interstate sphere, corporations held the right to import that denied states' their protective powers.

Field's Principles and Their Application

Therefore, the Court in *E. C. Knight* did articulate a means to combat corporate power. The justices, including Field, protected states' power in the expectation that they

[169] Kelly, Harbison, and Belz, 377.

[170] McCurdy, 341.

[171] *Ibid.*

would wield it against production monopolies in their midst while the Sherman Antitrust Act shuttered similar activity in the interstate market. Field thought that together these measures could curtail and contain the corporate power he had "most to fear for the successful maintenance of sound constitutional views."[172]

Yet while they help to explain, these points do not entirely justify Field's Commerce Clause jurisprudence. Though open to change, Field can legitimately face criticism for not adjusting his application of Commerce Clause principles quickly or decisively enough. By the late 1890s, the lines he drew between production and commerce, as well as his system to control corporate power, proved increasingly inadequate. In a nationalizing and industrializing economy, state power soon was overwhelmed without sufficient federal support. [173]

At the same time, in critiquing Field's jurisprudence we must keep in mind two points. First, we must consider the difficulty faced by actors at the time in making the needed adjustments. Field first articulated his remedy to corporate power in 1869, early into America's national and industrial growth. This remedy did not seem inadequate at that time. Nor was the insufficiency of these well-established regulatory remedies so clear in 1895, the year *E. C. Knight* was decided and two years before Field retired. To that point the states still showed promise in combating corporate power while the national government had not wrongly surrendered a role in stopping such power's effects on interstate trade. States showed a willingness to confront monopolies in the 1880s and 1890s. Louisiana, New York, California, Nebraska, Illinois, and Ohio, for example,

---

[172] *Ibid.*

[173] Harlan P. Pretchel, *Big Business and the State: Historical Transitions and Corporate Transformation, 1880s—1990s* (Albany, NY: State University of New York Press, 2000), 36-37.

waged successful litigation against trusts, breaking them up on the grounds put forward in Field's jurisprudence. These gains did not last, of course, as within a decade the states largely acquiesced to corporate power.[174] Yet in Field's tenure such a conclusion was far from obvious.

Second, Field's caution in dealing with corporation's growing power must be understood in light of what he sought to preserve. The lines between intra and interstate commerce guarded federalism. For Field, maintaining this system was vital because it protected liberty. The intermixture of state and national regulation could best adjudicate the claims of liberty through and from government.

When applying Commerce Clause principles, Field certainly shared the concern, stated by Chief Justice Fuller in *E.C. Knight,* that effectively eliminating the line between production and commerce would mean "comparatively little of business operations and affairs would be left for state control."[175] In a society so contractual and commercial, such circumstances could obliterate the boundary between state and national power, giving decisive dominance to the latter over the former. Therefore, any steps taken to modify these lines must tread carefully, seeking to preserve federalism amidst shifting circumstances. Thus, Field continued to cling predominately to the old distinctions, only slowly adapting the contours to the new economic realities in hopes of preserving state power. Though this move may have been overly slow, it certainly came from a desire to protect Constitutional principles while still acknowledging the need for change.

---

[174] In particular, New Jersey's lax laws allowing interstate corporate mergers and the resulting influx of revenue to its coffers broke the will of other states. Rather than aggressively isolate the Garden State and its corporations, other states at first did nothing before eventually joining it. The national sweep of economic power then brought pressure beyond what states were able to coordinate against or willing to endure. See Kelly, Harbison, and Belz, 377; Pretchel, 36-37.

[175] *United States v. E.C. Knight* 156 U.S. 16.

Conclusion

In summary, in this chapter I looked to Field's understanding of national regulatory power and that power's relationship to the states. By doing so, I extended my examination of the Justice's cooperative vision beyond state power and into federalism. The purpose of Constitutional cooperation remained the same. The spheres of national and state power, together, protected individual liberty from infringements, governmental or otherwise. The national government would exercise its police power through the various Constitutional clauses as the state exercised its own. Field understood the commonality of police power due to governments' unified purpose in protecting liberty. The Commerce Clause provided an extended example of this cooperation, giving rise to an intricate division of power between state and nation. Field believed the combination of exclusive and overlapping spheres helped provide a framework within federalism to protect individual rights. Though his Commerce Clause positions receive heavy criticism, they did extend from a perspective seeking to protect liberty.

In hindsight, however, the threat to liberty in Commerce Clause cases existed from inadequate application, not inadequate principle. Field supported changing application for changing times, but he failed fully to apprehend the needed changes in application here. The growing national economy needed swifter, more dramatic change in jurisprudence for government to adequately fulfill its role. Field's application, again, did not perfectly realize his own principles. But faulting Field's application does not deny these principles. If anything, the argument against Field's particular distinctions and remedies reinforces them. To the extent Field failed, he failed to allow the cooperation

within federalism then necessary to protect liberty, the very cooperation that was the hallmark of his Constitutional vision

CHAPTER SIX

Liberty: Text and Context

In discussing Field's understanding of liberty, I have focused on the Constitutional means of its achievement. Liberty's achievement predominately stemmed from two cooperative relationships. The first involved the Due Process Clause and state police power. The second consisted of state and national police power. Together, these provisions protected liberty from as well as through government. Together, they comprised the Constitutional provisions by which Field articulated his understanding of liberty itself.

Field, however, did not come to these conclusions on the basis of the Constitution's text alone. The Constitution does not define precisely what it means by the term liberty. It does not specify its exact definition of due process and the police power. Field's articulation of Constitutional liberty, therefore, did not rely on the text alone to determine what the Constitution meant.

Scholars have addressed how Field reached his interpretation of Constitutional liberty. The most dominant explanation of Field in the scholarship is stated by Paul Kens. Kens argues that Field drew upon philosophical and economic sources—such as the Declaration of Independence and Adam Smith—to construct what "was so open-ended a doctrine that it allowed him the flexibility to pursue a personal agenda."[1] This agenda included protecting business by *Laissez-Faire* economics and adherence to a natural

[1] Kens, *Justice Field,* 275.

rights philosophy.[2] While others argue for the influence of Jacksonian Democracy on Field's thought or the ideology of free soil, free-labor,[3] Kens connects each of these strands to a view of liberty rooted in Field's own individualistic antagonism to government.[4]

What remains for my discussion, then, is to address how Field reached his conclusions regarding his Constitutional understanding of liberty. In this chapter, I first examine the sources Field consulted and how they influenced his reading of the Constitution. Justice Field looked to both the Declaration of Independence and the common law as means for understanding the context out of which the Constitution's view of liberty should be interpreted.

Second, I discuss the primacy of the Constitution's text in how Field made use of these other sources. While the Declaration and common law could help to understand the meaning of a Constitutional provision, the provision itself remained the legal means of enforcement. To show Field's approach here, I look at how he argued differently for judicially protecting rights against state infringement before and after the Fourteenth Amendment's ratification.

Other Sources

Justice Field certainly turned to a number of other sources when interpreting the Constitution. These included quotations from contemporary judicial scholars such as Thomas Cooley, economists like Adam Smith, as well as many state and federal court

---

[2] Swisher, *Stephen J. Field,* 383, 396; McCloskey, *American Conservatism,* 89

[3] See Charles McCurdy, "Justice Field and the Jurisprudence of Government-Business Relations: Some parameters of Laissez—Faire Constitutionalism, 1863-1877," *Journal of American History* 61(4):

[4] Kens, *Justice Field,* 7-9.

precedents.[5] These sources aided in Field's articulation of individual rights and government's role in protecting but not infringing upon them.

But two sources stand out for Field, both in frequency of use and the importance which he placed upon them. These sources were the common law and the Declaration of Independence. In looking to these sources, Field believed he consulted means by which to understand the context out of which the Constitution was formed, not merely his own personal philosophical or economic prejudices.

Thus, in the case of *Cummings v. Missouri,* Field discussed what he considered to be "[t]he theory upon which our political institutions rest."[6] The Constitution's discussion of liberty, of due process and regulatory power did not come out of a vacuum. Principles existed that informed Constitutional provisions. Field gave a short synopsis of this theory as being "that all men have certain inalienable rights; that among these are life, liberty, and the pursuit of happiness… and that in the protection of these rights all are equal before the law." [7] Field furthermore noted a particular manner in which the pursuit of happiness occurs, namely "that, in the pursuit of happiness, all avocations, all honors, all positions are alike open to everyone."[8]

In this summary, Field drew upon both the Declaration and the common law. Phrases such as "inalienable rights" and "life, liberty, and the pursuit of happiness" were familiar then as now as coming from the Declaration of Independence. At the same time,

---

[5] See *Gloucester Ferry Company v. Pennsylvania* 114 U.S. 196*; Butcher's Union Co. v. Crescent Union Co.* 111 U.S. 746.

[6] *Cummings v. Missouri* 71 U.S. 321.

[7] *Ibid*.

[8] *Ibid*.

Field's description of equal access to avocations, honors, and positions drew upon well-established ideas found in English common law. In the *Slaughterhouse Cases,* Field spoke the same language of "the equality of right among citizens in the pursuit of the ordinary avocations of life" as stemming in part from common law precepts.[9]

Therefore, Field saw in both the Declaration and the common law an articulation of liberty's meaning from which the Constitution drew. Each document he spoke of as pre-existing the Constitution and as aids in explaining its principles. The Declaration, he noted elsewhere, was an "evangel of liberty to the people"[10] articulating principles upon which, as he said in *Cummings,* the Constitution rested. "The common law of England" he furthermore noted, "is the basis of the jurisprudence of the United States" and that the Framers understood its protections to be "a part of their 'indutible[sic] rights and liberties.'"[11]

Field thus turned to these sources first and foremost to understand Constitutional liberty. In particular, he consulted these sources to understand three concepts: the status of inalienable rights, their content and extent, as well as government's role in protecting them. I will look to each to show Field's use of the Declaration and the common law in forming his rights' based view.

Status

The first area in which Field drew upon these sources concerned the unique status of inalienable rights. The Constitution makes no explicit distinction between the rights it

[9] *Slaughterhouse Cases* 83 U.S. 109.

[10] *Butchers' Union v. Crescent City Company* 111 U.S. 757.

[11] *Slaughterhouse Cases* 83 U.S. 104.

protects. It merely states them, such as "the right of the people to peaceably assemble,"[12] "the right of the people to keep and bear arms,"[13] and "the right of the people to be secure…against unreasonable searches and seizures."[14] Yet Field, like many other justices in the Court's history, made distinctions among kinds of rights.

In Chapter Four, I discussed Field's division of individual rights into three categories, namely civil, political, and social. Among these categories, civil rights stood out as those which are "absolute" and thus "are never to be withheld…."[15]

Why did those rights falling under civil hold absolute status, unlike those considered political or social? Field answered by appealing to the sources he thought represented the context for Constitutional liberty. First, Field consulted "what was placed by the Declaration of Independence among the inalienable rights of man."[16] The Declaration of Independence asserts the existence of inalienable rights, rights which are the same for Field as civil rights.[17] As inalienable, these rights could not be separated from their possessor. Thus Field declared them also to be absolute with no one able to rightly take them away.

Field continued to look to the Declaration to explain why these rights were inalienable. The reason was their origin. They are endowed, Field says, "not by the grace of emperors or kings…" nor do they come "by force of legislative or constitutional

---

[12] U.S. Constitution, Amendment I.

[13] *Ibid.*, Amendment II.

[14] *Ibid.*, Amendment IV.

[15] *Ibid.*

[16] *Powell v. Pennsylvania* 127 U.S. 692.

[17] See my discussion of this overlap in Chapter Four.

enactment…."[18] Instead, in cases such as *Powell v. Pennsylvania*, he noted that the "Declaration of Independence" speaks of the "rights of man, with which all men are endowed…by their Creator."[19] Elsewhere, in *Munn v. Illinois,* Field pointed to God again as the one who "has given…life"[20] by creating human beings.

In these cases, Field's referencing creation focused on the claim that humans possess certain rights for the sole reason that they are human. This reasoning underpins the numerous descriptions Field gives of these rights. When he described them as "inalienable," "absolute and personal," or as "inherent rights,"[21] he declares that they form a part of what it means to be human. To be human comprises the sufficient condition for possessing rights and to alienate persons from them would be to deny their very humanity.

In this reasoning, Field also saw the Declaration as helping to define these rights as equal for all human beings. In *Powell v. Pennsylvania,* Field argued that the "inalienable rights of man," as discussed by "the Declaration of Independence," are those with which "all men are endowed" and are therefore "equal rights."[22] This language was supported by various other references he made to inalienable rights as also equal rights.[23] Since being human constituted the only condition for their possession, then all human beings held them equally.

---

[18] *Powell v. Pennsylvania* 127 U.S. 692.

[19] *Ibid*.

[20] *Munn v. Illinois* 94 U.S. 142.

[21] *Butcher's Union Co. v. Crescent Union Co.* 111 U.S. 756.

[22] *Powell v. Pennsylvania* 127 U.S. 692.

[23] See *Munn v. Illinois* 94 U.S. 142;

Field, therefore, looked to the Declaration as one important way to understand the status of inalienable rights. Though this document was his most frequent source, Field also consulted the common law to come to the same conclusion. In the *Slaughterhouse Cases,* for example, Field drew upon the common law to attack the monopoly enacted by the state of Louisiana for butchers. In so doing, Field said that under the common law, the right to "any lawful trade and employment" was "assumed to be the natural right of all Englishmen."[24] Here Field saw a natural rights foundation beneath the English common law and thus in its continuance in America. Though the English common law recognized the right for its own people in particular, Field argued that as a natural right this action was merely acknowledging a human right, not creating it. Thus, this common law right was itself inalienable—beyond government power to grant or deny.

Furthermore, in looking at the common law regarding the openness of employment, Field's *Slaughterhouse* dissent asserted that "there is a recognition of the equality of right" to pursue ordinary vocations and trades.[25] As a natural right, all possessed it in an equal manner. No person could, by government grant or natural superiority, claim a superior right to work. Theses common law rights were equal rights as well in Field's interpretation.

Therefore, the common law along with the Declaration comprised means by which Field sought out the Constitution's understanding of inalienable rights' status. These rights' status as absolute and equal, as inhering in persons' very humanity, comprised part of the theory upon which Field believed the Constitution rested.

---

[24] *Slaughterhouse Cases* 83 U.S. 104.

[25] *Ibid.,* 83 U.S. 109.

Content and Extent

Beyond their status, Field looked to these other sources to understand the content and extent of the inalienable rights the Constitution protected. For example, when discussing the Privileges or Immunities Clause in the *Slaughterhouse Cases,* Field first said that they include those "which of right belong to the citizens of all free government."[26] But what are the privileges or immunities that belong by right to such persons? No list exists in the Clause itself.

One source Field turned to for answers, again, was the Declaration. Field quoted this "immortal document" in its familiar phrase that "the Creator had endowed all men 'with certain inalienable rights, and that among these are life, liberty, and the pursuit of happiness.'"[27] These "inalienable rights," as found in "the declaration of 1776," were the rights to which "[t]hat [the Fourteenth] amendment was to give practical effect."[28] Field thus found the butchers' monopoly created by Louisiana as "an invasion of these privileges, for they encroach upon the liberty of citizens to acquire property and pursue happiness."[29] In this case, Field saw the rights to life, liberty, and the pursuit of happiness as part of the privileges or immunities protected by the Fourteenth Amendment. In so doing, he consulted the Declaration of Independence as a means to discern their content.

At the same time, Field immediately added that such slaughterhouse monopolies as passed by Louisiana also "were held void at common law."[30] Field thereby drew upon

---

[26] *Slaughterhouse Cases.,* 83 U.S. 97.

[27] *Ibid.* 83 U.S. 105.

[28] *Ibid.*

[29] *Slaughterhouse Cases.,* 83 U.S. 101.

[30] *Ibid*.

the English common law as well in order to define these privileges or immunities. In reviewing the English case law, Field declared that "[t]he common law of England…condemned all monopolies in any known trade or manufacture."[31] The reason Field saw this condemnation again connected to natural rights. It was here where Field said that, according to the common law, the ability to "pursue…any lawful trade or employment" was considered "to be the natural right of every Englishman."[32] In fact, Field saw this as protection of the natural right to property, which originated in a person's own labor.[33] This right to property, exercised by pursuing lawful trades, formed another of the privileges or immunities—a common law one—protected by the Fourteenth Amendment.

Field looked to the same sources when examining the rights protected by the Due Process Clause. Unlike the Privileges or Immunities' Clause, these rights are listed, as the text specifies due process protections for "life, liberty, or property."[34] But the Due Process Clause does not state how broad or narrowly these rights are to be defined and thus protected. Field, as discussed in previous chapters, interpreted them broadly. In cases such as *Munn,* Justice Field described the expansive scope each should receive. Life was more than mere "animal existence" extending well beyond to the health and safety of the person. Liberty went beyond physical restraint to a freedom of action so long as others' rights were not threatened. Property should receive "the same liberal construction which

[31] *Ibid.,* 83 U.S. 104.

[32] *Ibid*.

[33] See *Butchers' Union v. Crescent City Co.* 111 U.S. 757.

[34] U.S. Constitution, Amendment XIV, Section 1.

is required for the protection of life and liberty," including generous protection for use in addition to possession.[35]

Field found this liberal construction again through his reading of both common law and the Declaration. In *Munn,* Field approved the common law maxim, *sic utere tuo ut alienum non laedas,* which he declared to mean that "each one must so use his own as not to injure his neighbor."[36] Field interpreted this phrase as a broad protection of rights both from and through government. In protecting from government interference, Field understood the restrictions involved to go no further than "the protection of the rights of others" including the "equal use and enjoyment of their property." Field argued that "the power of the State over the property of the citizen does not extend beyond such limits."[37] This interpretation of the common law gave a wide expanse for the exercise of these rights without government interference. But Field also, as discussed in Chapter Three, saw great room for legislation in the protection of rights. The same common law principle declared that regulation should extend so far as necessary for rights' protection. Thus Field argued that the police power "embraces an almost infinite variety of subjects. Whatever affects the peace, good order, morals, and health of the community comes within its scope."[38] This articulation thus gave great scope to liberty, this time through government action. To the extent that rights were threatened by others, the common law allowed government the power—the police power—to regulate.

---

[35] *Munn v. Illinois* 94 U.S. 142.

[36] *Ibid.,* 94 U.S. 145.

[37] *Ibid.*

[38] *Munn v. Illinois* 94 U.S. 145.

Even more than this common law maxim, Field sought out the Declaration to support his expansive view of the rights to life, liberty, and property. Field's referencing of the Declaration for the Due Process Clause, however, presents an interesting textual issue. The Declaration diverges from the Due Process Clause in what follows the rights to life and liberty. While Due Process adds "property," the Declaration lists "the pursuit of happiness."

Though not present in the text, Justice Field saw the pursuit of happiness as an enforceable right within the Constitution. He in fact referred to it as much if not more than any other Supreme Court justice in American history. How Field saw the pursuit of happiness enforced in the Constitution helps to explain why he believed rights should receive such expansive protection.

The importance Field placed on the pursuit of happiness resulted from the relationship he saw existing between it and other rights. He argued that the rights to life, liberty, and property were thought "to secure to every individual the essential conditions for the pursuit of happiness…"[39] Since the rights to life, liberty, and property formed "the essential conditions for the pursuit of happiness," each one must be understood as including happiness's pursuit within it. Field continued that "for that reason," these rights have "not been heretofore, and should never be, construed in any narrow or restricted sense."[40] The right to pursue happiness, inherent in life, liberty, and property, was the reason why Due Process Clause rights must be defined broadly.

[39] *Ibid.,* 94 U.S. 142.

[40] *Munn v. Illinois* 94 U.S. 142.

We see this logic in looking to Field's definition of each Due Process Clause right. When Field argued that life was more than "mere animal existence," he said that it included "whatever God has given to everyone with life for its growth and enjoyment…."[41] He stated elsewhere that, "the gift of life was accompanied by the right to seek and produce food, by which life can be preserved and *enjoyed*."[42] The right to life sought not only an existing life, not only a growing life, but an enjoyed life. Life, in other words, sought happiness. Field therefore argued for a broad interpretation of the right, as broad as necessary to protect its enjoyment.

The same logic undergirded liberty. The Justice argued that liberty "means freedom to go where one may choose, and act in such a manner, not inconsistent with the equal rights of others, as his judgment may dictate for the promotion of his happiness…."[43] The greater purpose of liberty's action stood in promoting the happiness of the actor. Field even went so far as to say that liberty "exists *only* where every individual has the power to pursue his own happiness…."[44] So important was this purpose that if happiness could not be pursued, then liberty did not exist. So broad was the resulting definition, that Field argued nothing should restrain liberty except what would tend to violate the rights of others.

The right to property, finally, also formed part of the means to pursue happiness.[45] As noted above, Field's *Munn* dissent said that all persons have a property right that

---

[41] *Ibid*.

[42] *Powell v. Pennsylvania,* 127 U.S. 690. (emphasis added).

[43] *Munn v. Illinois* 94 U.S. 142.

[44] *Butcher's Union Co. v. Crescent Union Co.* 111 U.S. 758 (emphasis added).

[45] The preceding statements also contradict claims by certain scholars that the pursuit of happiness only concerned tangible property or employment. See Swisher, *Stephen J. Field,* 423.

includes "equal use and enjoyment."[46] Again, we see happiness for Field as a purpose of exercising the rights listed in the Due Process Clause. Just as one possesses property in order to use it, so he uses it for enjoyment. Protection of property rights, therefore, must include use to the extent needed to allow the pursuit of happiness. Such a goal, as with life and liberty, gave a broad protection to the right to property.

Thus, Field looked to both the Declaration and the common law to better understand the content and extent of inalienable rights. These rights included life, liberty, and property, with the pursuit of happiness inhering in and thus giving expansive meaning to the others. Together, Field saw these rights as those which the Due Process Clause and the police power addressed in fulfilling Constitutional liberty.

Ramifications for Government

The third issue Field connected to other sources concerned the role for government regarding liberty. Justice Field, as discussed in previous chapters, asserted that the purpose of government was to protect inalienable rights. In fact, in *Munn,* Field argued that a state's police power "can only interfere with the conduct of individuals in their intercourse with each other, and in the use of their property, so far as may be required to secure these objects [rights' protection]."[47] At the same time, he upheld a role for popular will in pursuing those rights. Field declared that "supreme power in this country [is] vested in the people, and only in the people" by whom "certain sovereign powers have been delegated" to government by means of the Constitution.[48]

---

[46] *Munn v. Illinois* 94 U.S. 145.

[47] *Munn v. Illinois* 94 U.S. 145-146.

[48] *Fong Yue Ting v. U.S.* 149 U.S. 758

As noted in Chapter Five, Field did not find these concepts in the Constitution's text. Thus, Field here also turned to other sources. On these matters, Field relied almost entirely on the Declaration. In the case of *Butcher's Union,* after quoting the Declaration's claim that men are "endowed by their Creator with certain inalienable rights," Field continued that "to secure these…governments are instituted among men."[49] Field quoted the same passage in his *Slaughterhouse* dissent, adding later that these rights "are the gift of the Creator, which the law does not confer, but only recognizes."[50] He also looked to the next phrase in the Declaration, namely that governments established to secure rights are also "deriving their just powers from the consent of the governed."[51] Thus, while government realizes its purpose in protecting rights, it receives its just power to do so from the consent of those possessing such rights.

Field's consulting the Declaration, therefore, informed his discussion of state and national police power. The Declaration helped to understand the purpose of the Due Process Clause in limiting government and the police power in empowering government. It informed the careful relationship Field posited between rights and consent, whereby popular will possessed great discretion in how but not whether to pursue rights' protection.

The discretion Field allowed for popular will has been discussed in previous chapters. But how regulatory power extended to one institution in particular helps to combat a popular critique of Field while further defining his understanding of liberty as being both from and through government.

---

[49] *Butchers' Union v. Crescent City Co.* 111 U.S. 757.

[50] *Slaughterhouse Cases,* 83 U.S. 105.

[51] *Butchers' Union v. Crescent City Co.* 111 U.S. 757.

In government regulation, Field made an important connection between public morals and the principles of the Declaration and the common law. In addition to regulations of alcohol, Field argued that government could regulate in reference to marriages and families, doing so for reasons of morality. He showed this position in two particular cases: *Maynard v. Hill* and *Davis v. Beason. Marynard* upheld the ability of legislatures to grant divorces, thereby denying a petitioner who was in the process of divorcing the amount of land given in the Oregon territory to married persons.[52] *Davis* upheld, over Free Exercise objections, an Idaho law requiring voters to take an oath swearing they were not part of any organization that promoted polygamy.[53]

In *Maynard,* Field referenced the Declaration's principle of the pursuit of happiness, quoting Maine's Supreme Court when it said that marriage constituted "a relation most important, as affecting the happiness of individuals…."[54] In the same case, he noted that, once a marriage "is founded upon the consent of the parties," its ensuing "rights and obligations" are based "upon the law, statutory or common."[55] Therefore, Field saw in both the Declaration's principles and the common law power to regulate marriages.

This point is important here because in explaining why the principles of the Declaration and the common law bestowed this power, Field's position pushes back against common criticism of him from modern scholarship. As noted above, some

---

[52] *Maynard v. Hill* 125 U.S. 190 (1888); See also Steven Hobbes, "Love on the Oregon Trail: What the Story of *Maynard v. Hill* Teaches Us About Marriage and Democratic Self-Government" *Hofstra Law Review* 32(2003): 111-112.

[53] 133 U.S. 333 (1889).

[54] *Maynard v. Hill* 125 U.S. 211.

[55] *Ibid.,* 125 U.S. 191.

scholars accuse Field of siding too much toward liberty from government, in doing so articulating an expansive, if not extreme, autonomous individualism.[56]

In speaking of regulating marriage, Field showed that he did not believe liberty's options were the autonomous individual on one hand and the government on the other. Instead, Field understood human beings as living in marriage, in families, and in society—associations in which the individual could experience liberty and learn its habits. Liberty from government involved an essential communal element.

Field cited the Indiana Supreme Court's argument that "[i]n every enlightened government it [marriage] is preeminently the basis of civil institutions….It is a great public institution, giving character to our whole civil polity."[57] These non-governmental institutions are essential to the existence of a political community.

How, then, does marriage form the basis of and give character to the civil polity? Field argued that marriage comprised "the first step from barbarism to incipient civilization…."[58] It is the first community. Field continued that marriage then constituted "the foundation of the family…."[59] From marriage and family then came society, including the "civil polity" of which Field spoke.

As the basis of society in order of being, Field also saw marriage as primary in instilling the habits which persons exercise as citizens. For the married partners, Field noted that "no other contract merged the legal existence of the parties into one."[60] This

---

[56] See Kens, 8-9.

[57] *Maynard v. Hill* 125 U.S. 213.

[58] *Ibid.,* 125 U.S. 211.

[59] *Maynard v. Hill* 125 U.S. 211.

[60] *Ibid.,* 125 U.S. 213.

legal combination partook of the more general sharing of lives which marriage entailed. Such an arrangement would have a great impact on the day to day life of the participants. In this relationship the most persistent opportunities to protect or infringe rights—and to learn the habits of doing so—could take place. Therefore, Field saw justification for governments to ban polygamous marriages. Field argued that polygamy tended to "degrade woman"[61] and later also said it tended "to debase man."[62] It did so by denying the human equality of the husband and wife. It established a tyranny which degraded the women involved and debased the character of the men. This tyranny extended to the children, either in treatment or by example. As children are so much formed by their households, the type of rule and the kind of respect for rights occurring in the home would have tremendous effects on society.

Thus, Field believed married life contained public consequences. How one acts as spouse and then as parent or child affects one's thoughts and actions as citizen. Tyranny in the home inculcates tyranny in public. Liberty of the hearth reaps a political harvest in-kind. Therefore, Field spoke of marriage "as having more to do with the morals and civilization of a people than any other institution…."[63] In cultivating habits of liberty or tyranny, it thereby had more to do with the happiness of persons than any other institution.

Field's understanding of marriage and family, therefore, proved important to this understanding of liberty through and liberty from government. In regulating these institutions, liberty through government did extend far, even into the home to protect

[61] *Davis v. Beason* 133 U.S. 341.

[62] *Ibid*.

[63] *Maynard v. Hill* 125 U.S. 205.

rights. The Declaration's call to protect rights, including happiness's pursuit, as well as the common law, helped inform Field's thinking on this matter. At the same time, these institutions existed as part of liberty from government, with the common law and the Declaration's principles allotting space for their existence. Therein, persons exercised their rights not as lonely individuals but as members of communities.

In these concepts, Field saw a close connection between outside sources and the Constitution. Field viewed certain rights protected by the Constitution as inalienable, inherent parts of human beings. These rights' expansive content included life, liberty, property, and therein the pursuit of happiness. Governments exist to protect these rights, gaining such power by popular consent, which must respect rights, including those involved in non-governmental forms of human community. Together, these principles formed the "theory upon which our political institutions rest," the theory which informed the meaning of Constitutional liberty.

Constitutional Interpretations

The preceding describes how closely Field looked to the Declaration and the common law to understand Constitutional liberty. But the question remains as to the role the Constitutional text played in relationship to these outside sources. Even when they acknowledge Field's use of these sources, many scholars say that their use replaced the Constitutional text more than they helped to explain it. Swisher, for example, finds Field's application of the Declaration tenuous, based on "general statements" that did not necessarily lead to Field's conclusions in particular cases.[64]

[64] Swisher, 424.

Such interpretations do not adequately appraise Field's own attempts to ground his opinions in the Constitution. Michael Zuckert's article on Field makes some worthy observations that support Field's constitutionalism. He notes Field's claim to link his principles to Constitutional claims, moving from principles of natural rights to searching for support "for that position in the Constitution."[65] But his comment on Field's position does not give a sufficient explanation for how the Constitution still rules for Field even when other sources are consulted.

Field did maintain the primacy of the Constitution's text over the sources he consulted to understand its meaning. Returning to *Missouri v. Cummings,* Field said that the principles declared by both the Declaration and the common law helped to make up "[t]he theory upon which our political institutions rest."[66] But Field refused to base his decisions on this theory alone. Instead, he added in that case that "this Court cannot decide the cases upon the justice or hardship of these provisions. Its duty is to determine whether they are in conflict with the Constitution of the United States."[67]

Similarly, in *Slaughterhouse* Field did assert that "the abstract justice" of the butchers' claims, claims of natural rights to property and the pursuit of happiness, are connected to the Declaration and to the common law.[68] But Field did not stop there in reasoning against the measure before the Court, either. He continued that "I shall endeavor to show that the position has some support in the fundamental law of the

---

[65] Zuckert, "Judicial Liberalism and Capitalism," 110.

[66] *Cummings v. Missouri* 71 U.S. 321.

[67] *Cummings v. Missouri* 71 U.S. 318.

[68] *Slaughterhouse Cases* 83 U.S. 104-105.

country."[69] In other words, Field demanded a basis in the Constitution itself in order to act upon such an injustice. The Constitutional text was primary. Outside sources could only aid in better understanding this text, and could not serve as an independent source of legal power.

Fourteenth Amendment and Police Power

Returning to a central focus of my examination—the limitation of state police power—shows Field's method in practice. As discussed before, the most common limit to state power which Field used was the Fourteenth Amendment, particularly the Due Process Clause. Here we can see how Field appealed to sources outside the Constitution to explain the Amendment's purposes, but did not consider them independent sources of legal authority. In fact, in the first Fourteenth Amendment Supreme Court case, Field explicitly linked the meaning of the new amendment to the Declaration of Independence. The Justice stated in his *Slaughterhouse* dissent that "[t]hat amendment was intended to give practical effect to the declaration of 1776 of inalienable rights…."[70] He further connected the Amendment to the common law on the same principles of rights, as previously discussed. In its giving "practical effect" to the Declaration, Field argued that the principles of the Declaration were not created by the Fourteenth Amendment. Instead, the Fourteenth Amendment created the power to enforce rights' protection against state governments.

Field's interpretation of the police power in relation to the Fourteenth Amendment provides a helpful study to see his approach in action. For his tenure

[69] *Ibid.,* 83 U.S. 86-87.

[70] *Slaughterhouse Cases,* 83 U.S 105.

included time both preceding and proceeding the Fourteenth Amendment's first judicial consideration. The first case for the Amendment—*Slaughterhouse*—came in 1873, a decade into Field's time on the Court. His retirement, moreover, came in 1897, nearly a quarter century after this first case. Therefore, Field spent significant time on the Court addressing state police power both with and without the Fourteenth Amendment. Examining the difference this Amendment made in Field's police power jurisprudence further reveals his reliance on the primacy of the text in his Constitutional interpretation.

Before the Fourteenth Amendment: Field argued that prior to the Fourteenth Amendment "the national government, except in a few particulars, could afford no protection to the individual against arbitrary and oppressive legislation"[71] by the states. This "arbitrary and oppressive legislation" stemmed from states' exercise of their police power.[72] Field believed police power contained intrinsic limits. But Field also thought the enforcement of limits was left largely to the states themselves. Only certain, narrow instances permitted judicial review to determine if true police power goals were being pursued. These limited instances existed only when "some right claimed under the Constitution, laws, or treaties of the United States is invaded."[73] The Court had to find that the state had acted contrary to a particular provision of the Constitution—a Constitution without the Fourteenth Amendment—to review and curb police power abuse.

[71] *Bartemeyer v. Iowa* 85 U.S. 140.

[72] See the discussion of *Cummings v. Missouri* below.

[73] *Missouri Pacific Railway Company v. Humes* 115 U.S. 520 (1885).

Though narrow, Field did make use of the "few particulars" then available to limit state's abuse of police power. One particular concerned the prohibitions on states found in Article I, Section 10. Field most famously enforced two of these prohibitions in the 1867 case of *Cummings v. Missouri.*[74] In the aftermath of the Civil War, the new Missouri Constitution instituted a strict loyalty oath which must be taken to hold certain offices, public and private.[75] The oath was extensive. In addition to denying participating "in armed hostility to the United States" the oath taker must also declare to never have, "by act or word," asserted agreement with rebels, sympathy for them, aided any of them in any manner, declared "disaffection to the government of the United States," or vacated the state to avoid the draft.[76] Failure to take the oath or deceit in so doing denied the person the ability to hold, among other positions, "any office of honor, trust, or profit" for the state, as well as "acting as a professor or teacher in any educational institution…or of holding any real estate or other property in trust for the use of any church, religious society, or congregation."[77] In light of this new law, a Roman Catholic priest was indicted and removed from his post for preaching and teaching without taking the oath.

Missouri argued that the oath was a police power regulation. It merely sought "to determine the qualifications for office and the conditions upon which its citizens may exercise their various callings and pursuits within its jurisdiction."[78] Setting such

[74] 71 U.S. 277 (1867).

[75] See Kens, 113.

[76] *Cummins v. Missouri* 71 U.S. 316-317.

[77] *Cummings v. Missouri* 71 U.S. 317.

[78] *Ibid.,* 71 U.S. 319.

qualifications was necessary to protect the persons involved as well as their fellow citizens.

Field believed the oath was not a proper exercise of the police power. Instead, the treatment of the priest went against "the theory upon which our political institutions rest"[79] by depriving him of his natural rights. The priest's removal violated the right to pursue happiness in that "all avocations, all honors, all positions are alike open to everyone…."[80] Furthermore, Field argued that doing so violated the common law. In addition to the common law precept of equal rights to a vocation, Field argued regarding the oath that "[t]he clauses in question subvert the presumptions of innocence, and alter the rules of evidence, which heretofore, under the universally recognized principles of the common law, have been supposed to be fundamental and unchangeable."[81] The burden was placed by the oath decidedly on the taker to prove he had never violated its numerous and extensive parts, thereby also violating the priest's rights in this case.

But whether Missouri's oath thereby violated the principles of the Declaration and the common law could not decide the case. Instead, Field wrote that the Court must "consider whether there is any inhibition in the Constitution of the United States against their enforcement."[82] The misuse of police power, the abuse of rights must contradict a Constitutional provision for the Court to limit it.

Field believed two such provisions existed in Article I, Section 10. The first concerned a ban on states passing *ex post facto* laws. *Ex post facto* laws make punishable

---

[79] *Ibid.,* 71 U.S. 321.

[80] *Ibid*.

[81] *Ibid.,* 71 U.S. 328.

[82] *Cummings v. Missouri* 71 U.S. 322.

acts which were not criminal when accomplished. The second rested in a state ban on bills of attainder, where a person is punished by legislative means without judicial determination of guilt or innocence.

The Missouri oath certainly applied to acts committed before its passage. It also constituted legislative action, not judicial. Therefore, one necessary condition for *ex post facto* laws and for bills of attainder each was met.

The remaining point of contention consisted in whether the oath prescribed punishment for its violation. For only if the oath actually punished persons would it run afoul of these Constitutional prohibitions. In determining this issue, Field first dismissed Missouri's claim that the oath was a "qualification" for office. These "relate to the fitness or capacity of the party for a particular pursuit or profession."[83] But no connection existed between abstention from uttering negative words about the U.S. government and safely administering the priestly office. Instead, the oath was intended "to reach the person, not the calling."[84] Qualifications, in other words, follow vocations not the persons seeking employment. This oath did no such thing.

Field argued that the manner in which the oath reached the person revealed its true status as punishment. He declared that punishment included "[a]ny deprivation or suspension of any…rights for past conduct."[85] To do so inflicted a hurt on the person deprived, taking from him something which would otherwise be protected. To do so in reaction to certain conduct, therefore, was punishment. This the oath did. It deprived the priest of his rights in two ways. First, it deprived him of his right to pursue "all

[83] *Ibid.,* 71 U.S. 320.

[84] *Cummings v. Missouri* 71 U.S. 320.

[85] *Ibid.,* 71 U.S. 322.

avocations."[86] Under the oath he could not seek a wide range of employments for failure to truthfully affirm its claims. Second, the requirement that he take the oath for his employment deprived him of the property he possessed in already holding a particular job, one which itself included numerous privileges and honors. The requirement did so not on the basis of present qualifications for the job, but chastised him for past action even if only minimally connected to the Confederate cause.[87] The oath furthermore did so for an entire class of persons—those who failed the oath—without judicial procedure.[88]

As punishment, the law therefore violated the Constitutional prohibition against *ex post facto* laws and against bills of attainder. The oath punished persons for acts committed before the law's passage. It also punished directly by statute, with no judicial determination of guilt or innocence. On both grounds, Field struck the oath down.

In this case, Field consulted outside sources to understand Constitutional provisions. Yet the use of outside sources remained wholly dependent on the Constitution's text. If the oath had punished future conduct and done so using judicial procedure, Field would have denied the Court's power to intervene. Only once these conditions were fulfilled could Field legitimately consult the Declaration and the common law and even then only to better understand the meaning of the punishments involved.

---

[86] *Ibid.,* 71 U.S. 321.

[87] Zuckert rightly argues that the decision is made easier for Field by the "blunderbuss quality of the oath," meaning Field did not have to address "more subtle issues" regarding whether some of the oath's mandates did justly cover present, reasonable qualifications for certain vocations. See Zuckert, "Judicial Liberalism and Capitalism," 115.

[88] *Cummings v. Missouri* 71 U.S. 325.

Another pre-Fourteenth Amendment Clause Field thought enforceable against the states was the Privileges and Immunities Clause of Article IV, Section 2. This provision said, "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[89] Here the national government could protect those citizens traveling outside their own state of residence from abusive treatment. Often this Clause is interpreted as only a case of equal protection.[90] Whatever laws existed for state residents, regardless of their effect on rights, must also apply to visitors.

But some cases, most famously Justice Bushrod Washington's 1823 circuit court case of *Corfield v. Coryell,*[91] interpret the Clause as involving the actual content of rights.[92] In *Corfield,* Justice Washington declared the Clause to include those privileges or immunities which are "in their nature, fundamental; which belong, of right, to the citizens of all free governments." Several prominent congressional supporters of the Fourteenth Amendment also attributed this reading to the Clause as they sought to copy it in the new amendment.[93]

Field gravitated toward Washington's interpretation. In 1869, before any Fourteenth Amendment case came before the Court, Field did argue that Article IV, Section 2 gave citizens "the equal protection of their laws."[94] But as the Justice saw

---

[89] U.S. Constitution, Article IV, Section 2.

[90] Robert Bork, *The Tempting of America*, 181.

[91] 6 Fed Cas. 546 (1823).

[92] Certain scholars also support this substantive argument. See Laurence H. Tribe and Michael C. Dorf, *On Reading the Constitution,* (New York: Harvard University Press, 1991), 53; Hadley Arkes, *Beyond the Constitution* (Princeton, NJ: Princeton University Press, 1990), 88.

[93] For an extensive list of quotations from Reconstruction Congressmen, see Barnett, *Restoring the Lost Constitution,* 60-64.

[94] *Paul v. Virginia* 75 U.S. 180.

content-based rights could be equal rights, so he saw a content-based component to this equal protection. Field asserted elsewhere, citing *Corfield,* that the "privileges or immunities designated" in this clause include "those which of right belong to the citizens of all free governments."[95] Field then later maintained "[t]hat only is a free government, in the American sense of the term, under which the inalienable right of every citizen to pursue his happiness is unrestrained, except by just, equal, and impartial laws."[96] In so doing, Field spoke of these rights in the same content-based fashion in which he spoke of Fourteenth Amendment rights.

Moreover, Field's first interpretations of the Fourteenth Amendment looked back to a content-based reading of Article IV, much like the Amendment's proponents. In *Slaughterhouse,* Field argued that "[w]hat the clause in question [Privileges and Immunities] did for the protection of the citizens of one State…the fourteenth amendment does for the protection of every citizen of the United States…whether they reside in the same or in different States."[97] What Article IV did was protect the content-based rights asserted in the Declaration and the common law. Therefore, the Fourteenth Amendment accomplished the same goal.

The difference rested only in who received the protection. While the Fourteenth Amendment included state actions against its own citizens, Article IV only protected those citizens traveling outside their native state. Whenever a citizen faced abuse while in another state, Field believed the Court could step in to review and thereby to curb state

[95] *Slaughterhouse Cases* 83 U.S. 98.

[96] *Ibid.,* 83 U.S. 111.

[97] *Slaughterhouse Cases* 83 U.S. 100-101.

misuse of the police power. But when the states sought to infringe the rights of their own citizens, absent the Fourteenth Amendment, Field saw no such broad power to protect.

Field certainly saw these provisions as usable to protect persons against state's abuse of their police power. But in the end, these means proved very limited. Few instances arose where states punished prior activity or directly through legislation. Rare also were cases where persons claimed content-based rights' violations while traveling out of state. In Field's opinion, the mass of state police power abuse remained beyond national, including judicial, review and correction.

After the Fourteenth Amendment: The Fourteenth Amendment changed the situation dramatically for Field. Prohibited was all state action violating the life, liberty, and property of its own citizens. Such prohibition, moreover, was far less limiting to judicial remedy. As discussed before, Field argued that "there are few subjects upon which legislation can be had besides life, liberty, and property."[98] Thus he noted that "the reach and influence of the [Fourteenth] amendment are immense."[99] Much greater enforcement power now existed to restrain state abuses of its police power.

Important, however, was the way Field described the change wrought by the new amendment. At the same time that Field asserted its great expanse, the Justice said the amendment was not "designed to interfere with the power of the state, sometimes termed

[98] *Ex Parte Virginia* 100 U.S. 366.

[99] *Ibid.,* 100 U.S. 367.

its police power, to prescribe regulations…."[100] Even stronger, he declared that it does not conflict "in any respect with the police power of the state."[101]

How does Justice Field assert broad new national and judicial powers to curb state police power and still say such expansion does not interfere or conflict with such power? The disjunction is explained by returning to Field's definition of police power. Police power always meant the regulatory protection of always existent rights. A new amendment denying states the ability to infringe on those rights would not limit such a power---rightly considered— in the least. What changed concerned the Court's ability to review state assertions of that power to determine their legitimacy. Before, when the states used police power to justify infringing rights, the Court could rarely intervene. Now the Courts could review all state police power actions pertaining to state residents, regardless of when the law was passed or how guilt was determined.

This power Field articulated in *Powell v. Pennsylvania.* As discussed in Chapter Three, the law under review claimed to be a state regulation for the health and safety of the public regarding the consumption of oleomargarine. While Field affirmed the state's power to make this kind of regulation, he decried the present case as "the pretense of such regulation…by false title, purporting to protect the health" of the people.[102] The law's health objective was nothing more than false pretenses masking other goals. He argued that if the law did not forbid activity, "injurious to the health or morals of the people" or which would "disturb their peace or menace their safety, it derives no validity

[100] *Barbier v. Connolly* 113 U.S. 31.

[101] *Bartemeyer v. Iowa* 85 U.S. 138.

[102] *Powell v. Pennsylvania* 127 U.S. 695.

by calling it a police…law."[103] Such laws never did. Instead, it constituted an "unwarranted interference with the rights and the liberties of the citizen."[104] Such laws always had.

But Field noted that "previous to the adoption of the Fourteenth Amendment, the validity of such legislation [regarding oleomargarine production] was to be determined by the constitution of the state and its tribunals were the authoritative interpretation of its meaning."[105] Before the Fourteenth Amendment, no matter how unjust, a situation like the one in *Powell* could not have judicial enforcement. After the Fourteenth Amendment, this circumstance was no longer the case. The Court now could see whether a law has "some relation to the end to be accomplished."[106] It thus could review all claims of police power and strike down those which infringed on the expansive rights to life, liberty, and property. The police power which was always limited in definition now could be limited by Constitutional force. The rights which always existed now could be protected by the same.

Thus, we see the primacy of the text in Field's Constitutional interpretation. Though Field always believed the Declaration and the common law helped explain Constitutional liberty, he did not see these sources as independent means to decide cases. A possible violation stemming from reading the text itself must arise. Only then could these outside sources aid in understanding the Constitution's terms and phrases. Field's actions before and after the Fourteenth Amendment's ratification help show this

---

[103] *Ibid.*

[104] *Ibid.*

[105] *Ibid*., 127 U.S. 690.

[106] *Ibid.,* 127 U.S. 695.

approach, with Field seeing the change in the Constitution's text as the sole ground for change in his judicial decisions.

Conclusion

Of course one could object to Field's reasoning in particular cases. These objections could only grow if this examination extended beyond Due Process and police power. The consultation of these outside sources is not an exact science but instead requires the exercise of judgment. As his civil rights and, to an extent, his Commerce Clause jurisprudence have shown, his applications did not always align perfectly with his articulated principles. But contrary to scholarly accusations, Field's method did not simply inject his personal economic or social views into his decisions. The Constitution was no *tabula rasa* to use for his own agenda. Neither was the Declaration or the common law. Each molded and informed, empowered and limited Field's jurisprudence.

My discussion here shows the fundamental importance sources such as the Declaration of Independence and the common law held for Field's opinions. The concepts of inalienable rights and government's purpose in their protection are understood partly in light of these sources' claims. The cooperation of the police power and Due Process, therefore, comprise applications of Field's reading. Furthermore, Field's use of these sources in Constitutional interpretation retained respect for both documents. For Field, the Constitution needed the Declaration and common law to help understand what was meant when it spoke of liberty. The text had a context. But the Constitution still ruled. Only its provisions were enforceable and thus only as explanations of its terms could these other sources be consulted. In the end, only the

Constitution could allow any power for the common law. Only it could "give practical effect to the declaration of 1776."[107]

[107] *Slaughterhouse Cases* 83 U.S. 105.

CHAPTER SEVEN

Conclusion

On February 4, 1890, a celebration took place at the Metropolitan Opera House in New York City. There, guests gathered to commemorate the centennial anniversary of the organization of the federal judiciary. The prestigious event included addresses by Chief Justice Melville W. Fuller and Associate Justice Stephen J. Field.

In his speech, Field summarized his understanding of liberty and of the Constitution's role in its protection. In doing so, he echoed the themes my preceding chapters display regarding his jurisprudence. Field first discussed the history and the philosophical underpinnings of the American republic. The Declaration of Independence, he asserted, "declared the rights to life, liberty, and the pursuit of happiness…as the endowment of his [man's] Creator."[1] These concepts Field regarded as describing the true content and basis for liberty—that liberty existed where these rights received protection.[2] He continued that guarding these rights formed the justification for government, not merely the reason for its limitation.[3] Thus when government acted, liberty was its goal. When government was restrained, the goal remained the same. Second, Field linked this pursuit of liberty to the Constitution itself, saying that its

[1] Stephen Field, "Address of Mr. Justice Field" in *Centennial Celebration of the Organization of the Federal Judiciary* (Washington: 1890), 9.

[2] *Ibid.*

[3] Field quotes, with one additional comment, the Declaration, "that to secure these rights—not to grant them—governments are instituted among men…." See *Ibid.*

purpose was "to preserve whatever of freedom had been gained in the past."[4] The Constitution formed the means to secure rights. The Constitution's particular provisions, therefore, each sought this broader goal. Field's subsequent discussion of the Fourteenth Amendment and the Commerce Clause all sought to reinforce the Constitution's liberty-preserving purpose.[5] In concluding his remarks, Field referred to the great success with which the Constitution pursued this purpose, declaring it, for that reason, to be "the noblest inheritance ever possessed by a free people."[6] As long as liberty from and through government continued in adequate cooperation, Field believed the inheritance to remain perpetually noble and perpetually the possession of a free United States.

Justice Field: Then and Now

This examination of Field's cooperative, Constitutional liberty does much toward clarifying the scholarly interpretation of him. He did not merely follow a *laissez-faire* policy to protect business interests. Nor did he only subscribe to an equal protection ideology. Instead, Justice Field saw liberty as the protection of rights that included an expansive sphere for government action as well as restraints upon that action. By his own words, in cases and in the speech noted above, he articulated this understanding of liberty as the foundation for his jurisprudence. The preceding chapters help to explain this understanding as a better way to interpret Justice Field's jurisprudence in general.

Though this work provides an extensive and fundamental interpretation of Justice Field's view of liberty, it hardly exhausts further scholarship on him. Instead, it intends to

---

[4] Field, *Centennial Celebration.,* 11.

[5] *Ibid.,* 17-18, 20-22.

[6] *Ibid.,* 24.

offer a foundation on which we might expand and refine the study of Field's jurisprudence. I showed Field's understanding through focusing primarily on the Due Process Clause, police power, and the Commerce Clause. Additional areas of study include Justice Field's view of the taxing power, most notably his concurrence in *Pollock v. Farmer's Trust* striking down an income tax.[7] This and other tax cases in which he participated speak further to both the regulatory power of government to protect liberty as well as the distinctions to be made between state and national power. Field's understanding of the Equal Protection Clause could also receive greater examination, particularly as it applied to racial matters for Chinese and African-American persons. Field's opinions here, while essentially in line with those discussed above, would further demonstrate his fallible application of his principles in particular cases.[8]

At the same time, my work on Field does not merely modify and refine the historical record. The Field described here continues to speak to the present. The judicial conversation regarding liberty remains active on today's Supreme Court. Term after term, justices declare their reasoning as faithful to the concept of liberty.[9] They hardly do so in unison, however. In cases involving the same Constitutional provisions through which Field addressed liberty, including the Due Process Clause, police power, and the Commerce Clause, divisions within the Court often occur, appearing in the body's perceived liberal and conservative wings.

---

[7] *Pollock v. Farmer's Loan & Trust Co.* 157 U.S. 429 (1895). See also *Wolff v. New Orleans* 103 U.S. 358 (1880); *United States v. New Orleans* 98 U.S. 381 (1878).

[8] Cases such as *Pace v. Alabama* 106 U.S. 583 (1883) could receive more attention as well as circuit court opinions like *In Re Ah Fong* 1 F. Cas. 213 (1874).

[9] See Justice Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (New York: Vintage, 2005).

Justice Field's opinions can offer these debates two forms of guidance. In the first place, the Justice's jurisprudence provides a more comprehensive context within which present divisions on the Court can discuss their differences. On numerous issues, including sexual privacy and gun control,[10] the Court's opposing wings often place state police power in deep if not fundamental tension with the Due Process Clause. Their reasoning often resembles what Field critiqued in the *Munn* Majority—that police power ultimately understands liberty in terms of popular will while the Due Process Clause understands liberty in terms of individual rights. As the underlying ground of liberty through government is different from liberty from it, a deep impasse often results in particular cases. In fact, it sometimes appears as if the different sides speak more past than to each other.

Field's jurisprudence helps by understanding the Due Process Clause and police power as pursuing a common purpose: the protection of rights. This common purpose would provide a standard by which justices could decide particular cases. Both sides might appeal to the rights involved, not to deeply different concepts of rights or will. The conservative and liberal wings of the Court no doubt would continue to disagree over whether certain matters involved rights or to what extent rights should receive protection.

Yet the common point of reference could reduce the depth of disagreement, turning it more toward the application of liberty to particular circumstances. It could also improve the degree to which the opposing sides speak to, rather than past, each other, as common language demanded some form of common meaning.

[10] See, for example, *Lawrence v. Texas* 539 U.S. 558 (2003); *McDonald v. City of Chicago* 561 U.S. 3025 (2010).

A similar point could apply to the Commerce Clause and to federalism in general. The more conservative wing of the Court often looks to restrain the scope of the Commerce Clause. In so doing, they often portray federalism's only purpose as protecting against intrusive, rights' infringing government.[11] Certain parts of the liberal wing, however, speak of the Commerce Clause and of federalism more in terms of realizing popular will through state and national cooperation. This debate, therefore, often also involves different standards, with one side speaking of individual rights and the other of governmental powers.

Justice Field's understanding of these matters could again provide a context in which these differing views of liberty might lessen division and better communicate. Field's jurisprudence positions governmental power, regardless of state or national, as the means to the end of protecting rights. The Commerce Clause and federalism thereby could be seen as protecting liberty as much in what they allow state and national governments to do as in what they restrain. Again, disagreements over the distribution of power in particular circumstances would almost certainly continue. But the common goal of liberty could make these disagreements less fundamental and result in better judicial dialogue.

In the second place, Justice Field can aid the Court in applying the principles of liberty to particular cases. Today's Court often seeks bright-line rules whose abstract purity is forced to fit messy facts. These include tests such as the Lemon test for violating the Establishment Clause,[12] scrutiny tests for Equal Protection,[13] and unchanging

[11] *NFIB v. Sebelius* 132 S. Ct. 603 (2012)*; U.S. v. Lopez* 514 U.S. 549 (1995).

[12] See, for example, *Lemon v. Kurtzman* 403 U.S. 602 (1971).

categories for commerce. The Court's search for such rules tends to take decision-making largely out of the justices hands in particular cases.

But doing so damages the Court, denying its essential role within the Constitution's separation of powers. This role, discussed in Chapter Three, consisted for Field in the exercise of judgment by which general principles must truly account for decisions involving particular circumstances.[14] Field's jurisprudence could help the Court to eschew such bright-line rules and better exercise this power of judgment. As discussed in both Chapters Three and Four, Field's approach took seriously the difficulty inherent in deciding particular cases. Protecting liberty was his purpose. But the competing claims and particular facts necessitated applying principles to the case at hand. These particular facts could also show change over time in the manner in which certain Constitutional principles should be applied. In accounting for these elements, Field was no ideologue, deciding cases on abstract principle divorced from concrete circumstance. However imperfectly, he allowed for circumstances to effect the application of broader principles.

An example of how Field's approach could apply to today's Court is the Commerce Clause. In Commerce Clause cases, certain members of the conservative wing if they followed Justice's Field's lead could better acknowledge how changes in America's economy in turn change the scope of interstate regulatory power.[15] The great nationalization of the market must be accepted and applied, meaning that greater

---

[13] These tests break down roughly into rational, intermediate, and strict, depending on the categorization the law makes. Examples of cases discussing them include *United States v. Virginia* 518 U.S. 515 (1996) for gender; *Grutter v. Bollinger* 539 U.S. 306 (2003) for race; and *Lawrence v. Texas* 539 U.S. 558 (2003) for sexual orientation.

[14] See Hamilton, *Federalist No. 78.*

[15] See, for example, Justice Thomas's concurrence in *United States v. Lopez* 514 U.S. 539 (1995).

interstate commerce entails greater national power to regulate. Liberals, moreover, could take into account how particular circumstances at times have too remote a connection to interstate commerce to warrant national regulation.[16] Bright lines cannot in practice be a blanket grant of power any more than they can be a blanket restraint. In other words, Field can teach both sides how better to practice the difficult but crucial activity of judgment, to truly account for principle and circumstance.[17]

In these ways, Field can do more than speak as part of the latter 19th century Court. His jurisprudence provides a common context to today's judiciary for discussing liberty and a judgment-based approach to deciding particular cases. In so consulting Field, the Court may better understand the Constitution's goal "to secure liberty to ourselves and to our posterity."[18] In other words, the Court may better pursue, not a liberty in part, but a liberty in full.

[16] The dissenting opinions in *Lopez* could serve to illustrate this point.

[17] For these ideas regarding bright-line rules and the use of judgment I am deeply indebted to David K. Nichols, who helped me understand the idea in relation to the contemporary Court which I could then see in relation to Justice Field. See Nichols, "Merely Judgment," 222-223, 230-231.

[18] U.S. Constitution, Preamble.

BIBLIOGRAPHY

Alexey, Robert. *Theories of Constitutional Rights* New York: Oxford University Press, 2002).

Arkes, Hadley. *Beyond the Constitution.* Princeton, NJ: Princeton University Press, 1990.

——— . *Constitutional Illusions & Anchoring Truths: The Touchstone of the Natural Law.* New York: Cambridge University Press, 2010).

Barnett, Randy. *Restoring the Lost Constitution: The Presumption of Liberty.* Princeton, NJ: Princeton University Press, 2004.

——— . "The Proper Scope of the Police Power," *Notre Dame Law Review* 79, no. 2 (2003-2004): 429-496.

Benedict, Michael Les. "Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origin of Laissez-Faire Constitutionalism" *Law and History Review* 3, no. 2 (Autumn 1985): 293-331.

Bensel, Richard Franklin. *The Political Economy of American Industrialization, 1877-1900.* New York: Cambridge University Press, 2000.

——— . *Yankee Leviathan: The Origins of Central State Authority in America, 1859-1877.* New York: Cambridge University Press, 1990.

Bernstein, David E. "*Lochner* Era Revisionsim, Revised: *Lochner* and the Origins of Fundamental Rights Constitutionalism" *Georgetown Law Journal* 92, no. 2 (2003-2004): 1-60.

Berry, Mary Francis. "Judging Morality: Sexual Behavior and Legal Consequences in the Late-Nineteenth Century South" in *Black Southerners and the Law, 1865-1900,* ed. Donald J. Nieman. London: Routledge, 1994.

Beth, Loren P. *John Marshall Harlan: The Last Whig Justice.* Lexington, KY: The University Kentucky Press, 1992.

Blight, David W. *Beyond the Battlefield: Race, Memory, and the American Civil War.* Amherst, MA: University of Massachusetts Press, 2002.

Bork, Robert. *The Tempting of America: The Political Seduction of the Law.* New York: Touchstone, 1990.

Brandwein, Pamela. "A Judicial Abandonment of Blacks?: Rethinking the 'State Action' Cases of the Waite Court" *Law & Society Review* 41, no. 2 (2007): 343-386.

——— . *Rethinking the Judicial Settlement of Reconstruction.* New York: Cambridge University Press, 2011.

Burrell, Thomas H. "Justice Stephen Field's Expansion of the Fourteenth Amendment: From the Safeguards of Federalism to a State of Judicial Hegemony" *Gonzaga Law Review* 43, no. 1 (2007): 77-168.

Burrill, Donald R. *Servants of the Law: Judicial Politics on the California Frontier, 1849-89: An Interpretive Exploration of the Field-Terry Controversy.* Lanham, MD: University Press of America, 2010.

Breyer, Stephen. *Active Liberty: Interpreting Our Democratic Constitution.* New York: Alfred A. Knopf, 2005.

Brown, Darryl K. "*Yick Wo* and the Constitutional Regulation of Criminal Law" *University of Illinois Law Review* 2008, no. 5 (2008): 1405-1414.

Cachan, Manuel. "Justice Stephen Field and 'Free Soil, Free Labor' Constitutionalism: Reconsidering Revisionism" *Law and History Review* 20, no. 3 (Fall, 2002): 541-576.

Colucci, Frank J. *Justice Anthony Kennedy's Jurisprudence: The Full and Necessary Meaning of Liberty.* Leavenworth, KS: University of Kansas Press, 2009.

Constitution of the State of Illinois, as Adopted in Convention, May 13, 1870, and Ratified by the People of the State, July 2, A.D. 1870. Chicago: The Western News Company, 1870.

Corwin, Edward S. "The Antitrust Act and the Constitution," *Virginia Law Review* 18, no. 4 (1932): 355-378.

——— . *Court Over the Constitution.* Princeton, NJ: Princeton University Press, 1938.

——— . *Twilight of the Supreme Court, The.* New Haven, CT: Yale University Press, 1934.

Davis, Abraham L. and Barbara Luck Graham. *The Supreme Court, Race, and Civil Rights: From Marshall to Rehnquist.* Thousand Oaks, CA: Sage Publications, 1995.

Dubber, Markus Dirk. *The Police Power: Patriarchy and the Foundations of American Government.* New York: Colombia University Press, 2005.

Dworkin, Ronald. *Freedom's Law: The Moral Reading of the American Constitution.* New York: Oxford University Press, 1996.

Eastman, John and Timothy Sandefur. "Stephen Field: Frontier Justice or Justice on the Natural Rights Frontier?" *Nexus* 6, no. 1 (2001): 121-132.

Elliot, Mark. *Colorblind Justice: Albion Turgee and the Quest for Racial Equality from the Civil War to* Plessy v. Ferguson. New York: Oxford University Press, 2006.

Ely, Jr. James. W. *The Chief Justiceship of Melville W. Fuller: 1888-1910.* Colombia, SC: University of South Carolina Press, 1995.

——— . *The Fuller Court: Justices, Rulings, and Legacy.* Santa Barbar, CA: ABC—CLIO, 2003.

——— . "The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process" *Constitutional Commentary* 16, no. 2 (Summer 1999): 315-346.

Ely, John Hart. *Democracy and Distrust: A Theory of Judicial Review.* Cambridge, MA: Harvard University Press, 1980.

Epstein, Richard. *The Classical Liberal Constitution: The Uncertain Quest for Limited Government.* Cambridge, MA: Harvard University Press, 2013.

——— . "The Proper Scope of the Commerce Power," *Life, Property, and Government: Constitutional Interpretation Before the New Deal,* ed. Ellen Frankel Paul and Howard Dickman. Albany, NY: State University of New York Press, 1989.

Eule, Julian. "Laying the Dormant Commerce Clause to Rest" *Yale Law Journal* 91, no. 3 (1982): 425-485.

Field, Stephen. "Address of Mr. Justice Field" in *Centennial Celebration of the Organization of the Federal Judiciary* (Washington: 1890)

Fiss, Owen M. *The History of the Supreme Court of the United States, Vol. 6.* New York: Cambridge University Press, 2006.

Foner, Eric. *Reconstruction: America's Unfinished Revolution, 1863-1877.* New York: Harper-Collins, 1988.

Freely, Malcom M. and Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons.* New York: Cambridge University Press, 1999.

Fried, Charles. *Saying What the Law is: The Constitution in the Supreme Court.* Harvard University Press, 2004.

Gais, Thomas and James Fossett. "Federalism and the Executive Branch," in *The Executive Branch,* ed. Joel D. Aberbach and Mark A. Peterson. New York: Oxford University Press, 2005.

Gershman, Gary. *The Legislative Branch of the Federal Government: People, Process, and Politics.* Santa Barbara, CA: ABC—CLIO, 2008.

Gillman, Howard. *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence.* Durham, NC: Duke University Press, 1993.

Goedecke, Robert. "Justice Field and Inherent Rights" *Review of Politics* 27, no. 2 (April, 1965): 198-207.

Graham, Howard J. *Everyman's Constitution.* Madison, Wi: State Historical Society, 1968.

——— . "Justice Field and the Fourteenth Amendment" *Yale Law Review Journal* 52, no. 4 (Sept. 1943): 851-889.

Gunther, Gerald. "The Supreme Court 1971 Term, Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection" *Harvard Law Review* 86, no. 1 (November 1972): 1-49.

Haggard, Thomas R. "Work, Government, and the Constitution: Determining the Proper Allocation of Rights and Powers" in *Liberty, Property, and the Future of Constitutional Development,* ed. Ellen Frankel Paul and Howard Dickman. New York: SUNY Press, 1990.

Hall, Kermit. *The Myth of Judicial Activism: Making Sense of Supreme Court Decisions.* Hartford, CT: Yale University Press, 2006.

Hamilton, Alexander, James Madison, and John Jay, *The Federalist Papers,* ed. Clinton Rossiter. 1961, reprint, New York: Signet Classics, 1999.

Hamilton, Alexander. *American Political Thought.* Edited by Isaac Kramnick and Theodore J. Lowi. New York: W. W. Norton & Company, 2009.

Hobbes, Steven. "Love on the Oregon Trail: What the Story of *Maynard v. Hill* Teaches Us About Marriage and Democratic Self-Government" *Hofstra Law Review* 32, no. 1 (2003): 111-144.

Hofstadtler, Richard. *The Progressive Historians: Turner, Beard, Parrington.* New York: Knopf, 1968.

Huebner, Timothy S. *The Taney Court: Justices, Rulings, and Legacy.* Santa Barbara, CA: ABC—CLIO, 2003.

Jefferson, Thomas. *American Political Thought.* Edited by Isaac Kramnick and Theodore J. Lowi. New York: W. W. Norton & Company, 2009.

Jilson, Cal. *American Government: Political Development and Institutional Change, 6th ed.* New York: Harcourt-Brace, 2011.

K., G. W. "Interstate Commerce. State Regulation. Ferries," *University of Pennsylvania Law Review and Register* 63, no. 2 (Dec. 1914): 127-130.

Kelly, Alfred H., Winfred A. Harbison, and Herman Belz, *The American Constitution: Its Origins and Development, Vol. II, 7th ed.* New York: W. W. Norton & Company, 1991.

Kens, Paul. *Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age.* Lawrence, KS: University of Kansas Press, 1997.

Kersh, Ken I. *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law.* New York: Cambridge University Press, 2004.

Keynes, *Liberty, Property, and Privacy: Toward a Jurisprudence of Substantive Due Process.* University Park, PA: Pennsylvania State University Press, 1996.

Kissam, Philip C. "Constitutional Theory and Ideological Factors: Three Nineteenth Century Justices" *Kansas Law Review* 54, no. 3 (2006): 751-802.

Kitch, Edmund W. and Clara Ann Bowler, "The Facts of Munn v. Illinois" *Supreme Court Review* (1978): 313-343.

Knowles, Helen J. *The Tie Goes to Freedom: Justice Anthony M. Kennedy on Liberty.* Lanham, MD: Rowan & Littlefield, 2009.

Konvitz, Milton Ridvas. *Fundamental Rights: History of a Constitutional Doctrine.* Brunswich, NJ: Transaction Publishers, 2009.

Kramer, Larry D. *The People Themselves: Popular Constitutionalism and Judicial Review.* New York: Oxford University Press, 2004.

Levy, Richard E. *The Power to Legislate.* Westport, CT: Praeger Publishers, 2006.

Lively, Donald E. *Landmark Supreme Court Cases: A Reference Guide.* Westport, CT: Greenwood, 1999.

Lurie, Jonathan. *The Chase Court: Justices, Rulings, and Legacy.* Santa Barbara, CA: ACB-CLIO, 2004.

Machan, Tiber B. *Private Rights and Public Illusions.* Oakland, CA: The Independent Institute, 1995.

Matson, Cathy. The Revolution, the Constitution, and the New Nation" in *The Cambridge Economic History of the United States, Vol. 1,* ed. Stanley L. Engerman and Robert E. Gallman. New York: Cambridge University Press, 1996.

McCloskey, Robert G. *American Conservatism in the Age of Enterprise: A Study of William Graham Sumner, Stephen J. Field, and Andrew Carnagie.* Cambridge, MA: Harvard University Press, 1951.

——— . *The American Supreme Court, 4th ed.* Chicago: University of Chicago Press, 2005.

McCormack, Wayne. "Economic Substantive Due Process and the Right to Livelihood" *Kentucky Law Journal* 82, no. 2 (1993-1994): 397-464.

McCurdy, Charles. "American Law and the Marketing Structure of the Large Corporation, 1875-1890," *Journal of Economic History* 38, no. 3 (1978): 631-649.

——— . "Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897" *The Journal of American History,* 61, no. 4 (March 1975): 970-1005.

——— . "The Knight Sugar Decision of 1895 and the Modernization of American Corporate Law, 1869-1903." *The Business History Review* 53, no. 3 (Autumn, 1979), pp. 304-342.

McClain, Charles J. and Laurene Wu McClain. "The Chinese Contribution to the Development of American Law" *Chinese Immigrants and American Law,* ed. Charles J. McClain. New York: Routledge, 1994.

McInnis, Thomas N. *The Evolution of the Fourth Amendment.* Lanham, MD: Rowan & Littlefield, 2009.

Mendalson, Wallace. "Justice Field and *Laissez-Faire*" *Virginia Law Review* 36, no. 1 (Feb. 1950): 45-58.

Miller, Roger LeRoy. *Modern Principles of Business Law.* Stamford, CT: Cengage Learning, 2011.

Moreno, Paul D. *The American State from the Civil War to the New Deal: The Twilight of Constitutionalism and the Triumph of Progressivism.* New York: Cambridge University Press, 2013.

Nace, Ted. *Gangs of America: The Rise of Corporate Power and the Disabling of Democracy.* San-Francisco: Barrett-Koehler, 2003.

Neuborne, Burt. *Fundamentals of American Law,* edited by Alan B. Morrison. New York: Oxford University Press, 1996.

Nichols, David K. "'Merely Judgment': The Supreme Court and the Administrative State." *The Supreme Court and American Constitutionalism,* ed. Bradford P. Wilson and Ken Masugi. Lanham, MD: Rowan & Littlefield Publishers, 1998.

Novak, William J. *The People's Welfare: Law and Regulation in Nineteenth Century America.* Durham, NC: University of North Carolina Press, 1996.

Park, John S. W. *Elusive Citizenship: Immigration, Asian-Americans, and the Paradox of Civil Rights.* New York: New York University Press, 2004.

Patrick, John J., Richard M. Pious, Donald A. Ritchie, *The Oxford Guide to the United States Government.* New York: Oxford University Press, 1993.

Patterson, George Stuart. *Law of Contracts in Restraint of Trade with Special Reference to "Trusts,"* Philadelphia: University of Philadelphia Press, 1891.

Political Thought and the American Judiciary, ed. H. L. Pohlman. Boston: University of Massachusetts Press, 1993.

Porter, Glenn and Harold C. Livesay. *Merchants and Manufacturers: Studies in the Changing Structure of Nineteenth Century Marketing.* Chicago: Ivan R. Dee, 1989.

Pretchel, Harlan B. *Big Business and the State: Historical Transitions and Corporate Transformation, 1880s—1990s.* Albany, NY: State University of New York Press, 2000.

Ross, Michael Anthony. *Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court during the Civil War Era.* Baton Rouge: Louisiana State University Press, 2003.

Rutherglen, George. *Civil Rights in the Shadow of Slavery: The Constitution, Common Law, and the Civil Rights Act of 1866.* New York: Oxford University Press, 2013.

Sandefur, Timothy. *The Right to Earn a Living: Economic Freedom and the Law.* Washington, DC: Cato Institute, 2010.

Scaturro, Frank J. *The Supreme Court's Retreat from Reconstruction: A Distortion of Constitutional Jurisprudence.* Westport, CT: Greenwood Press, 2000.

Schoepflin, Rennie B. *Christian Science on Trial: Religious Healing in America.* Baltimore: Johns Hopkins University Press, 2003.

Schwartz, Bernard. *A History of the Supreme Court.* New York: Oxford University Press, 1993.

Shahidullah, Shahid M. *Crime Policy in America: Laws, Institutions, and Programs.* Lanham, MD: University Press of America, 2009.

Shankman, Kimberly C. and Roger Pilon, "Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government" *Texas Review of Law and Politics* 1, no. 1 (1998-1999): 1-48.

Shull, Steven A. *American Civil Rights Policy from Truman to Clinton: The Role of Presidential Leadership.* Armonk, NY: M.E. Sharpe, Inc., 1999.

Siegal, Stephen A. "The Revision Thickens" *Law and History Review* 20, no. 3 (2002): 631-637.

Siegan, Bernard H. *Property Rights: From Magna Carta—14th Amendment.* New York: Transaction Publishers, 2001.

Smith, Charles William. *Roger B. Taney: Jacksonian Jurist.* Chapel Hill, NC: University of North Carolina Press, 1936.

Smith, Jean Edward. *John Marshall: Definer of a Nation.* New York: Henry Holt & Company, 1996.

Smith, Rogers M. *Civic Ideals: Conflicting Visions of Citizenship in U.S. History.* New Haven, CT: Yale University Press, 1997.

Stephenson, D. Grier. *The Waite Court: Justices, Rulings, and Legacy.* Santa Barbara, CA: ABC-ClIO, 2003.

Stuntz, William J. *The Collapse of American Criminal Justice.* Harvard University Press, 2011.

Sunstein, Cass. *After the Rights Revolution: Reconceiving the Regulatory State.* Cambridge, MA: Harvard University Press, 1999.

——— . *Designing Democracy: What Constitutions Do.* New York: Oxford University Press, 2001.

——— . *One Case at a Time: Judicial Minimalism on the Supreme Court.* Cambridge, MA: Harvard University Press, 1999.

Sullivan, E. Thomas and Toni M. Massaro, *The Arc of Due Process in American Constitutional Law.* New York: Oxford University Press, 2013.

Swisher, Carl Brent. *Stephen J. Field: Craftsman of the Law.* Washington, DC: Brookings Institute, 1930.

——— . *American Constitutional Development.* Boston: Houghton-Mifflin Company, 1943.

Tribe, Lawrence H. *The Invisible Constitution.* New York: Oxford University Press, 2008.

Tribe, Lawrence H. and Michael C. Dorf. *On Reading the Constitution.* New York: Harvard University Press, 1991.

Tushnet, Mark. "The Newer Property: Suggestions for the Revival of Substantive Due Process" *The Supreme Court Review* (1975): 261-288.

——— . "The Supreme Court and Contemporary Constitutionalism: The Implications of the Development of Alternative Forms of Constitutional Review" in *The Supreme Court and the Idea of Constitutionalism,* ed. Steven Kautz, Arthur Melzer, Jerry Weinberger. Philadelphia: University of Pennsylvania Press, 2009.

Vinel, Jean-Christian. *The Employee: A Political History.* University Park, PA: University of Pennsylvania Press, 2013.

Wasserman, Rhonda. *Procedural Due Process: A Reference Guide to the U.S. Constitution.* Westport, CT: Praeger Publishers, 2004.

White, G. Edward. *Justice Oliver Wendell Holmes: Law and the Inner Self.* New York, Oxford University Press, 2007.

Williams, Ryan C. "The One and Only Substantive Due Process Clause" *Yale Law Journal* 120, No. 3 (2011): 408-514.

Williams, Walter Edward. *More Liberty Means Less Government: Our Founders Knew This Well.* Stanford, CA: Hoover Institute Press, 1999.

Wilson, James Q. *Thinking About Crime.* New York: Vintage, 1985.

Yandle, Bruce. *Common Sense and Common Law for the Environment: Creating Wealth in Hummingbird Economics.* Lanthan, MD: Rowan & Littlefield, 1997.

Zuckert, Michael P. "Congressional Power Under the Fourteenth Amendment—The Original Understanding of Section 5," *Constitutional Commentary* 3 (1986): 123-156.

——— . "Judicial Liberalism and Capitalism: Justice Field Reconsidered" *Liberalism and Capitalism,* Vol. 28, Part 2, edited by Ellen Frankel Paul, Fred Dycus Miller, Jeffrey Paul. New York: Cambridge University Press, 201.