Forgotten man in a Tumultuous Time: The Gilded Age as Seen by United States Supreme Court Associate Justice Henry Billings Brown

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Introduction

United States Supreme Court Justice Henry Billings Brown has been ignored and forgotten. It is ironic that Brown, the author of one of the Court's most notorious opinions remains one of the most obscure Justices in Supreme Court history. Consequently, little research has been done on his jurisprudence, and references to him are rare. Even a library holding his personal papers has overlooked his Supreme Court tenure. 1 One of the few scholars who has spent time analyzing Justice Brown's career, writes, “Henry Billings Brown ranks as one of the most forgotten men who ever sat on the United States Supreme Court.” 2

To the extent Brown is remembered, it is for his opinion in *Plessy* v. *Ferguson* , which upheld a Louisiana Statute mandating separate railroad cars for blacks and whites. 3 The decision is often credited for legalizing the doctrine of “separate but equal.” Until recently, the lack of attention to Justice Brown was in part due to a lack of research on the Fuller Court , as few legal scholars wanted to address what was perceived to be a mediocre Court. 4 However, in the late 1980s, the legacy of the Fuller Court began to be reevaluated.

The recent scholarship on the Fuller Court has sought to explain the rationale behind the Court's decisions. 5 Yet, despite the improved understanding of that Court, little light has been shed on Justice Brown's career. In fact, Owen Fiss, the author of the Fuller Court volume of the Oliver Wendell Holmes Devise, states in private correspondence, “ I am embarrassed to say that my knowledge of Brown is rather limited.” 6

Much of the scholarship on the Fuller Court has endeavored to refute the notion that the Court was “the willing instrument of corporate wealth.” 7 Consequently, scholars have

tried to understand the motives behind the justices' conclusions. As a result, there has been some insight into Brown's reasoning in specific cases, but those findings have not established a holistic understanding of his jurisprudence. This thesis seeks to give a more comprehensive view of Brown's jurisprudence by concentrating on the factors that may have influenced Brown's legal philosophy.

Justice Brown is not the first Justice to have slipped into anonymity, nor has he been the last. A short tenure, insignificant contribution, meager abilities, or a poor reputation may be reasons for why a Justice has been forgotten. 8 However, none of those reasons applies to Justice Brown. The cause of his obscurity is not all together clear, but it may be because men like Justices Harlan, Holmes, and Field overshadowed him on the Court. Moreover, Justice Brown was never credited with creating a significant legal doctrine or philosophy while on the Court. It was only after his death that the doctrine of “separate but equal” gained notoriety and that was a result of its legacy of racial segregation.

Brown's entire judicial career spanned from 1875 to 1906. He sat on the Supreme Court for over fifteen years, where he wrote over five hundred opinions. Prior to sitting on the Supreme Court, Brown spent fifteen years on the federal district bench in Detroit , where he became one of the period's foremost scholars in admiralty law. Brown had a solid reputation and “won not only the respect and esteem, but also the affection of all those associated with him.” 9

This thesis takes into account Brown's life, career, and legacy in order to place Brown's jurisprudence within a historical context. Previous scholarship has attempted to describe Brown's jurisprudence, but it has failed to connect those findings to the larger implications facing society during Brown's tenure. Likewise, there are some works that place Brown in a historical setting, but those works often overlook the subtle nuances that characterize legal reasoning in the Gilded Age and thus are essential in understanding the nature of Justice Brown's jurisprudence. This thesis uses writings on the Gilded Age in combination with legal scholarship on the Fuller Court to arrive at its conclusions about Justice Brown. 10

The years that Brown sat on the Court were formative for modern America . From the

end of Reconstruction to the beginning of World War I , America underwent rapid social, political, and economic transformation. Economically, the nation was experiencing an industrial revolution, which transformed the nation from a producer to a consumer society, and “from a society of island communities to a complex and interdependent social order.” 11 Politically, the country was struggling to find a new national identity, as the country shifted from a producer to a consumer society. Additionally, the Reconstruction ushered in a new era of federalism. Socially, America was once again becoming a melting pot of diversity as immigrants from around the world flocked to the United States to start a new life. Progress became the key phrase of the period even though there was little consensus about what progress actually meant.

While talk of progress seemed to pervade society, the American legal system labored over a new set of Constitutional Amendments, ratified in the aftermath of the Civil War that eventually revolutionized federalism in United States . Legal interpretation was not static over this thirty-seven year period between the end of Reconstruction and the beginning of World War I. The Gilded Age was a time of transition in legal philosophy, as jurists struggled to keep up with the blistering pace of economic, social, and political development. Legal principles that were once thought to be sound, were no longer considered to be such, as technological innovation, and economic integration and combination undermined some of the basic premises upon which prevailing legal thought had been founded. For example, the definition of property could no longer be limited to just a physical conception, which in turn had a dramatic impact on patent and copyrights laws. Additionally, assumptions about the relationships among government, law, and society were called into question.

Lawrence Friedman writes, “Legal systems reflect the societies in which they are embedded.” 12 If this is true, then Justice Brown's jurisprudence ought to illuminate his views of the fundamental values, ideas, and principles of the Gilded Age, and highlight the tensions that seemed pressing to those living in this period. As the process of modernization continued, it became apparent to some that the law had to adapt to new social, political, and economic norms. Justice Brown played an important role in encouraging the development of law with society. He believed that the laws and the

Constitution should be interpreted flexibly, so as to fit the needs of society. If the law could not meet the needs of society, then Brown feared that social conflict would erupt, as it would appear to people that the government was unresponsive.

The first chapter illustrates Brown's personality and life experiences. Brown respected competing interests in society, and sought to balance the societal tensions that arose as a result of their competitive struggle. Consequently, Brown saw himself as an arbiter, not a philosopher of law. His decisions were designed to solve particular disputes, and were not broad formulations of legal theory. Much of the information in the first chapter comes from Brown's autobiography, with addenda by Charles Kent. Chapter one synthesizes the autobiography into a concise chronological account of Brown's life. In terms of source reliability, Kent 's analysis is based on personal letters that are available in the Burton Historical Collection in the Detroit Public Library. In addition, the statements by Brown and Kent that are included in the first chapter are intended to help illustrate Brown's personality, not establish fact. The first chapter also relies on correspondence and public addresses that are not included in Kent 's work. 13

The second chapter explores Brown's jurisprudence in relation to the two predominate schools of legal thought during the Gilded Age: classical and progressive legal thought. 14 Classical legal thought claimed that the law was logically sound, value free, distinct from political reasoning, and operated independently of social conditions. Classical legal thought reached its high point right after the turn of the twentieth century, but began to fade away by the end of the Gilded Age, just as progressive legal thought began to gain greater acceptance among jurists and legal theorists. Progressive legal thought did not separate law from society. They were inextricably linked. Progressive legal thought argued that the law should change as society changes, that rules of law should be flexible, and that reform in society was necessary. The premise of chapter two is that Justice Brown in his jurisprudence did not adhere to either school of thought, but instead positioned himself as a pragmatist between classical and progressive legal thought.

Brown's central concern was with long-term social stability. He saw it as the Court's role to maintain the balance among the competing political, social, and economic interests in society. He did not believe in rigid, inflexible rules of law as classical theorists did and he

did not adhere to the idea that laws were scientifically discovered. However, he thought it beneficial to be consistent with prior precedent. Consistency to Brown meant, “an honest attempt to apply the same approach to each case, regardless of political consequences.” 15 For him, it provided a sense of security to society, especially when people were struggling to come to terms with a new national identity as a result of the Industrial Revolution. It reminded people that there were unique American values and principles that remained unchanged. Classical legal thought claimed that consistency was necessary for jurists so as to avoid being seen as political. In addition, classical legal thought maintained that the law operated independent of social considerations. Brown did not accept either of these arguments. He thought consistency was important for society because it helped maintain social stability not because it helped the social perception of jurists. Consequently, Brown's concerns were pragmatic in nature, not theoretical, and intended to preserve the wellbeing of society. His jurisprudence was not confined to theoretical approaches to law, but represented a real effort to solve disputes at an individual level. He was not interested in creating universal statements about the role of law in society. He tailored his decisions to the particular circumstances and saw little need to justify his opinion beyond that.

The third chapter addresses some of Brown's important Supreme Court decisions. The chapter seeks to relate Brown's thoughts in specific cases to larger social issues. The purpose of this section is to give Brown's reasoning historical context in relation to the important social issues of the time. By appreciating Brown's approach to the legal controversies during the Gilded Age, one can see how modern conceptions of Gilded Age thought may be distorted by the passage of time.

Some historians have argued that the Fuller Court sought to protect big business at the expense of laborers and minorities, and that it adopted social Darwinism into its legal rationale. However, these depictions of the Fuller Court reflect a misunderstanding of classical legal thought. Events such as the Great Depression, the New Deal, and the Civil Rights movement changed the way Americans view issues such as property rights, personal liberty, equality, and the roles of the state and national government in society. The Fuller Court saw limited government, contractual freedom, states' rights, and private

property as the core values of society. Justice Brown recognized those values, but what separated him for the rest of his brethren on the Court was his willingness to look beyond those values and to appreciate the larger tensions that were emerging in society.

Brown's jurisprudence was affected by his awareness of social tension. While on the Supreme Court, Brown attempted to make the rules of law fit the social circumstances of the time, which was the opposite of most of his brethren on the Court who tried to fit the cases to the rules of law. Brown saw a need to give the Constitution great flexibility, so it could respond to the demands of a changing society. Overall, Brown was a cautious but open-minded jurist. His opinions were based on his constantly evolving awareness of social conflict in the Gilded Age. He sought guidance from the past and refused to stray too far from the Court's precedent. Significantly, he displayed an acute awareness about the needs and challenges of Gilded Age society that often led him to progressive conclusions about the role of law in society. Consequently, Brown's jurisprudence helped the twentieth century transition from classical to progressive legal thought. This thesis offers historians a new perspective on the Gilded Age through the eyes of Justice Brown.

Chapter 1: The Character and Personality of Henry Billings Brown

Few of the scholars who have given thought to Justice Brown's career have analyzed in detail Brown's upbringing, education, and personal experiences outside of the Supreme Court. Brown was a kind, gentle, and sociable man who enjoyed life to the fullest. He was well educated and intelligent. Yet, he was not an intellectual, nor was he prone to deep thought. Pragmatic in nature, Brown relied heavily on personal experience, common sense, and a strong work ethic to guide him through life. Consequently, in order to comprehend Brown's vision of American law, one must first understand and appreciate Henry Brown's character and personality.

Henry Billings Brown was born March 2, 1836 in the small manufacturing town of South Lee , Massachusetts , just east of the Massachusetts - New York state border. 16 Paper manufacturing was the main source of income in South Lee. As a result, Henry became acquainted with industrial life at a very early age. He wrote, “[A]mong my earliest recollections is that of sitting in a forge, watching the sparks fly from the trip hammer and marveling why water was used to stimulate instead of extinguish fires.” 17 Henry's father owned and operated several lumber mills in South Lee, which further exposed Henry to industrialization. Henry recalled, “I had a natural fondness of machinery and

was never so happy as when allowed to ‘assist' at the sawing of logs and shingles and the grinding of grain in my father's mills.” 18 At a young age Henry's father taught Henry the value of a “hard day's work.” Henry learned to appreciate labor and its worth. Those who were acquainted with him during his life made frequent note in correspondences and speeches of his efficiency, dedication, and diligence in completing his work.

Justice Brown was of Puritan, Anglo-Saxon heritage. The first sentence of his *Memoir* reads, “I was born of a New England Puritan family in which there had been no admixture of alien blood for two hundred and fifty years.”19 Consequently, one might assume that Brown accepted traditional Puritan Anglo-Saxon beliefs, but in the next sentence he explains, “Though Puritans, my ancestors were neither bigoted nor intolerant- upon the contrary some were unusually liberal.” 20 Brown separated himself from conventional Puritan Anglo-Saxon beliefs. He recognized that his ancestry was an obvious part of his identity, but he wanted people to know that his heritage did not determine his beliefs. In fact, Brown was never a very religious man. He eventually grew uncomfortable with New England Puritan culture and moved west settling in Detroit in his twenties.

Henry was blessed with two loving and caring parents, who adored Henry. His mother was “a woman of great strength of character and pronounced religious convictions… She was strict in the performance of her religious duties, insistent upon her sons' attendance upon church, and was, in short, a typical Puritan mother.”21 Billings Brown, Henry's father, “though not an educated [sic], was a most intelligent man, and a great reader of history and biography, with occasional incursions into the domain of poetry and romance.” 22 Henry took after his father, and became an avid reader of both history and science.

Henry grew up in an affluent, but not rich, family. Charles Kent, Henry Brown's close friend and biographer, explains, “[His family] had enough [money] for comfort, but for no extravagances. He missed no good thing, which he could afford.” 23 As a result, Henry received a proper education. Determined to educate their son, Henry's parents sent him to some of the best preparatory schools in Massachusetts . Yet, before he even began proper education, Henry's mother had already instilled in him a desire to read. When he

was two years old his mother wrote, ‘Henry knows all the letters in the alphabet, large and small… books are his source of amusement.' 24 His desire to read became so voracious, that by the age of five his mother believed that an eye infection, which subsequently limited Henry's eyesight and plagued him for the rest of his life, was the result of his incipient desire to read. In her diary she wrote, ‘We find it necessary to divert his mind from his books on account of his eyes failing him. I have thoughtlessly indulged him in reading evenings the winter past, but seldom as long as he wished, yet I now see my error and lament it exceedingly.' 25 In 1845, the Brown family moved to Stockbridge, Massachusetts so that Henry could begin his formal education. His parents enrolled him in the Stockbridge Academy , where he began to study Latin. In his *Memoir* , Henry recalls, “Upon our removal to Stockbridge in 1845, I was entered as a scholar at the Academy and began the study of Latin, which I have always thought and still think, should be the foundation of the intellectual equipment of every educated man.” 26 Once in school, Henry learned his strengths and weaknesses. He wrote, “I soon discovered that my strength as well as my inclination lay in the direction of languages rather than of mathematics.” 27

Part of the reason Henry's parents were adamant about his education was that his father had already determined his son's future career. Henry, “naturally obedient,” explains, “[W]hen my father said to me one day, ‘My boy, I want you to become a lawyer,' I felt that my fate was settled, and had no more idea of questioning it than I should have had in impeaching a decree of Divine Providence.” 28 Henry readily accepted his father's choice, because for him, it “was not a bad idea…as it settled the doubts which boys usually have regarding their future.” 29 Moreover, “It also had an important effect in directing [Henry's] studies.” 30

In 1849, the Brown family moved to the village of Ellington , Connecticut . However, because the high school in Ellington did not meet their academic standards, Henry's parents sent him back to Massachusetts to the prestigious Academy at Monson. Henry continued his studies at the Academy at Monson until he entered Yale University in 1852 at the age of sixteen, two years younger than most of his peers. In his *Memoir* , Henry mentions that being younger than his peers by two years made the adjustment to college

life much more difficult, “Two years is a short time in the life of a man, but as between two boys in their teens of equal natural ability, the younger is handicapped by his age.” 31 Paralyzed to a certain degree by his adolescent immaturity, Henry writes, “My desire at first was merely to keep in college, and in truth I hardly did that the first term.” 32

On October 10, 1853 , Henry's mother passed away. The grief Henry felt as a result of his mother's death only exacerbated his juvenile behavior. He states, ‘I became reckless and behaved so foolishly as to ruin my college reputation for the next two years.' 33 However, by his third year at Yale, Henry had regained his composure and dedicated himself once again to his studies. He graduated from Yale in 1856, and said, “I had some prejudices to overcome, but I finally succeeded in graduating not with a high, but with a highly respectable, standing.” 34 Kent points out that Henry “was very fond of society, especially that of young ladies. He learned to dance and attended dancing parties. He learned to swim and to play billiards. Perhaps there was no college or society recreation in which he was not interested.” 35 At Yale, Henry “grew to be ambitious as a scholar, but he does not appear to have loved study for its own sake.” 36

After graduation, Henry's father paid for Henry to travel through Europe for a year. It was a remarkable experience for Henry, which he remembered fondly. In his *Memoir* he states:

After graduation, my father, who was most kind and indulgent, albeit somewhat hot tempered, offered me a year in Europe . It is needless to say that I eagerly seized upon this opportunity, then comparatively rare, of seeing something of the older world. The result justified my expectations, and I have always regarded that year (from November, 1856, to November, 1857) as the most valuable of my life from an educational point of view. Indeed a year of actual observation is a most befitting supplement to four years of study. Taken at just this time, it has a strong tendency to correct any false impressions, born of national pride or patriotism, to expand our political and religious views and to teach the lessons so hard to learn at home, that while we have accomplished much in the direction of a higher civilization, we have still much to learn. 37

When he returned home, Henry began studying law in the Squire's office in Ellington. Yet, Henry did not enjoy the work and did not enjoy living in Ellington. Moreover, a

religious revival was underway in Ellington, and Henry, unlike his mother, was not deeply religious. In his *Memoir* he explains, “[T]here was a general revival in progress, in which I took no active part, I fear my conduct did not elicit the approval of the ecclesiastical authorities, and that I was looked upon rather as a warning then [sic] an example. But my conscience was ‘void of offence,' and I still see nothing to regret or apologise [sic] for.” 38 According to Robert Glennon, “Religion was not central to Brown's life and meddling ministers made him impatient.” 39 Consequently, he went back to Yale and began his studies at the law school. However, after just nine months at Yale, Henry moved to Cambridge and began attending Harvard Law School , where he stayed for the next six months. Henry enjoyed law school because it was free from many of the compulsory duties of undergraduate education, but in the end, Henry did not earn a law degree from either school. He had grown tired of the rigors of academic life, and was ready for a new phase in his life. Brown had never been fond of philosophical thought, and was eager after his trip to Europe to gain new experiences outside of New England .

After leaving Harvard, Henry was determined to find his own niche in the world, and he eventually settled on Detroit , where he moved to in 1859. His reasons for settling in Detroit were twofold. His mother's uncle lived in Detroit , and through social connections in Pennsylvania , Henry received two letters of introduction to use in Detroit . Soon after arriving in Detroit , Henry joined the law firm of Walker & Russell, where he completed his legal studies. In July 1860, Brown was admitted to the Michigan Bar and became a practicing attorney. Brown spared no time in making new connections and acquainting himself with the local legal practice in Detroit , which at the time was mainly concerned with shipping and admiralty law. Brown familiarized himself with the Michigan Reports, by reading all twelve volumes thoroughly.

Brown received his first professional break in Spring 1861 after the election of Abraham Lincoln. Through a family friend, Brown was appointed as deputy United States Marshall. As the deputy U.S. Marshall, Brown came into contact with numerous admiralty lawyers, and this in turn fostered a passion in Brown for the practice of admiralty law. Brown writes, “[The appointment] was out of the line of professional advancement, but I had no hesitation in accepting it, as it not only gave me an immediate

income, but also brought me into connection with vessel men of all classes who naturally gravitate toward the Marshal's office whenever any question arises as to ‘tying up' a vessel to secure a claim.” 40

Shortly thereafter, Brown was appointed Assistant United States Attorney for the Eastern District of Michigan. He was extremely active in the office, trying cases, interrogating witnesses, preparing indictments, and attending the sessions of the grand jury. As Brown later recalled, “This was really the beginning of my professional activity, and by the expiration of the District Attorney's official term I had built up a practice, principally in the admiralty branch, which justified my taking an office to myself.” 41 Through his hard work and dedication as an Assistant United States Attorney and a deputy U.S. Marshall, Brown was able to open a private practice, which specialized in admiralty law. On December 31, 1861 Brown wrote in his diary, “Indeed, I have already had quite a number of admiralty cases (for which I have a particular partiality), brought to me through my connection with the marshal's office… My professional business is much greater than it was a year ago, and long may it live and grow.” 42 Yet, Brown never enjoyed the competitive nature of private practice, and the constant need to secure business: “I have done but little because I could get but little to do, and it is not my nature to drum business as most Western lawyers do.” 43

On April 12, 1861 the Civil War began. Brown, a staunch Republican, had supported Lincoln in the election of 1860, and was deeply opposed to secession. Yet, even before the war began, Brown foresaw that conflict was on the horizon. He always had an acute sense about social tensions in society. In his last diary entry in 1860, for example, Brown wrote, “The situation of the country is dreadful and civil war appears almost inevitable. Anything but disunion; God help us.” 44 A year later, after the fall of Fort Sumter , he proclaimed,

The country, my greatest source of anxiety at present, is in a dreadful state. We have entered upon a war to which I can see no possible end, during the present administration. As I see its inevitable consequences in the loss of life property, in the vast issues of paper money and consequently high prices, and depreciation of the currency, and in the breaking up of the whole social system, it absolutely makes me shudder. What its end

will be no man can tell, but all can safely prophesy that it will work immense injury to both sections. 45

Brown seriously considered joining the Union army, but in the end he avoided serving by paying eight hundred and fifty dollars to a substitute to take his place in the draft, a common practice for wealthy men during the war. Brown writes, “Twice I thought very seriously of participating in the terrible Civil War which has raged the entire year, but circumstances which I now regard as fortunate prevented my entering the service.” 46 Brown was able to afford the substitute through his marriage in 1864 to Caroline Pitts, the daughter of a prominent Detroit business man, whose wealth ironically came from the lumber industry, the same trade Henry's father had been involved in back in South Lee. Caroline Pitts, Henry's wife, was, “fine looking, well educated, intellectual, and sympathetic with all her husband's ambitions.” 47 Their marriage was “a very happy one…[and] After his marriage his society was largely with her friends and relations, but their acquaintances extended to the most cultured and wealthy people of the city.” 48 Henry loved children, but he and his wife never had any of their own, probably because Mrs. Brown “suffered much from ill health.” 49 In 1868, Caroline's father died and left a large portion of his wealth to his daughter Caroline, making her and Henry financially secure. They no longer had to depend on the inconsistent income of Henry's private practice, and even more importantly, the inheritance allowed Henry the financial freedom to accept his first judicial appointment.

In 1868, Republican Michigan Governor Henry Crapo appointed Brown to a temporary position as a state judge in the Wayne County Circuit Court in Detroit . However, his time on the bench was short-lived. The increased voter turnout out because of the presidential election in 1868 did not help Brown, who ran as a Republican for re-election in Wayne County , which was predominately Democratic. Kent writes, “Judge Brown was defeated by a candidate far inferior, simply because the Democrats were in a majority in this county.” 50 Yet, Brown's time on the county circuit court bench was crucial, as it opened Brown's mind to the possibility of a judicial career. In his *Memoir* , Brown states, “I was decisively beaten at the November election, though I ran considerably ahead of my ticket. But short as my experience was, it gave me a taste for judicial life which has much to do in fixing my permanent career.” 51 After his defeat in

the election, Brown returned to private practice at the well-known admiralty firm of Newberry & Pond, which later became Newberry, Pond & Brown. He practiced at the firm for seven years, all the while remaining active in Republican Party politics. He even tried, albeit unsuccessfully, to win the Republican nomination for Congress in 1871. Despite his political disappointments, Brown's return to private practice at Newberry & Pond “was a most important step in his professional progress, and soon gave him business of more importance than he had before had.” 52

While in private practice, Brown often viewed the practice of law with pessimism. For example, on May 30, 1862 , Brown argued his first case in the Michigan Supreme Court, and lost. In response, he wrote, “Verily there is little certainty in the law.” 53 In another journal entry in 1863 he wrote, “How sad it is to think that [a lawyer's] prosperity generally grows fat upon the miseries of the rest of the world.” 54 In an entry on July 21, 1869 he scribbled, “ Won disgracefully a little case in the justice's court. The justice of the peace's partiality so marked I was ashamed of him and myself.” 55 Moreover, in his *Memoir* , Brown noted, “I felt my health was giving way under the uncongenial strifes of the Bar, and the constant fear lest by some mistake of my own the interests of my clients might be sacrificed.” 56 Brown was a competent lawyer, but for him private practice left much to be desired. It was only after his appointment to the Federal District Court that many of his desires and ambitions were satisfied.

On March 11, 1875 , Federal District Court Judge John W. Longyear died, creating a judicial vacancy for the Eastern District Federal Court of Michigan. Brown, although remorseful upon hearing the news of Judge Longyear's death, “at once entered on an active canvass for the position of United States District Judge,” for which there was little competition. 57Kent states, “I do not remember that there were other candidates. The salary of a district judge was then but $3,500.00 per annum, an amount too small to attract competent lawyers, who were dependent on their earnings.” 58 Brown, who was well respected in the Detroit legal community, in short time received the appointment from President Ulysses Grant and was unanimously confirmed by the Senate. Yet, Kent writes, “I do not think that either [Brown] or his best friends thought him more deserving of judicial honours than some others. His great distinction was that he had a great

ambition to be a judge and was able to accept the position with the small salary then paid." 59

Brown enjoyed his position on the district bench, as it was a better fit for his personality than was private practice. Part of the reason was that Brown did not thrive on competition. He writes, "I was glad to take refuge in the comparative response of the bench," even though doing so meant giving up two thirds of the income he had made working in private practice. 60 As a judge, Brown believed he was enacting "justice," something he had not felt in private practice. In his *Memoir* , he explains, "I felt quite content to exchange a position where one's main ambition is to *win* , for one where one's sole ambition is to do *justice* . The difference in the nervous strain involved gave me an incalculable relief." 61 Accordingly, he asserts, "I know of none in the gift of government which contributes so much to making life worth living as a district judgeship of the United States ." 62

Brown cherished his free time. Thus, one of the most appealing aspects of the district judgeship to him was the ability to efficiently handle a steady workload in a timely fashion. He states, "I found that I could easily dispose of the business in nine months of the year, and that there was always an opportunity for a summer's outing." 63 Brown valued his free time so much that he considered overworking a character flaw. For example, he criticized Judge Thomas Cooley, a leading legal scholars of the day and a colleague of Brown at the University of Michigan Law School for failing to appreciate his time away from work. After calling Cooley's works some of the best the country has ever seen, Brown observed that, "Judge Cooley was guilty of one grave mistake: He overworked his intellect grossly; gave himself no leisure or relaxation, and at our age his career was practically ended." 64

Judge Brown sat on the district bench for fifteen and a half years, which in his opinion were "characterized by no event of special importance, were full of pleasurable satisfaction and were not overburdened by work." 65 During these fifteen and a half years, Detroit continued to be a major shipping hub. As such, admiralty cases dominated Judge Brown's docket, and he became nationally recognized as an expert in admiralty jurisprudence. In 1876, Brown published a treatise on admiralty law, titled *Brown's*

Admiralty Reports , which was well received and highly respected among admiralty scholars. In fact according to Kent , “The admiralty business greatly increased in Detroit after Justice Brown went on the Bench…His Court not only had the business which naturally belonged in Detroit , but also absorbed considerable from other ports. Cases were frequently brought from other places by consent in order to have the trail before him.” 66 Judge Brown's impeccable reputation in admiralty law and his congenial and cordial personality were important traits that would help him earn a position on the U.S. Supreme Court.

Over his fifteen-year tenure, Brown wrote hundreds of decisions, of which only forty-four were appealed, and just five were actually overturned. “My relations with the Bar,” Brown explained “were of the pleasantest description and were clouded by no event, and when the question of my promotion arose I seemed to have received practically the unanimous endorsement of the Bar and the Legislature.” 67 Even though he mostly dealt with admiralty cases, Brown was generally recognized as a competent judge in all areas of the law, and he often rode circuit to help other judges complete their workload. Riding circuit was enjoyable to Judge Brown, as he was a sociable man, and “was only too glad of the opportunity to become acquainted with the laws and lawyers of neighboring jurisdictions.” 68 His efforts to meet and greet lawyers and judges while on circuit paid off later for Judge Brown when he was nominated for the Supreme Court. Many of the judges and lawyers he had met while riding the circuit voluntarily wrote letters to the President on his behalf, including Judge Howell E. Jackson, whose letter was instrumental in Brown's appointment. In addition to riding circuit, Judge Brown gave admiralty lectures at the University of Michigan Law School, where he met other judges and scholars much like himself, such as Judge Thomas Cooley. He also earned honorary LL.D. degrees from both the University of Michigan and Yale University .

Brown was a well-respected trial judge. He was known for carefully listening to both sides of an argument. His decisions were concise and his jury instructions were always clear. Overall, Brown was conservative and hesitated to overturn well-established precedent as a district court judge. Still, if he was convinced that he had erred in his reasoning, he was willing to reverse himself. However, “He had no ambition to attract

attention by new or extravagant views." 69Kent writes, "Perhaps his greatest fault was an ambition to understand a case and express his opinion too early in the argument." 70

Brown was appointed to the United States Supreme Court in 1890 by President Benjamin Harrison to replace Justice Samuel Miller, who had died on October 13, 1890 . In his *Memoir* , Brown attributes his promotion to the Supreme Court to the support of the then circuit court judge, but later Supreme Court Justice, Howell E. Jackson. Brown developed affable relations with Judge Jackson in Tennessee while riding the judicial circuit earlier in his career. They became close friends and in his *Memoir* Judge Brown fondly recalled Judge Jackson's visits to Detroit , and Judge Jackson's pleasant stays at his home. In terms of Judge Brown's promotion to the Supreme Court, Judge Jackson had developed a friendship with President Harrison while they were both serving in the United States Senate years earlier. Judge Jackson informed President Harrison of Judge Brown's well-respected reputation and his expertise in admiralty law. Ironic, but fittingly, Brown says that it was he who later encouraged President Cleveland to appoint Justice Jackson to the Supreme Court.

Kent writes, "Justice Brown's appointment to the Supreme Bench was not obtained without considerable effort on his part… In seeking a position on the Supreme Bench, as in other matters, Justice Brown did not hesitate to use all honorable means to attain the object of his ambition." 71 Before President Harrison announced the appointment, a great debate was waged over who ought to be appointed. An article in *The Washington Post* announcing Brown's nomination to the Supreme Court indicates that, "It was well-known that the President would have nominated Attorney General [William H. H.] Miller if he had followed his own personal wishes. The experiment of filling a vacancy on the Supreme Bench as a mere gratification of personal friendship would, however, have proved disastrous, and was wisely avoided." 72 As a result, the only other leading candidate for the appointment besides Brown was Alfred Russell, the former United States District Attorney, for whom Brown had previously been an assistant.

It is unclear from personal correspondences exactly why President Harrison in the end chose Brown over Russell. *The Washington Post* article suggests that Brown was "Appointed on his record only… Judge Brown's appointment was due almost solely to

his excellent record as a judge." 73Kent , on the other hand, argues that "one considerable ground for Justice Brown's appointment was his reputation as an admiralty judge and the lack in the Supreme Court of men specially familiar with this branch of the law." 74 According to the court records of the Eastern Federal District Court of Michigan, the members of the Detroit Bar attributed the nomination to

Judge Brown's long and practiced studies not only common law but in the special department of admiralty covering as it does the vast tonnage of our western lakes and waters, and also in the more technical field of patent law, has given him such an experience and familiarity with the legal rules and principles governing these important branches of legal inquiry that they cannot fail hereafter to strengthen him in his work and in these respects to aid also his associated of the Supreme bench. 75

Brown's name had been given to President Harrison a year before Justice Miller's death to replace Justice Stanley Matthews, but President Harrison passed over Brown in favor of his Yale classmate Justice David Brewer. Thus, when the opportunity arose to appoint another Supreme Court Justice, President Harrison already knew about Justice Brown and his expertise, making the choice of Justice Brown a logical one. Regardless of the President's reasons, the Senate unanimously confirmed Brown's nomination, and everyone familiar with Justice Brown including the Detroit Bar Association was content with the President's choice.

Justice Brown valued his time on the Supreme Court, but it was not without some remorse that he gave up his life and career as a district court judge. In his *Memoir* he writes, "If the duties of the new office were not so congenial to my taste as those of district judge, it was a position of far more dignity, was better paid and was infinitely more gratifying to one's ambition." 76 Moreover, he found solace in the pleasurable social scene that accompanied life in Washington , D.C. He explains, "[T]he social attraction of the capital of a great country cannot fail to be superior to those of a purely commercial city, however large and prosperous it may be." 77 He adds, "The constantly changing character of its population… and the increasing influx of new people…is sufficient of itself to make it the social, as it has been for more than a century the political, centre of the nation." 78 Justice Day, a colleague of Justice Brown, recalled,

“Justice Brown… was a sociable man, and enjoyed the life at the Capital, which gave him an opportunity to meet interesting and agreeable people... He always carefully discharged what he regarded as the social obligations of his position.” 79

Justice Brown sat on the Court from 1890 to 1906, writing hundreds of opinions for the Court, mainly in, but not limited to, admiralty and patent law. In describing his legacy on the bench Kent writes, “There is little doubt that Justice Brown was thought by his associates on the Supreme bench a good judge, fair minded, open to conviction, willing to listen to argument, willing to be convinced if he thought he was wrong, affable, having no jealousy of his associates.” 80 Justice Brown was a pleasant, sociable, and gracious member of the Fuller Court . Those familiar with him noted that he worked both efficiently and diligently on cases before him, and was dedicated to idea of doing “justice.” 81 He remained humble and was never given to pretension. Justice Day proclaims, “He was a capital judge and a genial and loveable companion, free from littleness, rejoicing in the good fortune of his brethren, and at all times upholding the honour and dignity of the Court.” 82

Brown sat on the Court until his seventieth birthday, at which point he retired. He offered his resignation to President Theodore Roosevelt, who appointed Justice William Moody as his successor. Justice Brown's retirement was not unexpected. Upon his appointment to the federal bench in 1875 Brown had promised himself that he would retire on his seventieth birthday in order to take advantage of the opportunity to retire with a full salary and enjoy the rest of his life free from work. In his *Memoir* , he states, “I had always regarded the act of Congress permitting a retirement upon a full salary as a most beneficent piece of legislation, and have only wondered that more judges have not availed themselves of it.” 83 In explaining the choice to retire at age seventy Justice Brown wrote, “[W]hile many, if not most, judges made the age of seventy, very few who remain upon the bench survive another decade. During that decade the work of the Supreme Court tells heavily upon the physique of its members, and sometimes incapacitates them before they are aware of it themselves.” 84 He had always believed that the mental capacities of a man began to deteriorate after the age of seventy, and thus it was desirable for a judge to step down at that time because the country as a whole

deserved judges who were in full possession of all of their senses.

Justice Brown was an avid traveler, making fourteen trips to Europe, ten of which he took during the fifteen and half years that he sat on the Supreme Court. His frequent trips to Europe helped him gain insight into American society, because he was able to develop a better understanding of the unique tensions and relationships in America by comparing American and European society. On his trips, Justice Brown "was interested in everything tourists usually wish to see, and especially in becoming acquainted with distinguished men." 85 However, on a trip in 1901 his wife died. Justice Brown, in a letter, wrote, "Her death puts an end to nearly forty years of the most unalloyed marital bliss that was ever accorded to man… life will never be to me again what is has been in the past." 86 Yet, Justice Brown found the strength to remarry, which he did in 1904 to his cousin's widow, Mrs. Josephine Tyler, who had lived with the Browns after her husband's early death. According to Kent , "They lived with the same harmony which had characterized Justice Brown's first marriage. After his marriage Mrs. Brown never separated from her husband… She waited assiduously on every want [and]… The portrait of the first Mrs. Brown was the most conspicuous object in the family parlour." 87

Upon his retirement from the Supreme Court, Justice Brown was given a public dinner in Washington, D.C. in which President Theodore Roosevelt, Vice President Charles W. Fairbanks, Chief Justice Fuller, and the other members of the Supreme Court were all in attendance. Speaking at his retirement dinner, Justice Brown in his usual lighthearted manner announced,

While it involves a good deal of a wrench to break up the habits of thirty years, and turn my back upon the genial and accomplished gentlemen who for more than fifteen years have been my daily associates, and wander in the land of the lotus eater where it is always afternoon, I feel there is at least some compensation awaiting me in the absolute freedom from all cares not voluntarily assumed. There is no one to say, and no inner conscience even to suggest, that it is your duty to be in Court at twelve o'clock; to keep your ears, if not your eyes, open, howevermuch [sic] you may prefer a stealthy nap, until four thirty; to listen to arguments for four hours, when in fact, you made up your mind in four minutes; and to be prepared at the next Saturday's Conference to give an opinion,

which your Associates will probably overrule. 88

In his retirement, Justice Brown continued to travel, mostly in Europe . He writes, “I left Washington soon after my resignation and spent a year in foreign travel. I was received with great courtesy by our own representatives abroad, and accumulated a fund of information which has been a never failing source of pleasure.” 89 Starting in 1906, he went to Italy , Austria , Turkey , Greece , England , and France . Then again in 1910, he visited Italy , Germany , Holland , and England . Apart from traveling, Justice Brown often gave public addresses and lectures. In addition, he wrote several law review articles, which covered a host of topics ranging from women's suffrage, divorce, the distribution of property, to the deleterious effects of the automobile on the most noble of animals, the horse. Justice Brown enjoyed seven years of retirement until succumbing to a heart attack in 1913.

Justice Brown is buried in Elmwood Cemetery in Detroit next to his first wife. His obituary in *The New York Times* read, “Justice Brown gained a reputation for the strictest impartiality and the greatest patience in going into the merits of a case. He was courteous to counsel and was noted for his willingness to admit he has committed an error. He was remarkably free from pride of opinion.” 90 The obituary claimed “His famous decisions include [the] constitutionality of income tax and control of [the] Philippines ,” 91 and labeled him an “Admiralty Law Authority.” 92 The obituary pronouncements about Justice Brown's legacy are themselves thought-provoking, as today he is remembered only for the doctrine of “separate but equal” from the *Plessy* v. *Ferguson* decision.

Throughout his life, Justice Brown was plagued by poor eyesight and bad health. Yet, he remained both undeterred in his ambition, and positive in his outlook. Justice Brown was constantly plagued by headaches and eventually lost his eyesight. Kent writes, “Trouble with his eyes began very early. Some years before he died, he lost the sight of one eye, and the vision of the other was greatly impaired. He began to have trouble with his heart in 1896, and thereafter many attacks of this disease, some of them very dangerous.” 93 In fact, Justice Brown suffered over fifty attacks during his life before he finally passed away from one in 1913 in New York . Still, “Justice Brown counted himself a fortunate man.” 94 Despite the headaches, the poor eyesight, and the heart attacks, Justice Brown

remained committed to his work; having his wife read briefs and helping him write opinions when his eyesight was too poor. Even in pain, Justice Brown remained “cheerful and reminiscent only on the cheerful things.” 95 As a man,

[Justice Brown] had an ambition to do almost everything those about him were doing, and to do everything in the best possible way. He had a great love of distinction, an interest in all kinds of general knowledge, in history and in science. He was greatly interested in political life, and in public men. He was a Republican, yet without bigotry. His mind was very active, interested in everything not requiring expert knowledge. He had good abilities in any subject to which he applied himself, but perhaps no extraordinary capacity in any line. He was absolutely sincere in the expression of every thought, though sometimes hasty. A marked quality was his love of society. 96

Justice Brown remained unassuming and modest throughout his life, and always sang the praises of his comrades. He accomplished much during his life span. Charles Kent argues that Justice Brown's life “shows how a man without perhaps extraordinary abilities may attain and honour the highest judicial position by industry, by good character, pleasant manners and some aid from fortune.” 97 No one provides a better contemporary assessment of Justice Brown's life than Charles Kent does. Yet, Kent's account, because it was published just two years after Justice Brown's death is unable to provide much historical perspective on Justice Brown's legacy.

The subsequent chapters of this thesis present a better historical understanding of Justice Brown and his tenure on the Supreme Court. This thesis will assess Brown's personality, character, and life accomplishments in order to illustrate Justice Brown's unique outlook on the law. It is hoped that this approach will explain how Brown's legal philosophy does not correspond to the conventional philosophical categories that scholars have used to describe the Fuller Court . Justice Brown was in the most basic sense a pragmatist. He does not fit neatly into the strict dichotomy of classical verus progressive legal thought devised by legal scholars to characterize judges in the late nineteenth century and early twentieth century.

Justice Brown's opinions offer insight into American society during the Gilded Age, which spanned the period 1877 to 1914. His opinions, writings, and speeches highlight

the important and pressing issues of that period and how they influenced the Court's decisions. Indicative of his pragmatic approach, at his retirement dinner, Justice Brown announced, “[N]othing pleased me better than to leave the Bench, take a seat at the Clerk's desk, with the sailors about me in an admiralty case, and examine them as if I were the captain of a ship; and then to ask a couple of sea-masters to sit with me on the Bench and listen to the arguments.” 98 He continued, “I may say that I never differed with them but once, and I afterwards came to the conclusion that they were right and I was wrong.” 99

Chapter 2: Legal Philosophies in the Nineteenth and Early Twentieth Century

In order to understand how Justice Brown approached cases and his outlook for America , it is first necessary to understand the prevailing legal ideologies of the Gilded Age. To know if Justice Brown's reasoning was typical or atypical of jurists in the late nineteenth and early twentieth century, one must appreciate the differences between classical and progressive legal thought, which were the two predominate theories of law at the time. Every U.S. Supreme Court has inherited precedent from the preceding Courts, and thus, to understand Justice Brown's logic, one must recognize which ideas he inherited, and which were his own. Most importantly, to truly appreciate Justice Brown for who he was, it is essential to understand the historical context of the society in which he lived.

The Fuller Court began in 1888 and lasted until 1910, mirroring Justice Brown's fifteen years of service from 1890 to 1906. It has been labeled by some scholars as one of the worst courts in U.S. Supreme Court history. 100 For example, Edward Wise writes, “Its decisions are replete with exaggerated insistences on the sanctity of private property, paranoid hostility to government regulation, xenophobic disdain for immigrants, and utter indifference to racial injustice.” 101 In recent years, the notoriously poor reputation of the Fuller Court has induced some scholars to reevaluate the Court to better understand the rationale behind the Court's decisions. They have thus sought “to return to the words of the justices, to their public utterances, and to place them in a conceptual framework and historical context that render them meaningful.” 102

A consensus exists among the scholars who study this period that the rapid economic growth and the social upheaval that accompanied both the industrial revolution and Reconstruction necessitated a change in legal rationale, which many of the Fuller Court

justices were not willing to accept or did not foresee. Consequently, legal scholars have begun to explain some of the most controversial and misunderstood decisions of the Fuller Court by placing the jurists involved in those decisions into two main categories: those who clung to classical legal interpretation, and those who recognized the new dimensions for law in an industrialized society.

According to William Wiecek, “The Civil War and the struggle over Reconstruction from 1861 to 1877 remade the constitutional order… The post war constitutional order had to adapt to an industrializing society that was undergoing profound social and economic transformation.” 103 Yet, the change was neither abrupt nor smooth. The Civil War was an obvious watershed in the history of the country, as it ushered in a new era of governmental relations, particularly between the states and the national government. Three new Constitutional Amendments were ratified in the war's aftermath, ending slavery, guaranteeing former slaves the right to vote, proclaiming that states could not infringe upon the “privileges and immunities of citizens of the United States,” and announcing that states not could “deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” 104 As a result, these new amendments, especially the broad philosophical language of “due process of law,” “equal protection of the laws,” and “privileges and immunities,” created new and difficult constitutional questions for the Supreme Court to answer.

The outcome of the Civil War, combined with ratification of the Reconstruction Amendments, dramatically altered the federal government's relationship with the states. Legal historian Michael Les Benedict states, “In terms of constitutional theory, the Civil War was fought between the concepts of State sovereignty and what we would now identify as State rights.” 105 Before the Constitution came into existence, the states were sovereign entities. Controversy arose after the states ratified the Constitution, as some politicians argued that the states retained their sovereignty, while others argued that the Constitution created an indissoluble compact among the states. The Civil War put an end to the controversy, as it “killed State sovereignty, and the postwar era saw the growing influence of… American nationalism.” 106 However, the idea that there were separate

spheres of authority for the state and federal governments remained the dominant view even after the war. As Benedict explains, the victors in the Civil War “fought for the Union they had known and loved, a Union in which the authority of the national government was balanced against the rights of the States…After victory they wanted to make the rights inherent in…freedom secure, but they wanted to secure them within the old federal framework.” 107 While the Civil War ended the controversy involving state sovereignty, a new debate was brewing over state's rights and the implications of the Reconstruction Amendments.

The ratification of the Fourteenth Amendment in 1868 confounded matters for jurists in the post-Civil War era. Politicians, scholars, theorists, and jurists all debated the Amendment's meaning, the intentions of its framers, and the implications on states' rights. Unfortunately, the Congressional debates at the time of the founding of the Fourteenth Amendment were anything but clear in terms of giving concrete meaning to the language of the amendment, as each group in Congress construed the purpose of the Fourteenth Amendment in a different way. Some members of Congress wanted to enact a federalism revolution by making the national government responsible for enforcing civil rights. Others believed that the Fourteenth Amendment was limited to ensuring that states did not infringe upon the citizenship rights of former slaves. As William Nelson points out,

The debates on the Fourteenth Amendment were, in essence, debates about high politics and fundamental principles-about the future course and meaning of the American nation. The debates by themselves did not reduce the vague, open-ended, and sometimes clashing principles used by the debaters to precise, carefully bounded legal doctrine. That would be the task of the courts once the Fourteenth Amendment, having been enacted into law, was given over to them to reconcile its ambiguities and its conflicting meanings. 108

Legal scholars have characterized the period following Reconstruction as a time of constitutional turmoil, as jurists struggled to understand the Reconstruction Amendments in a way that was consistent with America 's past legal traditions, but appropriate for a society undergoing mass industrialization. “That struggle, which drew into question the fundamentals of the legal order,” according to Morton Horwitz, “expressed a deep crisis

the stress lines of which could be traced directly to the ideological foundations of American society. The most basic conflict was over whether law could be characterized as neutral and non-political." 109

In response to the perceived constitutional crisis, classical legal thought became the predominant mode of legal interpretation during the latter half of the nineteenth century, and reached its peak just after the turn of the twentieth century. 110 "Classicism provided an explanation of what law was, what its sources and sanctions were, why it could command the obedience of all, how it animated society and directed the economic order." 111 Classical legal thought held that legal reasoning was distinct from political reasoning, and professed to be immune from the great changes that were taking place in society after the Civil War.

Classical legal thought was attractive to many because it embodied a set of unchanging values and beliefs. For adherers of classical legal thought, the theory created a degree of consistency and comfort in society because there was something in society that remained the same despite the social, political, and economic transformations. In addition, it maintained that individuals controlled their own destiny and had complete control over their own position in life. The ability of an individual to determine his own future and to be able to make his own political, economic, and social decisions constituted the definition of personal liberty in classical legal thought. Consequently, classicalism proposed that the government's role in society was to ensure personal liberty and to protect private property. Legislation designed to protect laborers, or any other class of citizen, was seen as violating this conception of personal liberty because it interfered with a person's self-autonomy.

Contracts were sacred in classical legal thought. They represented the epitome of liberty because individuals were free to determine the binding conditions of an agreement. As a result, classical legal thought treated the relationships in society as a series of contractual agreements between individuals or between individuals and the government. Thus, in determining cases, classical jurists tried to break down the disputes into contractual relationships, from which they could uncover the duties and obligations that people had freely bound themselves to do. By pointing out what people had "freely" bound

themselves to do the courts avoided being seen as political actors and maintained their legitimacy.

The fundamental belief of classical legal thought was that the law was a “science” in that its principles and precepts were fixed and unchanging. They argued that legal interpretation was wholly independent, removed, and void of political content. Classical legal thought conceived of law as “bounded, discrete, and not fundamentally connected to the larger society in which it operates.” 112> As Morton Horwitz states, “The question of whether law is ‘political'- and hence to be appropriately determined by democratic legislators… or, instead, is ‘scientific,' and thus capable of being expounded by judges, was at the heart of the…controversy.” 113 The role of a judge in classical legal thought was to find the appropriate law in a given case, and announce the outcome in the case based on the prescriptive nature of the law used. Under this theory, laws were comparable to mathematical functions, in that all one had to do was plug in the variables, and if the right formula were used, the proper answer would result. This mode of legal interpretation grew in popularity after the Civil War, as it was seen as an effective way to avoid a potential legitimacy crisis that might arise over the struggle to define and give meaning to the Reconstruction Amendments. The fear of classical theorists was that if jurists were seen as judicial legislators, they would squander their credibility and the judiciary would lose its sanctity in society. Thus, classical legal thought advanced a type of “mechanical jurisprudence” 114 so that jurists would not be seen as political.

Supporters of classical legal thought argued that the law was logically consistent and internally sound; there was an applicable law for every legal controversy. Using formal logic, judges could deduce the solution to any dispute. Classical legal thought put “faith in the coherence and integrity of bright line boundaries… [so as] to be able to render one right answer to any legal question.” 115 Daniel Ernst suggests that the emphasis on strict boundaries may be exaggerated, as “no coherent, neatly organized system of though lay in wait until the moment it could leap undisturbed into [jurists'] minds.” 116 However, the idea that classical jurists believed in a system of bright line boundaries reflects classicalism's reliance on case precedent and the common law tradition in formulating its decisions; it is not to suggest that jurists memorized a static set of rules, codes, and tenets.

The ability to produce definitive answers is what classical legal theorists contended separated law from politics and what made it a science. The separation of law from politics was crucial for maintaining that law was value free. Under classical legal thought, impartiality was assumed if everyone was subject to the same rules and procedures, which was possible only if judges ignored social inequality. Thus, Horwitz writes, “indifference to context was regarded as an important safeguard that would ensure that law would remain neutral and non-political.” 117 Classical legal theorists argued that there could be no reasonable complaint of favoritism when everyone was held to the same rules regardless of their position in society.

Classical jurists were typically not concerned with the substantive content of disputes. Instead, they tended to focus on the procedural correctness of the process, meaning that everyone was subject to the same rules. This was probably a result of the way that most classical jurists were educated. Prior to the 1870s, most lawyers and judges gained their knowledge of the law by serving as an apprentice for another lawyer for a certain number of years, where they studied the procedural process of law, and learned the substantive content of law by examining a set number of concrete cases in a particular area of law. It was not until Christopher Langdell became Dean of Harvard Law School in 1875, where he introduced the casebook method of legal education, that students began to study the more general principles of law and legal reasoning, which today forms the basis of the modern legal education. 118 Ironically, Langdell is often associated with classical legal thought due to his statements about the law as a “science,” but Langdell's dedication to the development of legal reasoning contributed to the downfall of classical legal thought years later, as it became increasingly obvious to his students that the general principles of classical legal thought were not entirely consistent or sound. 119

The roots of scientific and mathematical neutrality in connection with classical legal thought can be traced to the Jeffersonian and Jacksonian eras. Howard Gillman argues that both administrations were “bonded by the belief that it could hold its own in a political and economic system purged of the vestiges of special privilege.” 120 What unified Jeffersonians and Jacksonians into a coherent political movement was their commitment to

the democratization of politics in order to break up an established class of self-interested politicians… and the eradication of illegitimate government-sponsored privilege in the economy in order to exorcise corruption in the polity and maximize or democratize opportunity for personal liberty, social independence, and self-improvement in the private economy. In short, it was an ideology of market freedom protected specifically by a core value of political equality. 121

Michael Les Benedict has called this sentiment laissez-faire constitutionalism. Its importance stems from the fact that classical legal thought used it as a philosophical platform on which to base its outlook on American society. 122 It reflected opposition to government favoritism for any class of citizen, making the redistributive state its antithesis. It saw personal misfortune as a result of circumstances within a one's own control, such as idleness or imprudence. Laissez-faire constitutionalism followed the idea that the least government was often the best kind of government. It claimed, “that the existence of decentralized political and economic institutions was the primary reason why America had managed to preserve its freedom.” 123Under laissez-faire constitutionalism, it was argued that laws should to be “neutral”, “non-redistributive,” and “uncorrupted by political interference.” 124 It rejected state paternalism, and emphasized individual autonomy. Laissez-faire proponents contended that legislation could not effect change, because a set of self-executing natural laws unswervingly directed society and the economy. The natural self-executing laws were centered on classical economic principles as articulated in Adam Smith's *The Wealth of Nations* . Supporters of laissez-faire constitutionalism firmly believed that there was “an invisible hand guiding society to greater general welfare through the pursuit of an individual's self-interest.” 125The implication for classical legal thought was that society was self-regulating, and that government had no business protecting certain classes of people. Everyone was responsible for their own actions, and no one deserved special distinction.

Classical legal thought during the Gilded Age presumed, as it had during Reconstruction, that the Constitution conferred separate spheres of authority for the state and federal government, and that the law remained entirely consistent. As a result, jurists during the Gilded Age attempted to construe the Reconstruction Amendments narrowly because they could not bring themselves to believe that the Reconstruction Amendments,

particularly the Fourteenth Amendment's Due Process and Equal Protection clauses, were enacted to bring about a revolution in federalism.

However, when new problems arose, such as over the state commissions set up to regulate railroad rates for example, the Court necessarily had to expand upon the logic of its previous decisions to deal with the issues presented, which consequently created inconsistencies in the Court's precedent. For instance, in 1873 the Court held that the due process clause of the Fourteenth Amendment was a procedural, not a substantive, guarantee, but then in 1890, the Court found that the due process clause of the Fourteenth Amendment did infer some substantive limits on legislation. 126 The discrepancies among the Court's precedents were paralyzing for jurists who relied upon the Court's precedents to guide their logic in cases before them. As industrialization continued into the twentieth century, it was becoming increasingly apparent that the Court's decisions could not all be reconciled with each other. In addition, the Court's logic did not correspond well or relate to the changes and new problems that were facing society in the twentieth century. For example in tort law, when courts began to realize that there were multiple causes for an accident, it made the determination of responsibility for compensation open to political considerations, and could thus be seen as a means of redistributing wealth.

Property law was another area in which economic, social, and technological progress made classical legal thought distinctions seem antiquated with society. Property in classical legal thought was based on a landed definition, but as ingenuity intensified, courts increasingly recognized intangible forms of property, such as intellectual property. The developments in property law suggested that what constituted property was more “a creature of social choice,” than it was of a “pre-political right,” as classical legal thought presumed. 127 Thus, the rapid social and economic reorganization that occurred during the Gilded Age highlighted logical deficiencies in classical legal thought and made it fully apparent to some that the law could no longer ignore these discrepancies if it was going to maintain its legitimacy in society.

The Supreme Court first dealt with the implications of the Fourteenth Amendment in the *Slaughterhouse Cases* 128 in 1873. In the opinion of the Court, Justice Miller reaffirmed

the concept of dual federalism, which Chief Justice John Marshall and Justice Joseph Story had spoken of decades earlier. 129 Chief Justice Marshall and Justice Story developed the theory of dual federalism to support their argument that the state and federal governments should each have their own sovereign jurisdictions, arguing essentially that they should be viewed as if they were two separate countries. Their goal was to protect a weak federal government from the powerful state governments by guaranteeing to the national government its own sphere of uncontested authority. Ironically, Justice Miller in the *Slaughterhouse Cases* endorsed the doctrine of dual federalism to protect the weak state governments from the encroachments of the national government.

Justice Miller's opinion importantly limited federal intervention under the Fourteenth Amendment in two ways. First, “Congress could punish only those offenses perpetrated to deprive persons of right because of race, color, or previous condition of servitude, not offenses motivated by ordinary malice or greed.” 130 Secondly, the federal government could only protect those privileges and immunities, which “owe their existence to the Federal government, its National character, its Constitution, or its laws.” 131 The *Slaughterhouse Cases* importantly declared a commitment to state-based federalism, meaning that “states continued to possess elements of sovereignty that had not been conveyed to the federal government by the Constitution, and that the federal government [had] to respect these state sovereign powers.” 132 Ultimately, the *Slaughterhouse Cases* severely restricted the federal government's regulatory power under the Fourteenth Amendment.

Four years later, the Supreme Court decided the case of *Munn* v. *Illinois* , which involved the question of whether state imposed maximum rates on grain elevators and warehouses violated the equal protection and due process clauses of the Fourteenth Amendment. 133 Chief Justice Morrison Waite wrote the opinion of the Court, in which he argued that the state legislature had not violated either clause because the grain elevators and warehouses were “clothed with a public interest,” and thus subject to regulation for the benefit of the community. 134 Chief Justice Waite, drawing upon the common law tradition, stated that “when private property is ‘affected with a public interest, it ceases to be juris privati

only.'" 135 Chief Justice Waite's opinion in this case was significant in that it began to distinguish between legitimate and illegitimate forms of governmental regulation. The Chief Justice explained, "When one becomes a member of society, he necessarily parts with some rights and privileges, which as an individual not affected by his relations to others, he might retain." 136 Consequently, "the very essence of government," according to Waite, was to "[regulate] the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation become necessary for the public good." 137 Waite's opinion in *Munn* v. *Illinois* created a basic, but broad, principle on which state legislatures could regulate economic and personal activity under the Fourteenth Amendment. However, by stipulating that the regulation had to serve the common good of society, Justice Waite avoided giving state legislatures carte blanche control over regulating the activities of its citizenry. In the following decade the Fuller Court would extend Waite's logic in *Munn* v. *Illinois* , to imply that state regulations, which were arbitrary and unreasonable, failed to serve the common good of society, and thus violated the due process and equal protection clauses of the Fourteenth Amendment.

In 1883 the Supreme Court decided the *Civil Rights Cases* , which involved the Civil Rights Act of 1875. 138 Congress sought to prevent discrimination in public furnishings and on public transportation by private individuals. The Court ruled that section one of the Fourteenth Amendment did not extend to the acts of private individuals; it only applied to state action, meaning that the discrimination had to be carried out by the state or by an official of the state acting in his official capacity. William Nelson explains,

The issue at the root of the *Civil Rights Cases* was whether section one should be construed to guarantee fundamental civil rights absolutely or only to protect equality in the enjoyment of those rights. If the amendment protected fundamental rights absolutely, and if access to transportation facilities and public accommodation was a fundamental right, then it could be argued that a violation of the Fourteenth Amendment occurred whenever anyone, either private individual or public official, deprived another of such as right. If, on the other hand, the amendment only provided equal protection for rights created by state law, then it gave neither Congress nor the federal courts any jurisdiction

over matters as to which the states decided not to create rights. 139

Justice Bradley's majority opinion in the *Civil Rights Cases* helped to delineate the difference between public and private prerogative, and in doing so described the type of state legislation that he considered to be repugnant to the Fourteenth Amendment: “what is called class legislation… would be obnoxious to the prohibitions of the Fourteenth Amendment, … [which] extends its protections to races and classes, and prohibits any State legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws.” 140 Thus, while the Court held that section one of the Fourteen Amendment could not reach private individuals acting upon their own greed or malice, the Fourteenth Amendment could reach legislation that granted special benefits to a certain class of citizens in society. Consequently, the federal government could not regulate private acts, as the Fourteenth Amendment required state action, but the Amendment did grant Congress and the federal judiciary the “power to hold the states to the rule of law: the power to insure that the states extended the same rights to all individuals equally except on those occasions when the good of the public at large demanded that distinctions between individuals be drawn.” 141

Through *Munn* v. *Illinois* , the *Slaughterhouse Cases* , and the *Civil Rights Cases* , the Fourteenth Amendment became a check on “arbitrary and unreasonable lawmaking on the part of states.” 142 The Court reasoned that states could determine for themselves which laws were best for their own welfare, but the condition was that the laws had to be equally applied to all persons within the state's jurisdiction. As William Nelson explains, “The Court concluded that reasonable laws were those that were equal, and it determined that states could enact whatever laws they deemed best for the public welfare provided they did not oppress or unjustly discriminate against any particular class.” 143 Thus, the Court's approach in cases involving an alleged violation of section one of the Fourteenth Amendment was first, to see if there was state action. If there was, then the Court looked to see if the state action was unequal, arbitrary, or unreasonable. If the action was considered as such, the Court would then hold the state action to be in violation of the Fourteenth Amendment. Thus, the Court remained true to classical legal thought in that it had a mechanism for determining the constitutionality of every state law under the Fourteenth Amendment, which supported the conception of the law as an apolitical and

neutral system. However as time went on, evaluating the substantive content of state regulatory laws became problematic as there were no bounded guidelines to determine what constituted arbitrary or unreasonable action. Thus, the Fuller Court struggled to determine what “unreasonable,” “arbitrary,” “discriminatory,” and “oppressive” laws were, and this is where the contradictions in the law became apparent.

In addition to the problems caused by the ambiguity of the language of the Fourteenth Amendment, the Fuller Court had to deal with the tensions and conflicts that came as a result of the great changes that took place during the Gilded Age. When Chief Justice Fuller first came to the Supreme Court, the country was still recuperating from the Civil War. Yet, the Court throughout his tenure never fully recovered from the trauma of that war, and the nation as a whole struggled to find and accept a new national identity. It was not until World War I that the country came to accept its position in the world and reckoned with the legacy of the Civil War. Anxiety pervaded society for over thirty years as Americans saw themselves in a race with European nations for ascendancy. The industrial revolution created uneasiness in the population, as the economy shifted from agriculture to industry, and the country shifted from a producer to a consumer based society. In dealing with the new problems that arose in response to the unprecedented growth during the Gilded Age, the Fuller Court clung to classical legal thought as its approach to constitutional interpretation to avoid the appearance of political impropriety. Classical legal thought's faith in “an invisible hand guiding society” gave adherers of classical legal thought comfort during this period of social strife. According to Morton Horwitz, “After the trauma of the American Civil War, amid heightening social conflict produced by immigration, urbanization, and industrialization, orthodox legal thinkers and judges sought ever more fervently to create an autonomous legal culture as part of their ‘search for order.'” 144

Classical legal thought was not just a mode of judicial interpretation; it embodied values, beliefs, and ways of thinking about American society as a whole. As William Wiecek argues, “Classicalism rested on a deeper underlying ideological structure, which consisted of beliefs shared by most middle-class contemporaries about liberty, power, human nature, rights, and republican government. It identified the values that define

Americans as a people and their government as a republic." 145 Proponents of classical legal thought sought certainty, stability, and predictability in both law and society. Classical jurists were afraid of social unrest, political turmoil, and class agitation. Thus, the last third of the nineteenth century and the early part of the twentieth century was a source of great anxiety for classical legal thinkers, since American society seemed to be plagued by constant social and political instability, turmoil, and strife. However, the anxiety that classical jurists felt during the Gilded Age served to reaffirm their commitment to classical legal thought because the philosophy provided comfort and assurance to classical thinkers. Wiecek writes, "The social turmoil that marked the last quarter of the nineteenth century frightened [classical jurists]. Labor unrest and the turbulence of the cities seemed to realize their fears, with the promise of worse to come." 146 Consequently, "Legal elites turned to law to do what they could to suppress disorder. This response has led unsympathetic observers to write them off as conservative, if not reactionary. They were that… but our understanding of their outlook is incomplete if we conclude our inquiry at that point." 147

Classical legal thought tried to balance the power of the government to regulate against the concept of the individual liberty. In keeping with Lockean tradition, Classical jurists held that the role of government was to protect life, liberty, and property. It venerated individual will, which was equated with the idea of liberty. In fact, "they regarded the centrality of individual will as the supreme achievement of modern legal systems." 148 Limited government was a central tenant in classical legal thought, which complimented the idea of individual will and liberty. According to Wiecek, "Classical law proclaimed hostility toward state paternalism… classical judges stressed the necessity for all people to be responsible for their own destiny, and condemned intervention by the state meant to protect individuals from misfortune and their own folly or inadequacy." 149

The epitome of liberty and individual will in classical legal thought was freedom for all to enter into contracts. Contracts were treated as sacred texts in classical legal theory because they represented

…an essential aspect of individual freedom. Contractual capacity became the defining characteristic of individuality, the means by which an individual organized personal

economic affairs and pursued his or her own conception of self-interest. In this pursuit, all people had to be assured of an equality of opportunity, defined as freedom to own what property they could accumulate, and to contract for their labor or their property. 150 In terms of contracts, classical legal thought operated on the premise that both parties in a contract were equal to each other; it assumed that both parties could negotiate on a "level playing field." However, throughout the Gilded Age, it became apparent that this assumption was not true. Yet, under classical legal thought, "The law could not impute or recognize juristic inequality… by extending special protection to the weaker party in a contractual relationship," 151 because, "By definition, neither party was weaker, or at least the legal process could not determine in a neutral and disciplined way which was weaker and how." 152 As a result, classical legal thought, instead of being viewed as neutral and apolitical, came to be seen as reinforcing the social, political, and economic inequalities in society. Consequently, the Supreme Court became an obstacle to equality, rather than its protector. Starting in the 1890s, as corporations increasingly came to dominate society, classical legal thought began to lose its power and resonance in the scholarly world.

As it became apparent that classical legal thought was losing its grasp on reality, attacks on its premises began, and in its place emerged progressive legal thought. Horwitz writes, "Progressive thinkers challenged both the political and moral assumptions of the old order and the structures of legal doctrine and legal reasoning that were designed to represent those assumptions as neutral, natural, and necessary." 153 Progressive legal thought held that government regulation was better able to allocate resources than market forces alone could. 154 In addition progressive legal thinkers argued that the government ought to take full advantage of the developments in the social sciences in generating policy decisions, particularly Darwinism and William Jevons' theory of marginal utility. Herbert Hovenkamp explains, "Because the common law [was] poorly equipped to redistribute wealth or manage the economy, most Progressives were strongly committed to legislation rather than changes in judge made law to facilitate their goals." 155 Essentially, progressive jurists objected to the libertarian approach of classical legal thought, and instead advocated an active role for government in both the economy and society.

Progressive legal thought was based on a distrust of the unregulated free market. The progressive attacks on laissez faire economics arose in response to the growing paradox of the Gilded Age: with industrial and economic progress came increasing poverty in society. William Forbath writes, “Under capitalism, ‘progress' seemed to have the ironic consequence of producing its opposite, more ‘dependence,' more ‘ignorance,' and more ‘grinding poverty,' among each succeeding generation of workers.” 156 Forbath also adds, “The capitalist's wealth was being purchased at the price of making the working class unfit for citizenship.” 157 The aggregation of wealth into the hands of a few indicated inherent injustices in the free market system, “it produced noncompetitive business structures… [and] it transferred wealth… in the wrong direction – to those who already had a great deal, and away from those who were already impoverished.” 158

Darwinism and the theory of diminishing marginal utility greatly influenced progressive legal thought, and “prompted the end of classical legal thought.” 159 Herbert Hovenkamp argues, “Darwinism provided the biological foundations for the view that human beings are basically the same, with similar needs. Marginalism… provided a mechanism for evaluating individual preferences that could be quite diverse.” 160 As a result, progressives believed that man could influence and control the evolutionary process, and that wealth was subject to the theory of diminishing marginal utility, meaning that the value of a dollar to a wealthy man meant much less than it did to a poor person. Thus, “The state could increase total welfare by equalizing wealth – by taking a few dollars from the wealthy person, for whom they produced little incremental satisfaction, and giving them to the poor person, for whom they promised basic survival needs.” 161 In addition, progressives held that “the state should be actively involved in guiding the evolutionary process to produce the best individuals possible, and to seek to improve the lives of those who were not.” 162 Accordingly, progressive legal thinkers advocated reforms such as the graduated income tax, maximum hour laws for laborers, and minimum wage legislation.

With the help of Darwinism and the theory of diminishing marginal utility, progressive legal thought undermined the unwavering faith in unregulated free markets, which had been a bedrock principle in classical legal thought. It showed that governmental

intervention could have positive effects on the economy and society. In addition, progressive legal thought recognized the need for a more balanced playing field for negotiations and competition between laborers and capitalists, and big and small businesses. Progressive legal thought, according to Hovenkamp, helped produce "the modern administrative state which removed great parts of the economy from free market control and subordinated concerns for the efficient use of resources to other values that were much more difficult to articulate." 163 Progressive legal thought highlighted the inability of classical legal thought to deal with the issues of wages, employment, poverty, and market regulation, which accompanied the rapid industrial growth and economic reorganization during the Gilded Age.

Progressive legal thought, according to scholars like Morton Horwitz, began to crystallize into a coherent legal philosophy after the Supreme Court decided the case of *Lochner* v. *New York* in 1905. Horwitz contends that Justice Oliver Wendell Homles initiated the progressive attack on classical legal thought through his judicial opinions and other published works, such as *The Path of Law* and *The Common Law* . 164 For Justice Holmes, "Economic and social struggle undermined and eroded all efforts to find clear external bright-line boundaries between right and wrong." 165 Thus, Horwitz writes, "Holmes deserves to be seen as the preeminent figure in dismantling the system of legal thought based on absolute rights… he was justly a hero to…Progressive social reformers." 166

Another prominent progressive legal thinker at the turn of the twentieth century was Harvard Law's Roscoe Pound, who argued that classical legal thought was incompatible in industrialized society. Horwitz explains, "Pound was among the earliest thinkers to observe that the broad generalizations that characterized nineteenth-century legal consciousness presupposed a homogeneous society with standardized transactions and human interactions that could be generalized and abstracted into rules." 167 Industrialization put abstraction and generalization at odds with predictability because of the complex nature of society. Judges, according to Pound, had "to deal with the individual; not the abstract individual but the concrete human being in a society of human beings like himself." 168 Consequently, Pound praised the growth of the administrative

state, which had accompanied industrial growth in America . Horwitz states, “[Pound] saw the rise of administration as part of a shift from nineteenth-century ideas of ‘abstract justice' to twentieth-century demands for ‘concrete justice.'” 169

Progressive legal thought stood in stark contrast to classical legal thought. The transition between the two, however, was not as abrupt as one might think given the concrete starting point of *Lochner* v. *New York* that Professor Morton Horwitz presents in the *Transformation of American Law, 1870-1960* , or the creation of Darwinism and the theory of marginal utility that Professor Hovenkamp cites in his argument. After the *Lochner* decision, many jurists remained committed to the classical legal approach of interpretation, and likewise, jurists did not suddenly alter their perceptions on the laws because of the appearance of Darwinism and marginal utility. The philosophical evolution was incremental as jurists, lawyers, and scholars struggled to adapt to the rapidly changing world during the Gilded Age. Some jurists tried to adapt the law to the needs of society, and remain faithful to the prevailing mode of legal thought. Yet, those jurists who tried to adjust with society during the Gilded Age produced a jurisprudence characterized by inconsistencies, because the period itself was characterized by inconsistency. Unfortunately, legal scholars, in drawing the distinctions between classical and progressive legal thought, have often overlooked, misunderstood, or been critical of those jurists who appear inconsistent or do not fit precisely into classical or progressive legal ideology. Justice Henry Billings Brown was one such jurist.

Justice Brown was not a classical jurist. He did not regard the law as an inflexible system of rules, which judges apply in mathematical or scientific fashion. Brown was willing to accept that there were various approaches to cases that could lead to different holdings. According to Charles Kent, Justice Brown “never hesitated to express his views frankly,” but unlike many of his peers, he was “willing to be convinced if he thought he was wrong.” 170 Few classical jurists would admit that one of their decisions was wrong because they believed that the law was void of discretionary content. Justice Brown, on the other hand, stated that the law was “to a certain extent a progressive science,” meaning that “restrictions once necessary were such no longer, and were even detrimental.” 171 Consequently, Justice Brown claimed that his brethren on the Court,

the vast majority of whom were committed to classical legal thought, “poked a good deal of fun at [him]” for his statement on the progressive nature of the law. 172 However, he took the criticism in stride and responded, “I would as new questions arise, adapt the Constitution to them as far as possible.” 173 Justice Brown was willing to see the law grow with society and change to fit the needs and problems of society. However, Justice Brown was not willing to go as far as Justice Holmes or Roscoe Pound in denouncing the idea of bright-line boundaries. Justice Brown, like most jurists at the time, believed that “legal thought was separate and autonomous from moral and political discourse.” 174 Yet, Justice Brown struggled with the idealized conception of the individual, which was inherent in classical legal thought. While he believed that the individual was responsible for his own actions and could control his own thoughts, Brown also acknowledged that the “playing field” was not always level, and thus the presumption of equal opportunity was inappropriate.

Overall, Justice Brown's opinions reflect an acute awareness of Gilded Age society and the competing relationships within it. The manner in which he tried to balance those relationships was distinct from the means professed by either classical or progressive legal thought. Consequently, Brown's legal thought could be best described as pragmatic, as he recognized the demands of the changing environment and believed that the law should change with society. He was not interested in reforming the legal system as the progressives were, but he also questioned the tenets of laissez-faire constitutionalism, upon which classical legal thought relied heavily. For example, he argued that there was nothing unnatural about the unequal distribution of property, but stated, “I am by no means satisfied that the old maxim, that the country which is governed least is governed best, may not in these days of monopolies and combinations, be subject to revision.” 175

Brown's opinions were never sophisticated pronunciations of legal theory. They were centered on practical concerns and were realistic about the demands of society. For instance, in a notable district court case, *The Manitoba* , Brown announced, “if a collision has become imminent almost any error will be pardonable except that of not stopping and reversing.” 176 In another district court case, *The Trenton* , Brown found that courts could dismiss all liens on a ship because the admiralty laws in other civilized country

held this to be true and to hold otherwise would make judicial sales *in rem* impossible unless “perfect title, good the world over, could be obtained.” 177

Robert Glennon writes, “Neither clinging desperately to the past nor reaching boldly to the future, Brown represents in a real sense a microcosm of the society in which he lived.” 178 Justice Brown did not discard both classical and progressive legal thought in favor of a third version of legal thought; he, instead, tended to fluctuate between the two, as Glennon indicates. Justice Brown was not a classical jurist, but he did adopt classical legal positions in some of the most important cases during his tenure, most notably in *Plessy* v. *Ferguson* , which is one possible explanation why legal scholars have lumped him in with the conservative wing of the Fuller court. 179 On the other hand, Justice Brown took liberal or progressive positions in several of the most controversial cases during the Gilded Age, but those cases have subsequently lost their historical significance and been forgotten over time.

Justice Brown was a centrist jurist while on the Fuller Court . In terms of the present-day Supreme Court, an analogy might be drawn between Justice Sandra Day O'Conner and Justice Brown in terms of their positions on the Court. Justice O'Conner, much like Justice Brown defies conventional labels, despite conservative leanings. A former clerk for Justice O'Conner writes, “As a jurist, Justice O'Conner has refused to impose a ‘grand Unified Theory,' her own phrase, on each area of the law. Rather, in each case, she has sought to apply the law carefully to the particular facts before the Court.” 180 Likewise, “One could not predict Brown's vote simply by describing the subject matter. His approach was more subtle, more typical of the judicial function.” 181 Moreover, both O'Conner and Brown have defended states' rights, “that is, the notion that state and local representatives can do more and better for their constituents on many issues than distant representatives in Washington .” 182 Like Justice O'Conner today, Justice Brown was as we shall see, a moderate on a Court with its fair share of polarizing figures.

Like most of his brethren on the Fuller Court , Justice Brown was “faithful to a well-established constitutional tradition.” 183 However, that tradition was unable to deal with the rapid expansion of industry, the influx of immigrants, and innovation that characterized during the Gilded Age. As Howard Gillman writes, “The crisis in American

constitutionalism [during the Gilded Age] was triggered by the judiciary's stubborn attachment to… an increasingly anachronistic jurisprudence, one that had lost its moorings in the storm of industrialization." 184 However, "It was [a] mischaracterization of turn-of-the-century constitutional jurisprudence… to view judicial opinions as empty rhetoric designed to mask policy preferences rather than as principled explanations for legal decisions." 185 Justice Brown often relied on precedent as a guide, but not as a cloak for his personal or political advantage. In his *Memoir* , Justice Brown claimed, "I have never known partisan considerations to enter into the disposition of cases. By common consent politics were abjured when taking a seat upon the Supreme Bench." 186

Glennon explains, "In Brown one finds some hesitancy, some ambivalence – even contradiction – as he struggled to perform the judicial function." 187 Yet, Justice Brown "represent[s] a portrait of late nineteenth century America ." 188 His opinions are replete with references to the problems, tensions, and conflicts of his society. The following chapter in this thesis will explore Justice Brown's outlook on American society at the turn of the twentieth century. Justice Brown's decisions were not random. In a speech he affirmed, "It is impossible for one to occupy a judicial position for thirty-one years without imbibing certain strong convictions regarding the law, its administration and its defects – convictions which sooner or later are bound to crop out in his opinions." 189 The next chapter presents those "strong convictions regarding the law."

Chapter 3: The Pragmatic Approach

The previous chapter highlighted the differences between classical and progressive legal thought, and concluded that Justice Brown's jurisprudence could not be strictly characterized as either. This chapter illustrates the analysis by which Brown came to his conclusions in several specific cases. Brown often came conclusions that separated him from classical legal thought, but the path he traveled to arrive at those conclusions differed from the rationale that a progressive legal theorist such as Roscoe Pound would have used. Still, by coming to pragmatic conclusions, Brown contributed to the transition from classical to progressive legal thought. 190

It would be inappropriate to assume that since Brown's reasoning existed in between classical and progressive legal thought, he did not have sincere beliefs about the law, or that there was a lack of deliberative thought in his decisions. Justice Brown declared,

“Take a series of opinions of the same judge upon almost any given subject, you will find a thought underlying them all.” 191 Brown did not adhere to a strictly defined legal theory. Brown was at his core a pragmatist. He tried to account in his decisions for the social conditions that created the legal dispute. Brown was most interested in matters of fact, not theory. He looked for similarities in social circumstances with other cases to guide him in his decisions. For him, it was not a question of reckoning the case to a specific theory; it was finding in the substance of the law a recognition of and place for the practical demands of society.

The first chapter showed that Justice Brown was a product of the society in which he lived, and that he was a capable and competent jurist. The second chapter confirmed that he was not prone to philosophical thought, but nevertheless possessed strong opinions about the law and society. In his writings, speeches, and judicial opinions, Justice Brown expressed sentiments about some of the most pressing and controversial issues facing late nineteenth and early twentieth century society, such as taxation, race, labor, and imperialism. Consequently, an analysis of Justice Brown's jurisprudence may not only produce information about the transition between classical and progressive legal thought, it can provide insight into the major themes of the Gilded Age. Thus, this chapter seeks to illustrate the relationship between Justice Brown's judicial outlook and the political, social, and economic attitudes of the Gilded Age. Consequently, this is a story about the role of law in history, not a study of the history of law. Justice Brown sat on the Supreme Court during the apex of the Gilded Age, which was a period of very difficult economic, political, and social transition. Justice Brown's judicial reasoning offers a picture of how he tried to make sense of the dramatic changes that were taking place during this period and to do what he thought was right for society.

As the previous chapter pointed out, Roscoe Pound was a preeminent progressive legal theorist. Pound called for “pragmatism as a philosophy of law; for the adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles; for putting the human factor in the central place and relegating logic to its true position as an instrument.” 192 Pound referred to this “pragmatic” approach to legal reasoning as sociological jurisprudence, which formed the basis of the

legal progressive movement at the turn of the century.

Pound's early writings were in response to what he perceived to be the Fuller Court 's overemphasis on an idealized conception of the individual and an overzealous protection of property rights. He sought to synchronize both the rules of law and the philosophy of law embodied in the Constitution with society's needs. As a result, Pound became a central figure in the progressive movement. Yet, few scholars have recognized that even before Pound began writing about the need for greater pragmatism in the law, Justice Brown tailored legal principles and doctrines in his opinions to the human conditions in the Gilded Age, which was a drastic departure from the traditional modes of judicial interpretation. Thus, Justice Brown played a crucial role in moving legal reasoning away from the abstract legal theories in classical legal thought and toward a pragmatic approach to resolving disputes in society.

Scholars have been critical of Justice Brown's jurisprudence, calling it inconsistent and at times contradictory. 193 What makes Brown's jurisprudence difficult to characterize is the fact that Brown utilized pragmatism in his written opinions, but took classical legal thought positions in cases in which he did not write an opinion. Glennon explains, “Both [classical and progressive] dimensions to Brown's thought were deep-rooted and sincerely held. One finds both sides present, existing in tension, as Brown and late nineteenth-century America , struggled to understand a fundamental challenge to the prevailing social order.” 194 Consequently, his written positions are often incompatible with the decisions in which he did not issue an opinion. This discrepancy makes it difficult to reconcile all of Justice Brown's decisions with each other. Despite taking clashing positions, however, Justice Brown's written opinions offer keen insight into his personal views on some of the most important matters facing his society. As a man of his times and as a judge who tended to reflect popular sentiments, his written opinions are a means of understanding the Gilded Age.

There were numerous cases during the Fuller Court era that had historical and legal significance. Yet, this thesis only deals with four of those cases, dealing with taxation, race, labor, and imperialism. Two of the four cases did not receive considerable attention at the time they were handed down. The cases that are included in this thesis have been

chosen because they are illustrative of Justice Brown's jurisprudence and they relate to important aspects of the Gilded Age. I have not discussed cases in which Justice Brown failed to provide an explanation for his findings. For example, *Lochner* v. *New York* was a major decision because it announced the doctrine of liberty of contract, and has consequently received significant scholarly attention. 195 In *Lochner* , Justice Brown joined Justice Peckham's majority opinion, but did not offer any of his own justification. Since Justice Brown did not express his opinion in his own words, it is difficult to justify exactly what his thoughts were, and it would be improper to assume that he came to the conclusion that he did because of the reasons offered by Justice Peckham. Thus, this thesis relies on opinions written by Justice Brown from which it is possible to deduce his thoughts on larger issues facing his society. 196

Justice Brown did not consider law to be distinct or removed from the society in which it operated. Moreover, he was not afraid to ask normative questions about what the law ought to be. As a result of his desire to shape the law to society, Justice Brown did not fit the profile of a classical jurist. As Justice Harlan noted at Brown's retirement dinner, “[I]t is evident to me that [Justice Brown's] mind and heart have always revolted at the thought of doing injustice in deference to rigid, technical rules of law. He seems always to have struggled to harmonize those rules with the principles of right and justice.” 197 Justice Harlan continued, “This element of character is not always to be condemned in a judicial office, however great may be the necessity, in some cases, to administer the strict law; for… justice is the greatest interest of man on earth-the ligament which holds civilized beings and civilized nations together.” 198 If Justice Harlan's statement is true that justice holds the nation together, then it is important to understand the values and tensions that existed during the Gilded Age in order to appreciate how Justice Brown evaluated and balanced those ideals to achieve justice in society.

Sean Cashman writes that in the Gilded Age, “Society was obsessed with invention, industrialization, incorporation, immigration, and, later, imperialism. It was indulgent of commercial speculation, social ostentation, and political prevarication but was indifferent to the special needs of immigrants and Indians and intolerant of African-Americans, labor unions, and political dissidents.” 199 There was an uneasiness and anxiety in American

society at the turn of the twentieth century about the direction in which the country was heading. From 1877 to 1914, conflict seemed inevitable and a constant result of the economic shift from agriculture to industry. Memories from the Civil War remained prominent in the minds of people during the Gilded Age. The war had left deep divisions in the country that continued to be sources of conflict even after Reconstruction. Throughout the 1890s and into the twentieth century, people feared the outbreak of another civil war and the perilous turmoil that would follow.

Industrialization transformed society by shifting people away from the antebellum ideas of free land and free labor towards urbanization and wage labor. As industrialization became more rapid, people increasingly gave up the idea of self-sufficiency inherent in the Jeffersonian ideal of the yeoman farmer, in favor of working in industrial mills and plants. According to Alan Trachtenberg, workers moved from agriculture to industry during the Gilded Age because, "[m]any Americans…believed that industrial technology and the factory system would serve as historic instruments of republican values, diffusing civil virtue and enlightenment along with material wealth. Factories, railroads, and telegraph wires seemed the very engines of a democratic future." 200 However, industrialization created the paradox of the Gilded Age: as wealth and production increased so did poverty.

Industrialization was a setback for skilled labor. Laborers were interchangeable in the industrial process, as the products of industry were not based on the talents of workers. Trachtenberg explains, "New technology divided labor as surely as it divided and simplified different industrial processes. Unskilled novices could replace skilled mechanics-and at a lower wage." 201 Because labor was interchangeable, there was competition among workers for secure employment and wages. Further escalating the competition among laborers was the influx of immigrants, who agreed to work for extremely low wages. Competition among laborers had two important consequences for society. First, it led to the creation of labor unions, so that workers could have some bargaining power and equality to negotiate matters such as wages and hours with mill and plant owners. Secondly, the competition within labor created resentment in white male workers for their immigrant worker counterparts, such as the Chinese and the Irish.

As Leon Fink writes, “Consolidation of America's industrial revolution touched off an era of unexampled change and turmoil.” 202 Labor unions such as the Knights of Labor, the American Federation of Labor, and the National Labor Union sought better wages, better working conditions, and better hours for their members, but capitalists were unwilling to submit to the unions' demands for fear that the unions' demands would not stop. Thus, laborers and capitalists developed mutual enmity, in turn creating an atmosphere of distrust, hostility, and conflict, which pervaded society during this period. In fact, the tension and hostility between capitalists and laborers became so great at times that it boiled over into violent struggle, such as in the Great Railroad Strike of 1877, the Haymarket Riot in 1886 and at the Homestead Strike in 1892. Consequently, when violence erupted, “[F]ears of a new civil war spread across the country.” 203

The Fuller Court was not exempt from dealing with the clashes between capitalists and laborers. It frequently had to resolve issues arising from unionization, strikes, and labor legislation. During the Gilded Age, radical political and social movements such as communism, socialism, anarchism, and populism all began to take shape, and gain influence in sectors of the American public. According to Owen Fiss, “The early 1890s was a period of radical politics in America , during which basic aspects of social structure were called into question. At issue was nothing less than capitalism and the social relationship that it implied.” 204 Each of these radical movements claimed to be a response to what each argued was a growing number of injustices caused by the capitalist system.

The radical movements of the 1890s and early 1900s were crucial in “shaping the cultural and political life of the nation and defining the agenda of the Court.” 205 The philosophic principles on which these groups relied deviated enormously from traditional American beliefs about property, government, and individualism. For example, the communists called for the redistribution of wealth, an act which represented the antithesis of governmental protection of private property. Anarchists rejected government, political organizations, and the state itself, which they argued interfered with the creative capacities of the individual. Radical movements fostered skepticism among the Fuller Court justices, the vast majority of whom were economically conservative. 206 The

Fuller Court justices were, on the whole, not open to the substantive merits of the radical movements, and thus typically rejected the attempts to attain progressive changes. Justice Brown illustrated this point when he explained, “Socialism… while furnishing an interesting field for discussion, is not likely for another century at least to present itself as a scheme for practical consideration.” 207

Meanwhile, industrial tycoons like John D. Rockefeller and Andrew Carnegie gained greater control of the nation's wealth, which made the threat of class conflict seem more probable as the gap between the rich and poor grew exponentially. Consequently, one of the most contentious issues that arose during the Gilded Age was federal tariff and taxation policy. Throughout the nineteenth century, tariffs had been used to protect American businesses from foreign competition, and to ensure Americans a high return on the goods they sold in the United States . However, the end of the Jeffersonian ideal and the rise of industry changed the nature of protective tariffs. Traditionally, tariffs shielded American farmers by making their produce cheaper than foreign produce, which essentially eliminated the foreign produce from markets in the United States . Tariffs on wool, cotton, corn, and sugar were designed to stop foreign goods from flooding of American markets, which would have driven prices down and hurt, if not all together destroyed American production. Tariffs worked well as a protectionist tool prior to the industrial age because America was a producer society, but industrialization made America into a consumer society, which perverted the original intent of the tariffs.

With the onset of industrialization, the protective tariffs that had been implemented to help farmers, “taxed the farmers and workers for the benefit of manufacturers.” 208In 1892 the Populist Party championed the graduated income tax instead of protective tariffs under the Omaha Platform. It was not the first time an income tax had been proposed. A graduated income tax had been used to finance the Civil War, but it was repealed in 1872. In 1892, progressives and the Populist Party argued that a graduated income tax was a fairer way to tax people rather than regressive excise taxes and tariffs. Tariffs seemed to be unfair to the working class in America , and appeared to be class legislation because it taxed people at the point of consumption, instead of at the point of extravagance. Nell Painter explains, “For advocates of the income tax, the protective tariff represented class

legislation. The income tax was fair, they contended, because it taxed those best able to pay." 209 Furthermore, it seemed problematic that the bulk of the national revenue came from taxing people at the point of consumption, especially when industrial giants were reaping huge profits that were tax-free. The working class in America justifiably felt that it was carrying the economic burden of the country while those most able to pay were "free-riding" off of the laboring class.

In 1894, Congress created an income tax on personal earnings derived from real estate investment, bonds, and stocks. The passage of the act transformed the issue of the income tax from a political matter into a legal question, as it concerned the discretionary power of Congress to levy taxes. In 1895, the Supreme Court heard arguments over the constitutionality of the income tax in the case of *Pollock* v. *Farmers' Loan and Trust Company* . 210 There were two issues for the Court to decide. The first was whether the income tax was a direct tax, meaning that the tax was assessed on the taxpayer or his or her property by the government. If the income tax was found to be a direct tax, then the second question for the Court to decide was whether the tax was apportioned in accordance with each state's representation in Congress as required by Article I, Section 9 of the Constitution. Chief Justice Fuller, writing for the majority, held that the income tax was a direct tax, and was not apportioned based on Congressional state representation. Consequently, the Court found the national income tax to be unconstitutional.

Chief Justice Fuller's rationale in the majority opinion typified classical legal thought, as he "rest[ed] his decision solely on traditional canons of statutory interpretation." 211 In his opinion, he started with a well-established traditional legal principle and logically deduced from it the conclusion to the case. However, the opinion ignored social concerns and instead reflected a conscious, and arguably obsessive, desire to protect private property. For instance, Fuller attempted to justify his approach by referencing an opinion written by former Chief Justice John Marshall, 'The case, being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument as to justify those who expound the constitution in making it an exception.' 212

The question of whether the income tax constituted a direct tax was not simple. Proponents of the income tax argued that it was an excise tax, because it was based on the consumption of goods, not on the taxpayer or the good itself. Rather it was derived from the use of property. Yet, Fuller argued that an income tax on dividends was a direct tax because he saw a tax on income as essentially a tax on the property itself, and a tax on private property was by definition a direct tax. According to Fiss, Fuller and the rest of the majority "saw the direct tax provision, like the social order itself, as a mechanism for reconciling the need to create power and the need to limit it." 213

Justice Brown offered one of his strongest opinions in dissent to the majority opinion in the *Pollock* case. Justice Brown recognized the Court's obligation to protect the public against abusive taxation, but he, along with the other three dissenters, "argued that the apportionment rule was overly cumbersome and a clumsy protection against a tyrannical use of the taxation power." 214 Justice Brown maintained that, "the rule of apportionment was adopted for a special and temporary purpose, that passed away with the existence of slavery." 215 As a result, Brown called the apportionment requirement burdensome. Brown's dissent recognized that Congress was responding to the social conditions that had made it necessary for the creation of the income tax. He claimed that it was foolish for the Court to stand in the way of Congress' ability to levy taxes because of an antiquated apportionment provision, whose applicability during the Gilded Age was minimal at best. Thus, Brown's opinion, unlike that of the majority's, reflected an understanding of society and its problems. As Fiss points out, the apportionment rule "protected against the wrong kind of tyranny because it protected against the victimization of political rather than economic groups…[which] meant that the Court did not address frontally and directly the egalitarianism of the 1894 statute, which, of course, was the point of the exercise."216

Justice Brown objected to the premise in Chief Justice Fuller's argument that the income tax was a direct tax. Justice Brown argued that a necessary condition for the tax to be considered a direct tax within the meaning of the Constitution was that it could be apportioned on the basis of population. If the tax could not be apportioned, then the tax could not be considered a direct tax within the meaning of the constitutional provision.

He then stated, “[I]f the proposed tax were such that in its nature it could not be apportioned according to population, it naturally follows that it could not have been considered a direct tax.” 217 He accepted the argument that the income tax was a tax upon the property itself, but he argued that a tax on property does not in and of itself mean that the tax is a direct tax and thus subject to the apportionment rule. Justice Brown announced, “Being of the opinion that a tax upon rents is an indirect tax upon lands, I am driven to the conclusion that the tax in question is valid.” 218

Justice Brown further argued that if the Congress were to apportion the income tax based on population, the income tax would impose gross inequalities in society, which would cause popular unrest, a situation that greatly concerned Justice Brown. He wrote that apportionment of an income tax “would be so monstrous that the entire public would cry out against it. Indeed reduced to its last analysis, it imposes the same tax upon the laborer that it does upon the millionaire.” 219 Justice Brown's dissent called attention to the “flawed conceptions of equality and political power,” 220 that were inherent in the apportionment rule in regard to the income tax because “Under the apportionment rule the [income] tax burden would be equal, even though the tax bill would be a much greater burden on the citizens of the poor state relative to their wealth.” 221

Justice Brown also took issue with the practical limitations that the opinion of the Court placed on Congress. He argued that Chief Justice Fuller's opinion handicapped Congress and put the nation in peril because Congress was now limited in its capacity to raise revenues. In his opinion he explains, “It is certainly a strange commentary upon the constitution of the United States and upon a democratic government that congress has no power to lay a tax which is one of the main sources of revenue of nearly every civilized state.” 222 Justice Brown pointed out that Congress had used the income tax during the Civil War as a means to provide revenue for the national government to cover the costs of fighting the war. Justice Brown claimed that “so long as [the taxation] power is not wantonly abused, the courts are bound respect it.” 223 To Justice Brown, it seemed imprudent to restrict an efficient method for Congress to raise funds, especially when that method had proved to be crucial some thirty years earlier during a time of national crisis. Brown wrote, “My fear is that in some moment of national peril this decision will rise up

to frustrate [Congress'] will and paralyze its arm." 224 He went on to state, "I cannot escape the conviction that the decision of the court in this great case is fraught with immeasurable danger to the future of the country, and that it approaches the proportions of a national calamity." 225

Justice Brown not only thought that the majority opinion amounted to a "national calamity," because it restricted Congress' ability to raise funds during times of emergency, but also heightened the potential for class conflict in society. More than anything else, Justice Brown feared the possibility of class conflict. The Civil War had left the country with great wounds that were still sources of tension in the last decade of the nineteenth century and in the first decade of the twentieth century. In addition to the fears created by the Civil War, the early 1890s saw several devastating labor strikes, all of which alluded to the growing wealth inequalities in America that jeopardized peace and tranquility in society. For example, in 1894 Eugene V. Debs led the American Railway Union on strike against the Pullman Car Company. The strike paralyzed commerce in Chicago and threatened to destabilize the national economy. Just two years before the Pullman Strike, the steel mill workers at Homestead , Pennsylvania went on strike against Andrew Carnegie. The strike turned into a bloody conflict between the strikers and Pinkerton guards, in which sixteen people were killed. The entire country was aware of the strike and its "legacy of intense bitterness." 226 The strikes during the 1890s were illustrative of the social unrest that existed in society, which created anxiety in the population about class conflict. As Horwitz writes, "During the 1890s, the sense of crisis spread as the long depression of 1893-1897 and a series of major strikes from Homestead to Pullman moved the country to levels of internal strife that revived memories, perhaps exaggerated, of the Civil War." 227 Consequently, Justice Brown pronounced in his *Pollock* dissent, "I hope [the Court's decision] may not prove the first step toward the submergence of the liberties of the people in a sordid despotism of wealth." 228 In light of social circumstances Justice Brown claimed that, "the [*Pollock*] decision involves nothing less than a surrender of the taxing power to the moneyed class." 229

Justice Brown's dissent was the antithesis of classical legal thought, as he considered

social justifications for the income tax, and expanded his reasoning beyond the strict rules of legal interpretation. Justice Brown agreed with Chief Justice Fuller that the income tax was a tax on property, but while Fuller and the rest of the majority took that to mean that the tax was a direct tax and had to be apportioned, Justice Brown employed a broader interpretation of the meaning of a direct tax, and as a result found the apportionment rule to be inapplicable. Justice Brown declared, “Respect for the constitution will not be inspired by a narrow and technical construction which shall limit or impair the necessary powers of Congress.” 230 A major difference between Brown and Fuller was that Brown's dissent made the rules of law fit the case, whereas Fuller's opinion made the case fit the rules of law. In addition, Justice Brown was willing to consider facts that were outside of traditional legal interpretation, such as the ability of Congress to respond in times of financial crisis, class inequality, and social tensions. Brown sought to prevent situations in which conflict could erupt, and in terms of the income tax, Justice Brown saw the Court's decision as potentially exacerbating social tensions rather than ameliorating the anxiety that existed in society due to the recent conflicts that had erupted and the growing disparities in wealth. 231

Another prominent source of tension during the Gilded Age was race. The growth of industry and the appearance of the railroads attracted immigrants from across the world to America , as economic growth was a magnet for immigration. The Chinese and the Irish immigrated to the United States in droves to work on the railroads, in mines, and in factories. Ellis Island in New York became the famous port of entry for immigrants in search of a better life in America . Immigrants were often desperate to find work, and would agree to work for extremely low wages. Consequently, they began to replace the more expensive American workers, which caused the American workers to resent immigrants.

While immigration caused new racial hostilities, old prejudices against African-Americans remained prevalent, and the influx of new ethnicities only strengthened stereotypes and racial animosity. The Gilded Age was the period when Jim Crow laws, lynching, and the Ku Klux Klan emerged. While African-Americans were no longer slaves, society refused to treat them as equals to white men. In the South, the so-called

Jim Crow laws were passed to stop blacks from doing such things as voting, attending the same schools as whites, and traveling in the same train cars as whites.

Soon after Reconstruction ended, southern states began creating segregation laws that were designed to separate blacks and whites in just about every aspect of life. The Fourteenth Amendment, which was ratified in 1868, guaranteed to everyone the right to due process and the equal protection of the laws. Consequently, segregation laws were challenged on the basis that they violated both the due process and equal protection clauses of the Fourteenth Amendment. In 1892, Homer Plessy, who was seven-eights Caucasian, was removed for sitting in a “whites only” car for being “colored.” When he refused to move, Plessy was arrested under the Louisiana Separate Cars Act of 1890. The case was a test case. The Citizens' Committee to Test the Constitutionality of the Separate Car Law and local officials worked in coordination with each other to test the constitutionality of the Louisiana law. The Citizens' Committee had two goals: they wanted to overturn the train car segregation laws, and they wanted to illustrate the arbitrariness of racial classifications in society. Plessy, being seven eights Caucasian, was the perfect example, as he appeared entirely Caucasian, and without prior knowledge of the fact, it was impossible to tell that he was one eighth black.

Plessy v. *Ferguson* has become one of the most infamous decisions in U.S. Supreme Court history, and has come to define Justice Brown's legacy as a Supreme Court justice. 232 Conventional interpretations of Justice Brown's opinion in *Plessy* v. *Ferguson* suggest that his decision was motivated by racist feelings that were prevalent during the late nineteenth century. For example, Richard Kluger writes, “To write [the opinion in *Plessy*], Chief Justice Fuller chose one of the Court's dimmer lights, … Henry Billings Brown.” 233 Kluger continues, “Brown was thoroughly grounded in federal law and procedures… his guy wires were fastened to unadorned, conservative, Anglo-Saxon, Protestant, white, middle-class values that were probably close to the national consensus as a computer might have determined it.” 234 *Plessy* v. *Ferguson* is the best example of Justice Brown's reliance on classical legal thought precepts. It is the opinion of the author that Justice Brown was assigned the decision because the issue of train transportation was seen as comparable to transportation in his former specialty, admiralty. If that is indeed

the reason why Justice Brown was assigned the decision, that may help to explain why Justice Brown took a formalistic approach, because admiralty law was rather mechanical.

Scholars have stated that *Plessy* v. *Ferguson* stands as archetypical of classical legal thought. For example, William Wiecek writes that the case "joined the other grotesqueries of the decade in its distance from reality and in the harm caused by the imposition of thought-structures on varied economic and social relations." 235 Furthermore, as William Nelson points out, " *Plessy* appears as the quintessentially racist case to those of us raised on the progressivism of *Brown v. Board of Education* ." 236 It is true that the argumentation and reasoning used in *Plessy* is typical of classical legal thought, but Justice Brown arrived at his conclusion in *Plessy* not because of his commitment to classical legal reasoning, but because of his understanding of society and the tensions which existed in society at the time. Consequently, Justice Brown's reasoning was more in line in with progressive legal thought than it was with classical legal thought. Nelson explains, "The opinion of the Court, by Justice Henry Billings Brown, was not racist in tone; rather it was legalistic in style, relying chiefly on precedent and analogy to sustain its results." 237 Nelson adds, "Until the analogy and the precedents on which the Court's opinion are based are examined, the values that were in tension in the case and the manner in which the tension was resolved cannot be appreciated." 238

There were two questions presented to the Supreme Court in *Plessy* v. *Ferguson* . The first question was whether the separate car requirement violated the Thirteenth Amendment's prohibition of slavery. The second was whether the act abridged the due process clause of the Fourteenth Amendment by depriving Plessy of liberty and his property, meaning his reputation as a white man. In the end, the case hinged on whether the statute was a valid exercise of the police power of the state such that it was designed to protect the health, wellbeing, and morality of those in society.

Justice Brown's decision in *Plessy* v. *Ferguson* followed the traditional logic that had been applied to cases concerning state police powers. In the decision, Justice Brown held that the petitioner's attorney failed to demonstrate how the act constituted slavery, and that Plessy had not been deprived of his property since he was not entitled to the legal

status of a “white man” under Louisiana law. The definition of “white” was a matter left entirely to the states. Justice Brown wrote, “If he be a white man and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so called property [i.e. his reputation]. Upon the other hand, if he be a colored man and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man.” 239 As a result, he found the Louisiana statute to be a valid exercise of the police powers of the state. Justice Brown relied heavily on school segregation precedent to reach his conclusions as both state and federal courts had held school segregation to be within the constitutional purview of state legislatures. In the school segregation cases, the courts had recognized the legitimacy of the argument that white parents ought to be able to choose with whom their children were associating in school. However, courts also recognized that black children had the right to access to an equal education. Thus, the issue in the school segregation cases became one of balancing freedom of association as protected by the First Amendment with racial equality as protected by the Fourteenth Amendment. Justice Brown believed that the issues involved in *Plessy* mirrored those in school segregation cases. Accordingly, Brown drew the same conclusion as previous Courts had drawn in the school segregation cases. In the decision, Brown implicitly tried to balance racial equality and whites' freedom of association by validating portions of both arguments, but that ultimately left unresolved the issue of whether freedom of association or racial equality was most important. As William Nelson notes, “The nation values the right of blacks to equality, but it also values the competing right of freedom of association. Americans in 1866, in 1896, and today have persistently refused to determine which right they value more.” 240

The school segregation cases were not the only body of precedent that guided Justice Brown in his findings in *Plessy* . The *Civil Rights Cases* of 1883 was controlling precedent. 241 In the *Civil Rights Cases* , the Court had held that the authority to regulate relationships between citizens was the business of state governments, meaning “[T]here seemed little doubt that it was within the powers of the states to decide whether they wished to have [an equal accommodations statute] or, more realistically, its very opposite.” 242 Fiss writes, “Thus, while *Plessy* may have been a test case, the *Civil Rights Cases* rendered its outcome a foregone conclusion.” 243 The *Civil Rights Cases*

made *Plessy* a relatively insignificant decision at the time it was decided. It was not look upon as a turning point in race relations, as it is today. The *Civil Rights Cases* was the defining moment for race relations during the Gilded Age.

A point of contention between Justice Brown and the lone dissenter, Justice Harlan, was over the intended purpose of the Louisiana statute. A passage from Brown's opinion, which is often cited by scholars to show Brown's lack of tact and his legalistic approach, reads, “[T]he assumption [is] that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.” 244 Justice Brown contended that the purpose of the statute was not to make one race subservient to the other, and “Brown's point was not to suggest… that the perception by blacks of Jim Crow as an insult would be unfounded or gratuitous, but only that racial degradation or the maintenance of white supremacy was not the purpose or the end of the statute.” 245 According to Fiss, “Brown hypothesized a much more benign purpose for the statute, one that presumably did not transgress the principle of equal treatment.” 246 Although Justice Brown did not explicitly state in his opinion what he thought the purpose of the statute was, he did indicate that the separation of blacks and whites was acceptable if it helped avoid confrontation between the two racial classes. Justice Brown wrote, “In determining the question of reasonableness, [a state legislature] is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order.” 247 Thus, in *Plessy* v. *Ferguson* , it is foreseeable that Justice Brown saw the Louisiana statute as a way for the state to protect against the possibility of racial tensions boiling over into violent confrontation, and explains why Justice Brown saw the law was a justifiable exercise of the state police powers. 248

In 1910, four years after retiring from the Supreme Court, Justice Brown gave a speech against women's suffrage to the Ladies' Congressional Club of Washington, D.C. In his speech, Justice Brown referenced the problems that arose in response to the extension of voting rights to blacks to make his point that the extension of the right to vote to women would be ill advised. He stated, “While in the North, where the colored vote is small, no

great harm has resulted, the [Fifteenth] amendment has been generally disregarded in the South, and a serious attempt to enforce it by the military arm, if persisted in, would probably have resulted in another civil war." 249 His depiction of the unenforceability of law in southern society sheds light on the *Plessy* decision. Given his statement in 1910, it is entirely possible that Justice Brown took a pragmatic approach to whether the separate train car law was a deprivation of liberty. He may have decided to hold the law constitutional because he believed that the South would ignore the Court's decision if it found segregation unconstitutional, which would have destroyed the Court's legitimacy. Thus, Justice Brown found a way to hold the statute constitutional, and is an explanation for the decision's legalistic tone. In an ideal world, Justice Brown reasoned, separation had no effect on equality and this made it possible for facilities to be separate but equal. However, Justice Brown avoided the normative question of whether forced separation itself was just. Therefore, it is reasonable to believe that Justice Brown saw segregation as a necessary means to protect against conflict in the south, such as that which might erupt between blacks and whites by allowing the state to separate the races. In a letter to Charles Kent, Brown wrote, "My experience has taught me that the natural position of two [races] toward each other is one of hostility, to which there are very few exceptions." 250

This begs the question of whether Brown's decision reflected a belief in white superiority and whether Brown was a racist. Some scholars have argued that Brown's opinion in *Plessy* reflected Spencer's social Darwinism, and point to the passage, "Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences," as evidence. 251 They equate Brown's reasoning with the prevalent racism of the Gilded Age. However, a closer reading of Brown's reasoning shows that his decision had nothing to do with his feelings towards racial minorities. Brown did not harbor any ill will toward blacks, and his opinion was not an attempt to subjugate them. 252 He believed that it was entirely possible both to keep the races separate and to have equality. Brown envisioned that the two races would exist independently of each other, which would eliminate racial antagonism. His assumptions about racial separation were neither novel nor extreme. Booker T. Washington, an educated outspoken Black leader during the Gilded Age, asserted in 1895, "In all things that are purely social [Blacks and

Whites] can be as separate as the fingers, yet one as the hand in all things essential to mutual progress." 253 Brown's argument rested on the belief that the Court could not force social equality, and if it tried, it would "only result in accentuating the difficulties of the present situation." 254 He added, "I know nothing more ineradicable than racial antipathy, except, perhaps, national antipathy." 255

Brown had regrets about his decision in *Plessy* , which he wrote about after his retirement from the bench. He came to recognize as Justice Harlan had pointed out that the Louisiana law was designed to protect blacks from the hostility of whites, but was to keep blacks from associating with whites. Brown explained, "[T]he statute had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied or assigned to white persons." 256 Brown, in reflecting on the decision could not help feeling that the Court had sacrificed the spirit of the Reconstruction Amendments to the letter of the law by failing to "secure the equality of the two races in all places affected with a public interest." 257

Brown's reflection shows that he did not consider blacks to be inherently inferior to whites or that the appropriate function of the law was to elevate whites at the expense of blacks. Brown's statement about the inability of legislation to force the social equality of the races indicated Brown's awareness of southern culture. He believed that trying to force southern society to accept racial equality would only exacerbate racial tension and add to the failure of Reconstruction. Brown thought that racial separation was the most innocuous way of avoiding racial conflict in the South, which is why he argued that the law was "reasonable." However, Brown's error was in inferring that the state's goals matched his own; he did not appreciate the motives of those who passed the statute. Still, Brown never displayed contempt for blacks. His Anglo-Saxon protestant rhetoric in his memoir has convinced some scholars that he felt whites were genetically superior to other races, but he never explicitly manifested those views. If he were so dedicated to the notion that whites were superior to other races, it is a wonder why Brown insisted on political equality. If he believed in social Darwinism, it seems more likely that he would have adopted an Aristotelian definition of equality of treating equals equally and unequals unequally. However, Brown was not a racist. His opinion was not based on the

premise that whites were superior to blacks, which necessitated separation. Rather, his decision was based on a misreading of the purpose of the Louisiana law, because he thought the law was designed to ease racial hostility in the south. Brown held out the possibility of social equality, but thought it was best achieved if it were based on "a mutual appreciation of each other's merits, and a voluntary consent of individuals," not through "an enforced commingling of the two races." 258 Brown was not alone in this view. Booker T. Washington explained, "The wisest among my race understand that the agitation of questions of social equality is the extremest [sic] folly, and that progress in the enjoyment of all the privileges that will come to us must be the result of severe and constant struggle rather than of artificial forcing." 259

Labor was arguably the greatest source of anxiety for people living in the Gilded Age. In a commencement address at Yale University Law School in 1895, Justice Brown acknowledged that, "[T]he signs of the material development and prosperity of the country were never more auspicious than at present, it is not to be denied that the tendencies of the past thirty years… have produced a state of social unrest which augurs ill for its future tranquility." 260 Initially, workers received little public sympathy, but as reformers like Jane Addams, Mother Jones, and Lewis Hines emphasized the plight of the laboring class and the poor, the American public began to recognize that labor, health, and safety regulations were imperative in an industrialized society. State legislatures soon began passing laws designed to improve the working environment. For example, states began to limit the number of hours laborers could work per day. Statutes were also created to regulate the type of labor that children and women could perform. These laws were passed under the police powers of the state, with the intention of improving the health, security, and well being of the members of society. However, as states increasingly invoked their police powers to justify legislation, questions arose as to the limits of the police powers of the states.

In 1898, the Court gave its first decision on the issue of police powers and labor legislation in the case of *Holden* v. *Hardy* , which involved a Utah state statute capping the number of hours miners and smelters could work to either eight hours per day or forty hours per week. 261 Justice Brown wrote the opinion of the court and held that the Utah

statue was a valid exercise of the police powers. He argued that the right to enter into contracts was subject to certain limitations which the state could deem necessary for the health, safety, and morality of its citizenry. The petitioners in *Holden* challenged the statute as a violation of the due process, equal protection, and privileges and immunities clauses of the Fourteenth Amendment. They argued that state interference in the private negotiations between laborers and capitalists over labor hours constituted a deprivation of liberty and property because the interference infringed on an individual's self-autonomy. In addressing the Fourteenth Amendment claim, Justice Brown relied on the Court's traditional test of police power constitutionality. If the legislation promoted one class of citizens for its own sake or at the expense of another, the legislation was unconstitutional, that is unless the state could show that its objective was for the promotion of health, safety, or morality. Justice Brown asserted, “The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression, or spoliation of a particular class.” 262

The validity test in *Holden* was seemingly a question of whether the statute was “reasonable,” but reasonable to whom? Brown founded his decision on what he personally thought the purpose of the law was, which was not necessarily the purpose the state legislature intended, as was shown in *Plessy* . However in *Holden* , Brown's interpretation of the purpose matched that of the state, as both saw the legislation as designed to improve the health of the community. In the case, Brown began his inquiry into the question of reasonableness by determining whether the law increased the chances of civil strife. On the whole, Brown had few qualms about giving great discretion to the state legislatures to deal with the social problems that existed in society. He was of the belief that the states were best able to deal with the social ills that had arisen in response to the industrial revolution. He saw it as the national government's role to ensure free competition, and it was the Court's role was to prevent disputes from erupting into conflict. Thus, Brown understood reasonableness as a question of whether the law contributed to the “oppression, or spoliation of a particular class,” which were the reasons for social conflict in his mind. He once wrote, “Underlying… conflicts between the different classes of society, whatever shape they take, is the desire of one class to better

itself at the expense of the other." 263 Thus, Brown's holding in *Holden* hinged on a concern for class conflict, and for Brown, the question of whether the law improved the welfare of the community was of secondary concern.

In both *Pollock* and *Plessy* , Justice Brown first looked to see if there was a possibility of social conflict. When the dispute showed that potential to boil over into conflict, Justice Brown expanded his opinion to take into account factors that were normally beyond classical legal thought. Brown used social circumstances to validate his legal conclusions, not legal theory. For example, in *Plessy* , Brown stated that it would be inappropriate for the law to force blacks and whites to commingle. He claimed that if the Court were to do that, it would only exacerbate the tensions in the South. In making this point, Brown was analyzing the state of affairs in the South, and accounting for circumstances that were beyond the rules of law. He was in fact acknowledging that the political climate had an influence on the law. Coming to a decision was not strictly a process of adhering to the rules of law for Brown; in his mind he had to balance competing political, social, and financial interests to ensure stability in society. It was the only way Brown could make sense of the constant change that was going on around him. Change itself, however, was not a problem. It was the possibility of catastrophic social conflict arising out of change that concerned him. He stated, "There is a large class of people in our country who love change for the sake of change, or who think they may profit by it individually. These ideas are a perpetual source of trouble." 264

In *Holden* , he saw the possibility of social conflict arising out of the inequalities that existed between laborers and capitalists. He maintained that if the Utah statute was designed with the exclusive purpose of benefiting just one class, then there was a higher probability of social unrest, especially given the recent history of violent strikes during the 1890s. However, Justice Brown felt that the statute did not aim to elevate one class of citizens above, or at the expense of, another class; it was instead designed to protect the health of laborers. Justice Brown maintained that the Utah statue was concerned with health, and its purpose was not "simply to intervene in the competition among social groups on behalf of favored classes." 265 Furthermore, the law did not exacerbate social strife, but in some ways sought to ameliorate it because it limited what corporations could

demand from laborers. Corporations could no longer force laborers, under the guise of free negotiations, to agree to work longer hours in harmful conditions. As Howard Gillman writes, " *Holden* stood for the proposition that the police powers could be used not only to promote the general well-being of the community but also the specific physical well-being of a class of workers who were not in a position to make contracts favorable to their health and safety." 266

Justice Brown's opinion departed from classical legal thought in its acknowledgement of the inequalities that existed between laborers and capitalists. In his opinion, Justice Brown wrote, "[T]he fact that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself." 267 In another example of his departure from classical legal thought, Justice Brown argued that the law was "a progressive science," such that "while the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation." 268 He added, "the Constitution of the United States … should not be so construed as to deprive the States of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare."269 Thus, his conclusion that the legislation was a valid exercise of state police powers was recognition of the social situation that necessitated the legislation. It was possible to accept the limitations that the Utah legislature placed on contractual agreements because he appreciated the social environment to which the state legislature was responding. Justices Brewer and Peckham ignored the social factors, which is why they dissented from Justice Brown's opinion. Gilman writes, "The dissenters' position, like the position of some state court judges, was that traditional police powers jurisprudence required the Court to draw sharp distinctions between laws designed to promote the community's well-being and the laws designed to promote the well-being of a particular class." 270 The dissenters took a limited view of the legislation and quickly condemned it as class legislation without realizing its true purpose.

Justice Brown's argument in *Holden* reflected progressive strains of thought in holding that the law was a progressive science and that constitutional interpretation was flexible

with time. However, Justice Brown's reasoning did not fully amount to progressive legal thought. Progressives wanted to reform society, but that was not Brown's intention. For instance, he argued that there was nothing “unnatural or undesirable” about the unequal distribution of property in society. 271 Brown saw himself as maintaining the equilibrium in society, making sure that no one group could dominate another. He was not interested in restructuring relations between laborers and capitalists. In *Holden* , the question was whether the statute elevated laborers at the expense of capitalists, in which case for Brown the law would have raised the specter of class conflict, or whether it was designed to improve the well being of society and thus create social stability. Brown saw the statute in question as designed to protect the health, safety, and morality of the public, which he thought would help improve labor relations. He interpreted the legislature's action as an attempt to care for the public's welfare and to make life in the mining towns more harmonious. Harmonious life, he believed reduced the chances of conflict. As a result, Brown thought the legislation was a reasonable exercise of the state police powers. It is entirely possible that the Utah legislature passed the law in order to improve the status of workers in relation to capitalists, but that was not Brown's finding. Once he saw the potential stabilizing effect of the law, he realized that the law did not threaten society in the way that class legislation did. Consequently, he reasoned that the law was not class legislation.

Justice Brown's opinion in *Holden* allowed state legislatures greater discretion to pass legislation that was designed to protect the welfare of society. It permitted them to enact laws that benefited just one class of people. However, Brown argued that laws which benefit one class deserve intense scrutiny by the courts to ensure that they are not intended to bestow privilege or favor on one segment of the population, but are in fact designed to ensure stability.

Justice Brown's reasoning in *Holden* was distinct from progressive legal thought. Brown exemplified his pragmatic approach to legal interpretation when he announced, “[I]f it be within the power of a legislature to adopt such means for the protection of the lives of its citizens, it is difficult to see why precaution may not also be adopted for the protection of their health and morals. It is as much for the interest of the State that the public health

should be preserved as that life should be made secure." 272 Brown did not argue that inequality between laborers and capitalists in the negotiating process by itself legitimized the legislation; it was the tension in society that arose as a result of the inequalities that necessitated the legislation. The inequalities that Justice Brown recognized in his opinion were meant to establish that laborers do not always act in their own health interests, which Brown believed could lead to greater tensions in society if miners blamed their poor health on the coercive power of the proprietors. Consequently, the state was justified in passing the legislation to prevent these feelings, and to try to improve the strained social relations. If Justice Brown had approached the case using progressive legal thought, he would have upheld the legislation because he recognized that inequalities between laborers and capitalists existed which gave the government the prerogative to intervene to balance out those inequalities. Instead, Justice Brown pragmatically argued that it was not the inequalities per se that justified the legislation; it was the protection of health that validated the maximum hours limitation, because overall health had a direct effect on social stability. 273

Interestingly enough, both *Plessy* and *Holden* were neither highly publicized nor publicly scrutinized decisions at the time they were decided. For example, "Nowhere in the nation was [*Plessy* v. *Ferguson*] front page news. The major northern newspapers gave it only the most cursory attention, treating it as page seven railway news." 274 Fiss adds, "The major southern newspapers were more attentive; so were the newspapers of the black community, but even they did not depict [the decision] as a constitutional turning point in the history of race relations." 275 However, in 1901 Justice Brown wrote the opinion of the Court in *Downes* v. *Bidwell* , which involved imperialism during the Gilded Age. 276 As a result, his opinion in the case became one of the most scrutinized decisions during the Fuller Court era.

In 1893, Fredrick Jackson Turner wrote his famous thesis on the closing of the American frontier. The closing of the frontier meant that "there was no longer any discernable demarcation between frontier and settlement… [W]estward expansion was now complete. Manifest Destiny had been fulfilled." 277 Turner argued that the frontier was a defining characteristic of American culture and identity. He wrote, "The existence of an

area of free land, its continuous recession, and the advance of American settlement westward, explain American development." 278 As the American public came to realize that the frontier no longer existed, anxiety began to grow because the frontier has been a safety value for Americans who were looking for a fresh start in the west. As a result, Americans became concerned about the future of the country. In addition, the closing of the frontier indicated that America 's natural resources were limited, especially land. At the same time that the frontier was closing in America , European powers, particularly France and Great Britain , were strengthening their colonial empires. Consequently, imperialist sentiments in America developed and intensified throughout the 1890s. Nell Painter explains, "For many Americans, expansion was the inevitable result of the machine age that had already filled up the continental United States and now seemed to demand the raw materials and foreign markets that overseas colonies promised. The vision of factories running nonstop and workers employed without interruption made… annexation straightforward and persuasive." 279 In 1898, the United States went to war against Spain , and within one hundred days the United States had defeated Spain and acquired the territories of Puerto Rico, the Philippines , Guam, and Hawaii . However, with the acquisition of the territories came questions about the rights and privileges of the territories. The task of answering those questions fell to Justice Brown and the rest of the Fuller Court at the turn of the twentieth century.

Downes v. *Bidwell* stood at the core of the *Insular Cases* , all of which involved questions about the applicability of the provisions of the Constitution to the U.S. territories that had been gained in the Spanish-American War. *Downes* was "the principle insular case… [It] posed the issue of empire in its most salient form and fully revealed the divisions in the Court." 280 The specific issue in *Downes* v. *Bidwell* was whether Congress could apply a duty to goods brought from Puerto Rico, a U.S. territory. Article I, Section 8 of the U.S. Constitution, which is better known as the revenue clauses, requires that "all duties, imposts, and excises… be uniform throughout the United States ." 281 Thus the duty that Congress imposed on goods brought from Puerto Rico could not have been laid on goods produced by the states. Hence, the question presented to the Court was whether the revenue clauses applied to the territories. Justice Brown held that they did not pertain to the territories because Congress had not specifically extended those clauses to the

territories. Justice Brown argued that the privileges in the Constitution only became applicable to the territories when Congress extended those privileges to the territories. Brown maintained that while Puerto Rico was subject to the jurisdiction of the United States , it was not entitled to the same privileges that states were guaranteed solely because it was within American jurisdiction. Brown wrote the majority opinion in *Downes* , but none of his brethren joined in his opinion. The case was decided on a five to four margin with Justices Gray and White each writing separate concurring opinions. The other two justices in the majority besides Brown joined in Justice White's opinion, thus leaving Justice Brown as the only supporter of the opinion of the Court.

Justice Brown's argument was premised on the belief that territories were separate and distinct from states. While the territories were subject to the jurisdiction of the United States , they were “not of the United States .” 282 Referencing the Constitution, the Articles of Confederation, and the former territorial governments in the northwest, Justice Brown argued that, “it can nowhere be inferred that the territories were considered a part of the United States .” 283For example, Justice Brown used both the Thirteenth and Fourteenth Amendments to establish that there were places where the United States had jurisdiction, but were not considered to be states within the meaning of the Constitution. Consequently, the provisions of the Constitution were not necessarily applicable to the territories because the Constitution was a compact created by the states. Justice Brown wrote, “[T]he Constitution deals with states, their people, and their representatives.” 284 As a result, the revenue clauses requiring imposts, duties, and excises to be uniform throughout the United States was only applicable to the states, not the territories. However, Justice Brown argued that the provisions of the Constitution could be made applicable to the territories through Congressional legislation, which meant that Justice Brown granted Congress enormous discretionary power over the territories for which he explained, “[T]he power over the territories is vested in Congress without limitation, and… this power has been considered the foundation upon which the territorial governments rest.” 285 Consequently, Justice Brown's approach to Constitutional application became known as “extension” because he argued that Congress had to extend the provisions of the Constitution to the territory before they became operational in the territory.

Justice Brown was not willing to grant Congress carte blanche power over the territories. There were certain rights upon which no government could infringe. Justice Brown suggested that there were two classes of constitutional provisions: “natural rights” and “artificial rights.” He announced, “We suggest… that there may be a distinction between certain natural rights enforced in the Constitution by prohibition against interference with them, and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence.” 286 The examples of natural rights that he gave are: “the right to one's own religious opinions… the right to personal liberty and individual property; to freedom of speech and of the press; [and] to free access to courts of justice.” 287 On the other hand, he claimed that “the rights to citizenship, to suffrage, and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence,” 288 were examples of abstract rights. Abstract rights were not universally granted rights because, according to Brown, they were not intrinsic to life, liberty, and property. They were creations of the American system of government, and were best characterized as privileges that were given to people. Brown saw natural rights as those that were common to all humanity regardless of the system of government, because they were inherent in the ideas of life, liberty, and property. 289 Brown argued that Congress had to respect people's natural rights in the territories, but had discretion over the abstract rights.

In *Downes* , Justice White's concurring opinion contended that Constitutional provisions applied immediately to the territory, once the territory was incorporated, not necessarily annexed, into the Union . Justice White's theory became known as “incorporation.” He differed with Justice Brown over whether the territories were part of the United States within the meaning of the Constitution. Brown believed there was a Constitutional distinction between being a state in the Union and a territory under the protection of the United States . Still, Justices White and Brown came to the same conclusion in *Downes* that the duty laid on goods brought from Puerto Rico was constitutional. White came to that holding because he argued that incorporation had to be done through Congressional legislation, not through the treaty making power of the executive branch, as had been the case with Puerto Rico . Brown maintained that Congress had not extended the Constitution to Puerto Rico . Thus, Justice White, unlike Justice Brown, actually believed

that the revenue clauses were applicable to the territories, consequently, “Mr. Justice White place[d] narrower limits to the power of Congress than Mr. Justice Brown.” 290

The Chief Justice dissented from the majority, a dissent that Justices Harlan, Brewer, and Peckham all joined. According to L. S. Rowe, “The [dissenting] opinion rests upon a strict interpretation of the provisions of the Constitution relating to the powers of Congress.” 291 The dissenters reflected classical legal thought as they based their opinion on “contractarianism.” 292 The dissenters failed to understand why it might be necessary to allow Congress greater freedom to deal with the territories. They assumed that the Constitution could be just as effective in governing the territories as it was in the United States . They did not appreciate differences in the social or cultural conditions in the territories, and the effect that might have on the governing process. Chief Justice Fuller wrote, “Congress has no existence and can exercise no authority outside of the Constitution… this nation is under the control of a written constitution, the supreme law of the land and the only source of the powers which our government, or any branch or officer of it, may exert at any time or at any place.” 293 Brown's pragmatic approach to legal interpretation accounted for the complexity of governing the territories. Thus, out of all nine members of the Court, Justice Brown was the only one who thought it was advantageous to give Congress extensive discretionary control over the territories.

Justice Brown did not want to handicap Congress in its dealings with the newly acquired territories. He felt that the normative question of whether America ought to have a colonial empire was a political question, and not one for the Courts to decide. He stated, “Political and intelligent men may differ widely as to the desirableness of this or that acquisition, but this is solely a political question. We can only consider this aspect of the case so far as to say that no construction of the Constitution should be adopted which would prevent Congress from considering each case upon its merits.” 294

Justice Brown recognized that political and social differences necessitated a large degree of discretion for Congress, because he wrote that, “If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible.” 295 For instance, the fact that natives in the

Philippines in 1898 continued to wage war against America after the Philippines had been transferred to American jurisdiction, indicated that Congress and the Executive branch needed broad powers to deal with the ongoing conflict. It seemed unreasonable in Brown's opinion to expect that applying the Constitution to a territory would automatically ensure stability. If the Civil War had taught judges anything, it was that strict adherence to the letter of the law would not, in and of itself, prevent conflict. It was only by allowing law to grow with society that conflict could be avoided. “If the views of the four dissenting Justices in the Downes case had prevailed, both Congress and the Executive would have found their hands tied in dealing with our new possessions in such a way as to make efficient government almost, if not quite, impossible.” 296 Thus, Justice Brown's opinion in *Downes* , as well as in *Pollock* , *Plessy* , and *Holden* demonstrated his pragmatic understanding of the law, as he was ever attentive to the possibility of social conflict, and was willing to expand his reasoning beyond the traditional rules of law to make the law fit society's demands.

Glennon writes, “Brown's decisions, on the whole, correspond to the changes occurring in the philosophy of law.” 297 Justice Brown was unabashed in his willingness to adapt the laws to social circumstances. He did not prescribe to the classical belief that law was removed from society. In fact, he believed quite the opposite and always attempted to justify his holdings with references to social conditions. Consequently, he recognized and appreciated the tensions and anxieties that existed in society during his fifteen-year tenure on the Supreme Court.

In his speech to the 1895 graduating class at Yale Law School , Justice Brown declared, “The reconciliation of… strife, if reconciliation be possible, is the greatest social problem which will confront you.” 298 Justice Brown, throughout his service as a judge dedicated himself to resolving conflict. The Gilded Age was plagued by conflict: it began in the aftermath of the Civil War; it encountered countless strikes, many of which disintegrated into violence; it saw the closing of the American frontier; racism was widespread and rampant; America became an imperial power; and the period saw the onset of World War One. Consequently, it is fitting that Justice Brown announced, “The history of civilized society is largely a story of strife between those who have and those who have not – between those who are ambitious to acquire more and those who are compelled by adverse circumstances to put up with less than they consider their proper share.” 299 Brown's statement was more than anything else a reflection of his own understanding of the great social, economic, and political tensions and tumults of the Gilded Age.

Conclusion

America during the Gilded Age experienced dramatic economic, social, and political change. That change created extraordinary social conflict, strife, and tension in society among powerful competing interests. Issues such as labor, taxation, race, and imperialism created new and difficult questions for the Supreme Court to answer. In addition, the broad philosophical language of the Reconstruction Amendments left many jurists feeling nervous and confused about the direction that law would take as the Country entered into the twentieth century.

During the Gilded Age, the country transformed from a rural agricultural society into an urban industrialized nation. As America transitioned into an industrialized society, the concepts of free land and free labor faded away, while wage labor grew to be the dominant form of employment. Americans were no longer self-sufficient producers, and a small group of capitalists seemed to control the American economy. The nation was obsessed with the idea of "progress." It desperately sought confirmation that the country was moving forward into the twentieth century in the right direction.

Justice Brown was realistic about the demands of a changing society. He appreciated the need for consistency in the law, but he believed that as the political, economic, and social environment progressed, the law had to evolve with it. Justice Brown played a crucial role in moving legal reasoning away from the abstract legal theories in classical legal thought and toward a pragmatic approach to resolving disputes in Gilded Age society. He did not confine his reasoning to classical or progressive legal thought. Brown had never been prone to philosophical thought, which helps to explain why he never fell into just one school of legal thought. Brown saw the intricacies of society, and tried to account for those in his opinions. His concern was with the stability of the government and the country. Whether it was labor, race, imperialism, or taxation, Brown attempted to maintain the often-tenuous balance that existed between the competing interests in society.

In each case, Brown sought to determine the sources of the dispute and tried to navigate

toward a solution that seemed to be both practical and just for Gilded Age society. He was interested in resolving disputes by dealing with the sources of the tension. Brown did not approach cases with the intention of fitting them into a specific legal theory. He believed that resolutions needed to correspond to the social circumstances that created the problem in the first place. Brown saw justice as the path to resolution, which was best for society at that time, not a theoretical notion. Consequently, Justice Brown was not reluctant, unlike classical legal theorists, to use social circumstances to arrive at his opinions. He stated, “I am not frightened at the charge of judicial legislation. Almost all decisions turning upon the construction of the Constitution or statutes involve necessarily a legislative element.” 300

Brown's expertise in admiralty and patent law were in part responsible for his pragmatic approach to legal reasoning. For example, the growth in technological innovation in the Gilded Age caused a corresponding evolution in patent law. As a result, Justice Brown was comfortable with the idea that new interpretations of the law would arise in order to fit new circumstances. Brown experienced first hand how the classical conception of landed property could no longer be used to determine property rights. In 1891, Justice Brown reasoned that the creation of barbed wire was a novel idea and warranted a patent. 301 It was not the attaching of the barbs to the wire that warranted the patent, according to Brown, it was the way in which the barbed wire was marketed to society that made it a novel idea and thus patentable.

Justice Brown's career exemplifies the unforeseen consequences of judicial decision-making. Some of the cases and issues that drew considerable attention in the Gilded Age are no longer seen as significant decisions today, and some of the cases that seemed rather routine or insignificant in the 1890s are now seen as constitutional and historical turning points. In addition, the meaning that has come to embody a case is not always what the author of the Court's opinion intended. *Plessy* v. *Ferguson* illustrates this quite clearly. Justice Brown readily believed at the time he gave his decision that it was entirely possible to separate the races and to still maintain equality. However, today, the case symbolizes racial segregation, and the validation of Jim Crow laws. Given Justice Brown's statement in 1912 that he had come to realize that the Louisiana law had its

purpose not in excluding whites from black railroad cars, but to keep blacks out of white railroad cars, it is questionable whether Justice Brown would have found the same way that he did if he had the opportunity to decide the case again. 302 Regardless, Brown will most likely always be remembered for the doctrine of “separate but equal,” and its impact on race relations in the United States .

Classical legal thought gained its greatest following during the Gilded Age as it gave people some consistency by claiming that the law was immune to the political and social changes that were transpiring in society around the turn of the twentieth century. Classical legal thought claimed to be the protector of the values, principles, and concepts that were fundamental to the American system of government by treating everyone equally and subjecting all parties to the same procedural standards. No class received special privilege or government favoritism. This idea had its roots in the founding era of America , as the abolishment of social distinction was an essential belief of the framers of the Constitution.

Classical legal thought argued that the law was a coherent body of precedent and rules, which could guide jurists to the right conclusion to a legal dispute. Classical legal thought suggested that despite social, political and economic changes in society, the law remained the same. It gave people comfort to know that some parts of society had not changed, and that they could rest assured that the country was still “on the right track.” Yet, the political, social, and economic advancements undermined some of the basic premises in classical legal thought. Its inflexibility made the theory seem like it was unable to deal with new social disputes that were arising in the aftermath of the Industrial Revolution. Classical legal thought did not appear to be able to cope with the social strife and the growing tensions in society. The social, political, and economic changes showed that justice was not just based on procedural equality, but that there was a substantive content to the laws that required jurists to account for the social, economic, and political disparities in society.

Progressive legal thought arose after the turn of the twentieth century. It was a response to the mechanical nature of classical legal thought. Progressive legal thought called into question the belief that individuals could freely negotiate contracts with employers.

Justice Holmes pointed out the logic of the law is based on experience, not on formal logical deductions from *a priori* principles. Progressive legal theorists sought to reform the legal system so as to put parties on equal footing and to recognize social, political, and economic inequalities. Progressives often came to policy-oriented conclusions that reflected a desire to counteract the social, political, and economic inequalities that existed. Progressive legal thought claimed that strict adherence to the letter of the law often sacrificed the spirit and the intent of a law.

Justice Brown was a bridge between these two legal theories. Brown took a pragmatic approach to legal reasoning. He sought to make the rules of law applicable to contemporary problems by giving them flexible interpretations. However, he did not believe that the principles of law were out of date with society; they just needed to be applied and interpreted in a more pragmatic fashion. Brown pointed out, “The spirit of legislation is found in the necessity calling for it, — in its probable operation and in the presumed intent of Congress.” 303

Brown believed that it was the job of the legislature to respond to the demands of society. It was not the Court's job to solve society's ills. The Court was there to ensure that society remained free and stable. He argued, “So long as we can be represented in legislative halls by upright and intelligent men who will stand for the most enlightened sentiment of their constituency, we may safely bid defiance to all…dangers.” 304

Justice Brown's jurisprudence helps to illustrate the transition from classical to progressive legal thought, and the dramatic changes that were transforming society during the Gilded Age. Brown recognized that changes were altering society, but by 1893 he thought that they had run their course. He stated, “[T]here are good reasons for believing that the era of these great fortunes is nearing its culmination, and that, with the more complete development of the country, they will cease to be a threatening danger.” 305 Brown believed that these changes were a natural outgrowth of social progress, and thus change itself was nothing to fear.

The transition from classical to progressive legal thought was not abrupt. The change happened as jurists began to realize that rights were social creations that reflected the

values, principles, and morals of society. The rapid social and economic reorganization that occurred during the Gilded Age highlighted logical deficiencies in classical legal thought and made it fully apparent to some that the law could no longer be based on an inflexible system of natural rights if the law was going to maintain its legitimacy in society. Justice Brown understood the need for flexible definitions to the rules of law, for he believed that inflexibility would stifle social, political, and economic development.

Justice Brown's career exemplifies the importance of individual choices that jurists are compelled to make. Each judicial decision has a potential, seen and unforeseeable, for dramatic impact on society. In recent decades the Supreme Court has become increasingly selective in determining what issues the Court will decide. During Justice Brown's tenure, the Fuller Court faced society-changing issues with which it had little experience, forcing the Court to articulate views on major social problems, often before legal thought on those problems had matured. 306

Supreme Court histories often begin by exploring the overall ideologies of the Court as a whole, and then interpret the individual justices according to that understanding of the Court's jurisprudence. This analytical method may obscure what was unique about the individual justices. The Gilded Age was not a period of consensus on the Court as the *Insular Cases* showed. The justices all approached cases differently. Brown was concerned with the stability of the government and ensuring that law was capable of dealing with the social strife that existed in society. He did not want a redistributive state, and he did not want people to believe that the law bestowed special privileges on certain classes of people. Much of the scholarship on Brown has tried to fit him into the conventional interpretation of the Fuller Court , or within the framework of classical legal thought. In doing so, scholars have over simplified Brown's reasoning, which diminishes the influence he had on the law and it hides the importance that individual choices have on society. Brown believed that Americans were a determined, strong, and resilient people. He wrote, “[W]hatever peril there may be in store for us, we may rest assured will be surmounted with the fortitude we have more than once displayed in our life as a nation.” 307 He added, “As a people we are unusually tolerant of grievances, but when they become unendurable, we have never failed to apply a sharp and decisive remedy.”

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Justice Brown was a product of his society. As a judge who tended to reflect popular sentiments, his written opinions are a means of achieving a deeper understanding of the Gilded Age. Justice Brown's judicial career sheds light on the tensions and conflicts that existed during this period. He sat on the Supreme Court at the apex of the Gilded Age, and formed opinions on some of the most pressing and complex issues facing society. There were numerous philosophical paths for Justice Brown to reach his conclusions, but, instead of using one of the more dominant forms of legal theory, he chose to rely on his pragmatic understanding of the social relationships of the Gilded Age to resolve legal disputes. The fact that Brown chose to be pragmatic in his approach to legal reasoning indicates that Brown had reservations about the effectiveness of the prevailing legal ideologies. It also demonstrated uneasiness about the future. He based his decisions on tangible observations not theoretical premises because he, like many other Americans, sought some comfort that the country was on the right path. Just months before he died, Brown wrote, “While we have doubtless troublous times ahead of us, I am still optimistic, and believe the country is in much less danger than it was in 1861, when I was inclined to pessimism. We have a happy way of getting into the tight spots, and then getting out of them.” 309

End Notes

PAPER 1

1. The Bentley Historical Library in Ann Arbor , Michigan is a historical library dedicated to the history of the state and of the University of Michigan . On its website, it publishes a list of historical figures for whom it has documents. Justice Brown was a lecturer at the University of Michigan for a period of time, and the library holds several pieces of his correspondence. However, the library does not recognize him as a U. S. Supreme Court Justice. In fact, it lists Justice Frank Murphy, who was appointed to the Court in 1940, as the first Supreme Court Justice from the state of Michigan .

2. Robert J. Glennon, Jr., “Justice Henry Billings Brown: Values in Tension,” 44 *University of Colorado Law Review* 553 (1973).

3. *Plessy* v. *Ferguson* , 163 U.S. 537 (1896).

4. See Owen M. Fiss, *Troubled Beginnings of the Modern State , 188-1910* (Oliver Wendell Holmes Devise History of the Supreme Court of the United States , vol. 8) New York : Macmillan, 1993. (Note: “The Fuller Court ” refers to era of Chief Justice Melville Fuller who presided over the Supreme Court during Brown's time on the bench.)

5. Works on the Fuller Court are by Owen Fiss, Morton Horwitz, William Nelson, Howard Gilman, and Michael Les Benedict.

6. Owen Fiss, “Re: Justice Henry Billings Brown.” e-mail to the author. 28 March 2004.

7. Daniel R. Ernst, “The Critical Tradition in the Writing of American Legal History,” 102 *Yale Law Journal* 4 (1993) p. 1022.

8. Glennon, 553.

9. Charles H. Butler, “Mr. Justice Brown,” 18 *The Green Bag* 6 (1906) p. 330.

10. The Gilded Age was the period that started with the end of the Reconstruction Era in 1877 and continuing to the beginning of World War I in 1914.

11. Jeffery D. Hockett, *New Deal Justice: The Constitutional Jurisprudence of Hugo L. Black, Felix, Frankfurter, and Robert H. Jackson* (Lanham: Rowman & Littlefield Publishers, 1996) p. 37-38.

12. Lawrence M. Friedman, *Law in America* (New York : Modern Library Chronicles, 2002) p. 9-10.

13. The sources of information for the first chapter come from the Bentley Historical Library in Ann Arbor , Michigan , the Burton Historical Collection in the Detroit Public Library, and the Library of Congress in Washington , D.C.

14. Sources of information for this chapter come from works by legal scholars including: Morton Horwitz, Owen Fiss, Howard Gillman, William Wiecek, Herbert Hovenkamp, and Michael Les Benedict.

15. Joel Goldfarb, “Henry Billings Brown,” *The Justices of the United States Supreme Court 1789-1969: Their Lives and Major Opinions* , vol. 2, Leon Friedman and Fred L. Israel, eds. (New York: Chelsea House Publishers, 1969) p. 1556.

Chapter 1: Character and Personality of Henry Billings Brown

16. The primary reference for the factual material in this chapter comes from Charles A. Kent, *Memoir of Henry Billings Brown: Late Justice of the Supreme Court of the United States* , (New York: Duffield & Company, 1915), but the author has also used Robert J. Glennon, Jr., "Justice Henry Billings Brown: Values in Tension," 44 *University of Colorado Law Review* 553 (1973).

17. Kent, 4.

18. Ibid.

19. Ibid., 1.

20. Ibid.

21. Ibid., 2-3

22. Ibid., 2.

23. Ibid., 34.

24. Ibid., 3.

25. Ibid., 3-4.

26. Ibid., 6.

27. Ibid.

28. Ibid., 5.

29. Ibid.

30. Ibid.

31. Ibid., 10.

32. Ibid., 35.

33. Ibid.

34. Ibid., 9-10.

35. Ibid., 34.

36. Ibid.

37. Ibid., 13.

38. Ibid., 18.

39. Glennon, 555.

40. Kent , 19.

41. Ibid., 20.

42. Henry Billings Brown, *Personal Diary of 1861* , Henry Billings Brown Papers, Burton Historical Collection, Detroit Public Library, Detroit , MI .

43. --, *Personal Diary of 1860* . Henry Billings Brown Papers, Burton Historical Collection.

44. Ibid.

45. Kent 47.

46. Ibid., 49.

47. Ibid., 53.

48. Ibid.

49. Ibid.

50. Ibid., 41.

51. Ibid., 20.

52. Ibid., 62.

53. Henry Billings Brown, *Personal Diary of 1862* , Henry Billings Brown Papers, Burton Historical Collection, Detroit Public Library, Detroit , MI .

54. --, *Personal Diary of 1863* , Henry Billings Brown Papers, Burton Historical Collection.

55. --, *Personal Diary of 1869* , Henry Billings Brown Papers, Burton Historical Collection.

56. Kent 21.

57. Ibid., 72.

58. Ibid., 72-73.

59. Ibid., 73.

60. Ibid, 21.

61. Ibid. (emphasis in original).

62. Ibid., 23.

63. Ibid.

64. Letter from Justice Brown to Charles A. Kent, May 9, 1899, Henry Billings Brown Papers, Burton Historical Collection.

65. Kent , 23.

66. Ibid., 74-75.

67. Ibid., 23.

68. Ibid., 22.

69. Ibid., 75.

70. Ibid.

71. Ibid., 76.

72. "New Supreme Justice," *The Washington Post* , Dec. 24, 1890, Pg. 4; Proquest Historical Newspapers, The Washington Post, 13 September 2004.

73. Ibid.

74. Kent 76.

75. U.S. District Court, Eastern District of Michigan, Southern Division, Detroit, General Records, Journals (Law Journals), 1837-1939, Vol. K., Pg.186, United States National Archives Great Lakes Region, Record Group 21, Records of the District Courts of the United States, Chicago.

76. Kent , 28.

77. Ibid., 30.

78. Ibid.

79. Letter from Justice William Day to Charles A. Kent, Nov. 15, 1913, Henry Billings Brown Papers, Burton Historical Collection. (Justice Day also added that in his opinion Justice Brown had one of the most attractive houses in Washington).

80. Kent , 77.

81. See personal correspondence in Henry Billings Brown Papers, Burton Historical Collection.

82. Letter from Justice William Day to Charles A. Kent, Nov. 15, 1913, Henry Billings Brown Papers, Burton Historical Collection.

83. Kent , 32.

84. Ibid.

85. Ibid., 80.

86. Letter from Justice Brown to Charles A. Kent, Aug. 2, 1901, Henry Billings Brown Papers, Burton Historical Collection.

87. Kent , 81.

88. Henry Billings Brown, "Dinner given May 31, 1906 by the Bar of the Supreme Court of the United States to Mr. Justice Henry Billings Brown upon his retirement from the bench of the Court." Willard Hotel (Washington, D.C.: W. F. Roberts Co, inc., 1906), pg 18, Burton Historical Collection.

89. Kent , 33.

90. "Henry B. Brown, Noted Jurist, Dies," *New York Times* , Sept. 5, 1913, Pg. 9; ProQuest Historical Newspapers, The New York Times (1851-2001), 21 January 2005.

91. Ibid.

92. Ibid.

93. Kent , 87.

94. Ibid.

95. Letter from Chauncey Depew to Charles A. Kent, Oct. 18, 1913, Henry Billings Brown Papers, Burton Historical Collection.

96. Kent , 82-83.

97. Ibid., 87.

98. Henry Billings Brown, "Dinner given May 31, 1906 by the Bar of the Supreme Court of the United States …," 18.

99. Ibid.

Chapter 2: Legal Philosophies in the Nineteenth and Early Twentieth Century

100. Owen M. Fiss, *Troubled Beginnings of the Modern State , 188-1910* (Oliver Wendell Holmes Devise History of the Supreme Court of the United States , vol. 8) New York : Macmillan, 1993, p. 3.

101. Edward M. Wise, "Henry Billings Brown," *The Court Legacy* , Vol. IV, No. 2, (Fall 1996) p 2.

102. Fiss, 12.

103. William M. Wiecek, *The Lost World of Classical Legal Thought: Law and Ideology in America 1886-1937* (New York: Oxford University Press, 1998) p. 65.

104. Section 1, Amendment XIV, The United States Constitution.

105. Michael Les Benedict, "Preserving Federalism: Reconstruction and the Waite Court ," *The Supreme Court Review* , Vol. 1978 (1978) p. 46.

106. Ibid., 51.

107. Ibid., 40.

108. William E. Nelson, *The Fourteenth Amendment* (Cambridge: Harvard University Press, 1988) p. 63.

109. Morton J. Horwitz, *Transformation of American Law, 1870-1960* (New York: Oxford University Press, 1992) p. 3-4.

110. Classical legal thought is also referred to as "legal orthodoxy," "legal formalism," or "classicalism," by legal scholars. The names are interchangeable.

111. Wiecek, *The Lost World of Classical Legal Thought: Law and Ideology in America 1886-1937* , p. 64.

112. Tom I. Romero II, "Re: Henry Billings Brown," e-mail to the author, 9 February 2005.

113. Horwitz, 9.

114. Roscoe Pound, "Mechanical Jurisprudence," 8 *Columbia Law Review* 605 (1908).

115. Horwitz, 199.

116. Daniel R. Ernst, "The Critical Tradition in the Writing of American Legal History," 102 *Yale Law Journal* 4 (1993) p. 1040.

117. Horwitz 15.

118. See Anthony Chase, "The Birth of the Modern Law School ," *The American Journal of Legal History* , Vol. 23, No. 4 (Oct., 1979), pp. 329-348.

119. Roscoe Pound, a prominent figure in the progressive attack on classical legal thought at the turn of the twentieth century, was a student at Harvard Law School during the 1880s, where he studied law using Langdell's casebook method.

120. Howard Gillman, *The Constitution Besieged* (Durham: Duke University Press, 1993) p. 35.

121. Ibid.

122. Michael Les Benedict, "Laissez-Faire and Liberty : A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism," *Law and History* , Vol. 3, No. 2 (Autumn, 1985).

123. Horwitz, 4.

124. Ibid., see pages 4 and 11.

125. William Weicek, *Liberty Under Law* (Baltimore: The Johns Hopkins Press, 1988) p. 111.

126. See Justice Bradley's dissent in the *Slaughterhouse Cases - The Butchers' Benevolent Association of New Orleans* v. *The Cresent City Live-Stock Landing and Slaughter-House Company* 83 U.S. 36 (1873). Also, see the *Milwaukee Road Case* of 1890- *Chicago, Milwaukee & St. Paul Ry. Co.* v.

Minnesota , 134 U.S. 418 (1890).

127. Horwitz, 163.

128. *The Butchers' Benevolent Association of New Orleans* v. *The Cresent City Live-Stock Landing and Slaughter-House Company* 83 U.S. 36 (1873).

129. Dual federalism treats the state and federal government as co-equals, in which each has its own sphere of authority. In the *Slaughterhouse Cases* , Justice Miller argued that people possessed two distinct citizenships: one being of United States , and the other being of the state in which one resides.

130. Benedict, "Preserving Federalism: Reconstruction and the Waite Court ," p. 70.

131. *The Butchers' Benevolent Association of New Orleans* v. *The Cresent City Live-Stock Landing and Slaughter-House Company* 83 U.S. 36, 79 (1873).

132. William M. Wiecek, *Liberty Under Law* (Baltimore: The Johns Hopkins Press, 1988) p. 95.

133. *Munn* v. *Illinois* , 94 U. S. 113 (1877).

134. Ibid., 126.

135. Ibid., 125.

136. Ibid., 124.

137. Ibid.; Ibid., 125.

138. *Civil Rights Cases* , 109 U. S. 3 (1883).

139. Nelson, 194.

140. 109 U.S. 3, 24 (1883).

141. Nelson, 195.

142. Ibid.

143. Ibid., 10.

144. Horwitz, 10.

145. William M. Wiecek, *The Lost World of Classical Legal Thought: Law and Ideology in America 1886-1937* (New York: Oxford University Press, 1998) p. 3.

146. Ibid., 11.

147. Ibid.

148. Ibid., 9.

149. Ibid.

150. Ibid., 87.

151. Ibid., 97.

152. Ibid.

153. Horwitz, 169.

154. Herbert Hovenkamp, "The Mind and Heart of Progressive Legal Thought," Presidential Lecture, The University of Iowa, 1995, 2 February 2005 <http://sdrc.lib.uiowa.edu/preslectures/hovenkamp95>.

155. Ibid.

156. William E. Forbath, "The Ambiguities of Free Labor: Labor and the Law in the Gilded Age," 1985 *Wisconsin Law Review* 767 (1985). p. 806.

157. Ibid.

158. Hovenkamp.

159. Ibid.

160. Ibid.

161. Ibid.

162. Ibid.

163. Ibid.

164. *Lochner* v. *New York* , 198 U.S. 45 (1905); Oliver Wendell Holmes, Jr. "The Path of the Law," 10 *Harvard Law Review* 457 (1897); --, *The Common Law* (Boston: Little, Brown, and Co., 1881).

165. Horwitz, 136.

166. Ibid.

167. Ibid., 219.

168. Roscoe Pound, "The Growth of Administrative Justice," 2 *Wisconsin Law Review* 321, 332 (1924).

169. Horwitz, 218.

170. Charles A. Kent, *Memoir of Henry Billings Brown: Late Justice of the Supreme Court of the United States* (New York: Duffield & Company, 1915), p. 76-77.

171. *Holden* v. *Hardy* , 169 U.S. 366, 367 (1898); Henry Billings Brown, "Dinner given May 31, 1906 by the Bar of the Supreme Court…," 21.

172. Ibid.

173. Ibid., 20-21.

174. Horwitz, 193.

175. Henry B. Brown, "The Distribution of Property," *Report of the Sixteenth Annual Meeting of the American Bar Association* (Philadelphia: Dando Printing and Publishing Company, 1893) p. 237.

176. *The Manitoba* , 16 F. Cas. 620 (1878); Ibid., 625.

177. *The Trenton* , 4 Fed. Rep. 657 (1880); Charles H. Butler, "Mr. Justice Brown," 18 *The Green Bag* 6 (1906), p. 323.

178. Robber Glennon, "Justice Henry Billings Brown: Values in Tension," 44 *University of Colorado Law Review* 553, 554 (1973).

179. *Plessy* v. *Ferguson* , 163 U.S. 537 (1896).

180. Marci Hamilton, "Justice Sandra Day O'Conner's Twenty Years on the Supreme Court," June 7, 2001, FindLaw, 4 February 2005 <http://writ.news.findlaw.com/hamilton/20010607.html>.

181. Glennon, 603.

182. Hamilton .

183. Gillman, 11.

184. Ibid.

185. Ibid.

186. Kent , 31.

187. Glennon, 554.

188. Ibid., 603-604.

189. Henry Billings Brown, "Dinner given May 31, 1906 by the Bar of the Supreme Court …," 19.

Chapter 3: The Pragmatic Approach

190. Progressive conclusions are those that were "consequentialist [and] policy-oriented." see Daniel R. Ernst, "The Critical Tradition in the Writing of American Legal History," 102 *Yale Law Journal* 4 (1993) p. 1021.

191. Henry Billings Brown, "Dinner given May 31, 1906 by the Bar of the Supreme Court of the United States to Mr. Justice Henry Billings Brown upon his retirement from the bench of the Court." Willard Hotel (Washington, D.C.: W. F. Roberts Co, inc., 1906), pg 19, Burton Historical Collection, Detroit Public Library, Detroit , MI .

192. Roscoe Pound, "Mechanical Jurisprudence," 8 *Columbia Law Review* 605 (1908).

193. Robber Glennon, "Justice Henry Billings Brown: Values in Tension," 44 *University of Colorado Law Review* 553 (1973).

194. Ibid., 576.

195. *Lochner* v. *New York* 198 U. S. 45 (1905).

196. Joel Goldfarb argues that many of the majority opinions that Brown joined were not reflective of his judicial opinions. He argues that Brown often joined the majority even if the Court's holding went against his better judgment, in order to prevent splits on the Court. "Brown himself dissented only when he felt it absolutely necessary. If there was any doubt in his mind concerning the propriety of a position, he voted with the majority even though on balance he might have come to a different result. Brown especially did all he could to avoid five to four decisions." See Joel Goldfarb, "Henry Billings Brown," *The Justices of the United States Supreme Court 1789-1969: Their*

Lives and Major Opinions , vol. 2, Leon Friedman and Fred L. Israel, eds. (New York: Chelsea House Publishers, 1969) p. 1557-1558.

197. Justice John Harlan, "Dinner given May 31, 1906 by the Bar of the Supreme Court …," 27.

198. Ibid.

199. Sean Cashman, *America in the Gilded Age: From the Death of Lincoln to the Rise of Theodore Roosevelt* (New York: New York University Press, 1993) p. 3-4.

200. Alan Trachtenberg, "The Machine as Deity and Demon," in *Major Problems in the Gilded Age and the Progressive Era* , ed. Leon Fink (Boston : Houghton Mifflin Company, 2001) p. 27.

201. Cashman, 102.

202. Leon Fink, "Class Consciousness American Style," in *Major Problems in the Gilded Age and the Progressive Era* , ed. Leon Fink (Boston : Houghton Mifflin Company, 2001) p. 35.

203. Trachtenberg, 28.

204. Owen M. Fiss, *Troubled Beginnings of the Modern State , 188-1910* (Oliver Wendell Holmes Devise History of the Supreme Court of the United States , vol. 8) New York : Macmillan, 1993, Fiss, p. 37.

205. Ibid., 45.

206. Statement that the majority of the Fuller Court justices were economically conservative comes from James W. Ely, Jr., *The Fuller Court : Justices, Rulings, and Legacy* (Santa Barbra: ABC-CLIO, 2003) p. xi.

207. Henry Billings Brown, "Distribution of Property," *Report of the Sixteenth Annual Meeting of the American Bar Association* (Philadelphia: Dando Printing and Publishing Company, 1893) p. 226.

208. Nell Irvin Painter, *Standing at Armageddon* (New York: W. W. Norton & Company, 1987) 126.

209. Ibid., 127.

210. *Pollock* v. *Farmers' Loan and Trust Company* , 158 U.S. 601 (1895).

211. Fiss, 91.

212. 158 U.S. 601, 632, internal quote is from the Dartmouth College Case, 4 U.S. 518, 644.

213. Fiss, 93.

214. Ibid.

215. 158 U.S. 601, 687.

216. Fiss, 94-95.

217. Brown explained, "I regard it as very clear that the clause requiring direct taxes to be apportioned to the population has no application to taxes which are not capable of apportionment according to population." 158 U.S. 601, 688.

218. Ibid., 693.

219. Ibid., 689.

220. Fiss, 93.

221. Ibid.

222. 158 U.S. 601, 695.

223. Ibid., 694.

224. Ibid., 695.

225. Ibid.

226. Painter, 114.

227. Morton J. Horwitz, *Transformation of American Law, 1870-1960* (New York: Oxford University Press, 1992) p. 65.

228. 158 U.S. 601, 695 (1895).

229. Ibid.

230. Ibid.

231. The *Pollock* decision lasted eighteen years before it was overturned by the passage of the Sixteenth Amendment in 1913, ironically, just months

before Justice Brown death.

232. *Plessy* v. *Ferguson* , 163 U.S. 537 (1896).

233. Richard Kluger, *Simple Justice* (New York : Vintage Books) p. 73.

234. Ibid., 73-74.

235. William Wiecek, *Liberty Under Law* (Baltimore: The Johns Hopkins University Press, 1988) p. 121.

236. William Nelson, *The Fourteenth Amendment* (Cambridge: Harvard University Press, 1988) p. 185.

237. Ibid.

238. Ibid.

239. 163 U.S. 537, 549.

240. Nelson, 187.

241. *Civil Rights Cases* , 109 U.S. 3 (1883).

242. Fiss, 362.

243. Ibid.

244. 163 U.S. 537, 551

245. Fiss, 364.

246. Ibid.

247. 163 U.S. 537, 550.

248. Justice Brown's opinion in *Plessy* was reminiscent in Brown's mind of Chief Justice John Marshall's opinion in *Marbury* v. *Madison* , such that the holdings in both cases were politically crafted to avoid a political backlash. In *Marbury* , Marshall knew that if he held that the Court could issue the writ of mandamus granting Marbury his position as a justice of the peace, President Jefferson would have rejected the Court's legitimacy and its ruling. Likewise, in *Plessy* , Justice Brown recognized that he needed to politically craft his decision to preclude outright disregard for the decision in the South. He knew that if he found the opposite way, no one in the South would have accepted the Court's opinion. Brown was fond of Marshall . In fact, Kent in his addenda

included a letter written by Justice Day, in which Justice Day wrote, "[Brown] once said to me that, excepting about a dozen of Chief Justice Marshall's opinions, the Court was then doing as good work as did Marshall ." (Quote is from Charles A. Kent, *Memoir of Henry Billings Brown: Late Justice of the Supreme Court of the United States* , (New York: Duffield & Company, 1915) p. 79.)

249. Henry Billings Brown, "Women's Suffrage," A speech before the Ladies' Congressional Club of Washington, D.C., April 1910, p. 11 (New Haven: Research Publications Inc., 1977) microfilm, Harlan-Hatcher Graduate Library, University of Michigan , Ann Arbor , MI .

250. Letter from Justice Brown to Charles A. Kent, February 27, 1903, Henry Billings Brown Papers, Burton Historical Collection.

251. 163 U.S. 537, 551.

252. An interesting fact is that Brown was responsible for bringing the first black bailiff to the United States Supreme Court. See Rhonda Bates-Rudd, "Uncovering the Buried History of Black Detroiters," *The Detroit News* , 2 February 2000 <http://www.detnews.com/2000/african/0002/15/02020040.htm>. Brown, while he was on the Federal district bench in Detroit , became close friends with his bailiff Richard Bush who was an ex-slave. Upon his appointment to the Supreme Court, Brown brought Mr. Bush with him to the Supreme Court, and to be the first black bailiff for the U.S. Supreme Court. Additionally, they are both buried in Elwood cemetery in Detroit , Michigan .

253. Booker T. Washington, "Booker T. Washington Advocates Self-Help, 1895," in *Major Problems in the Gilded Age and the Progressive Era* , 302.

254. 163 U.S. 537, 551.

255. Letter from Justice Brown to Charles A. Kent, February 27, 1903, Henry Billings Brown Papers, Burton Historical Collection.

256. Henry Billings Brown, "Dissenting Opinions of Mr. Justice Harlan," 46 *American Law Review* 335, 338 (1912).

257. Ibid., 336.

258. 163 U.S. 537, 551.

259. Washington , 302.

260. Henry Billings Brown, "An Address Delivered Before the Graduating

Classes at Yale Law School ," June 24, 1895 (New Haven: Hoggson & Robinson, 1895) p. 14, Library of Congress, Washington , D.C.

261. *Holden* v. *Hardy* , 169 U.S. 366 (1898).

262. 169 U.S. 366, 398.

263. Brown, "The Distribution of Property," 218.

264. Letter from Justice Brown to Charles A. Kent, May 26, 1913, Henry Billings Brown Papers, Burton Historical Collection,

265. Howard Gillman, *The Constitution Besiege: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham: Duke University Press, 1993) p. 125.

266. Ibid.

267. 169 U.S. 366, 397.

268. Ibid., 385; Ibid., 387.

269. Ibid.

270. Gillman, 124.

271. Brown, "The Distribution of Property," 218.

272. 169 U.S. 366, 395.

273. The idea that the health of workers could translate into improved labor relations became a widely accepted view by the turn of the twentieth century. The Colorado Fuel and Iron Company, for example, in 1901 created a sociological department that sought to protect the health of its workers and their families, so that workers would not feel oppressed by their employers, which would in turn, improve the relationship between labor and capital.

274. Fiss, 362.

275. Ibid.

276. *Downes* v. *Bidwell* , 182 U.S. 244 (1901).

277. Fiss asserts, "[Brown] was the author of the Court's opinion in *Plessy* v. *Ferguson* and *Holden* v. *Hardy* , but in their day those cases were not subjects of great interest. *Downes* v. *Bidwell* , on the other hand, was one of the great

public occasions for the Fuller Court , attracting attention from newspapers and law reviews." (Fiss, 240.)

278. Fredrick Jackson Turner, "Significance of the Frontier in American History," A paper read at the meeting of the American Historical Association in Chicago, July 12, 1893, American Studies Program, University of Virginia <http://xroads.virginia.edu/~HYPER/TURNER/chapter1.html>.

279. Painter, 147.

280. Fiss, 234.

281. Article 1, Section 8 of the Constitution of the United States of America .

282. 182 U. S. 244, 278.

283. Ibid., 250-251.

284. Ibid. 251.

285. Ibid., 267-268.

286. Ibid., 282.

287. Ibid.

288. Ibid.

289. Example of a natural and abstract right: For Brown, the right to a trial was a natural right because liberty required that individuals be able to have disputes settled freely and fairly. However, the right to a jury was an abstract right because it was entirely possible to ensure life, liberty, and property without a jury. The right to a trial by jury was an example of a procedural right peculiar to the Anglo-Saxon legal tradition.

290. L. S. Rowe, "The Supreme Court and the Insular Cases," *Annals of the American Academy of Political and Social Science* , Vol. 18 (Sep., 1901) p. 53.

291. Ibid.

292. Fiss, 235.

293. 182 U. S. 244, 380.

294. Ibid., 286.

295. Ibid., 287.

296. Rowe, 61.

297. Glennon, 590.

298. Henry Billings Brown, " Yale Law School Commencement Address," 15.

299. --, "Distribution of Property," *Report of the Sixteenth Annual Meeting of the American Bar Association* (Philadelphia: Dando Printing and Publishing Company, 1893) p. 213.

Conclusion

300. Henry Billings Brown, "Dinner given May 31, 1906 by the Bar of the Supreme Court of the United States to Mr. Justice Henry Billings Brown upon his retirement from the bench of the Court." Willard Hotel (Washington, D.C.: W. F. Roberts Co, inc., 1906), pg 21, Burton Historical Collection, Detroit Public Library, Detroit , MI .

301. *Barbed Wire Patent Case* , 143 U.S. 275 (1891).

302. Henry Billings Brown, "Dissenting Opinions of Mr. Justice Harlan," 46 *American Law Review* 335, 338 (1912).

303. Brown, "Dinner," 21.

304. Henry Billings Brown, "Distribution of Property," *Report of the Sixteenth Annual Meeting of the American Bar Association* (Philadelphia: Dando Printing and Publishing Company, 1893) p. 241-242.

305. Brown, "Distribution of Property," 241.

306. Robber Glennon, "Justice Henry Billings Brown: Values in Tension," 44 *University of Colorado Law Review* 553, 603 (1973).

307. Brown, "Distribution of Property," 241.

308. Ibid.

309. Letter from Justice Brown to Charles A. Kent, April 17, 1913, Henry Billings Brown Papers, Burton Historical Collection, Detroit Public Library, Detroit, MI.

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2001. p. 34-45.

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