Introduction: "All the Facts That Surround"

Melvin I. Urofsky

This issue of the *Journal of Supreme Court History* follows a pattern that will be quite familiar to our readers: namely, one of eclecticism. As the study of legal and constitutional history continues to mature as a field, it expands its view of what may legitimately be included within its scope. This does not mean that the great cases will be ignored (as Edward Purcell's article on the *Erie* case shows), but rather that we now look at other things than just the bottom line of a holding (again, as the Purcell article so brilliantly does).

This pattern is not unique to legal and constitutional history, but is part of a larger development in the broader field of history. At one time, all that mattered was politics—the great decisions made by the great men. Then we discovered that history also included how common folk lived, how the arts and culture of a nation affected its history, how women and minorities played a far greater role than that with which they had previously been credited, and historical work began to look like what it should be—a complex tapestry of a nation's story, with different threads representing different groups and strata, all tied together in a beautiful pattern. Politics is still there, and it is still important, but we now understand it far better for our knowledge of these other strands.

Similarly, great cases, while still important, are now seen as one part of a broader picture. We do not ignore the cases, but we recognize that a narrow focus on the legal holding robs us of the broader vision that courts play in our national life. Louis D. Brandeis used to say that in order to understand an issue properly, one had to know "all the facts that surround." If one wanted a subtitle for this issue, it might well be "all the facts that surround."

When one teaches the First Amendment Press Clause, the normal pattern is to talk about the John Peter Zenger case early in the eighteenth century, then the Alien and Sedition Acts at the end of the century, and then to skip 130 years to *Near v. Minnesota* (1931), when the Supreme Court incorporated the Press Clause and applied it to the states through the Fourteenth Amendment. Last year, in one of the Society's lecture series, David Rabban

spoke about the history of the Speech Clause before *Schenck* and *Abrams* (see his "Free Speech: The Lost Years," 25 *Journal of Supreme Court History* 145 [2000]). In this issue, Ralph Frasca provides a similar look at the early and unknown history of public nuisance prosecution in the mid-nineteenth century, in a case that gives us a better understanding of just how important *Near* would be.

Similarly, Kurt Hohenstein, who is the winner of this year's Hughes-Gossett Student Essay Award, takes a Supreme Court decision and gives us the facts that surround, in an examination of congressional efforts to regulate both narcotics and the medical profession during the Progressive Era.

Edward Purcell won the Society's triennial Erwin Griswold Award for his brilliant book **Brandeis and the Progressive Constitution** (which will be featured in a review essay in our next issue). The lecture he gave at the Court in May 2001 showed how, in the hands of a talented historian, knowledge of all the facts that surround can lead us to understanding cases that we thought we knew well in ways that we did not even imagine. My guess is that every law school professor who teaches Federal Courts and Jurisdiction will now have to revise their lectures on *Erie*.

A few years ago, my good friend James Patterson of Brown University asked me to read his manuscript on the aftermath of the famous Warren Court landmark decision, *Brown v. Board of Education* (1954). After I read it, I determined that when the book came out, there would be an essay review of it in the *Journal*. This is a very important book; it forces us to look not just at the actual holding in the case, but at its results nearly fifty years afterwards. It is a somber and sobering story. Eventually, I hope, historians will take a look at other important cases, such as *Miranda v. Arizona* (1966) or *Roe v. Wade* (1973), to see just how the decision played out in the everyday life of the nation, to look at all the facts that surround.

Last but certainly not least, Grier Stephenson continues to report on the wide range of books relating to the history of the Supreme Court.

It is a rich feast that awaits you. Enjoy!

The Helderberg Advocate: A Public-Nuisance Prosecution a Century before *Near v. Minnesota*

RALPH FRASCA

> For Helderberg had groaned and shook for years,
> E'en from the time that Holland hither sent
> Her yonkers, boors and lordly patroon-peers,
> To hoard up beaver-skins and wheat and rent.[1]

William Gallup seethed with the same righteous indignation in May 1842 that John Morrison, Jay Near, and Howard Guilford did almost a century later. Furious that a Schoharie County, New York grand jury had declared his newspaper, *The Helderberg Advocate,* to be a "public nuisance" for his support of tenant farmers during a rent rebellion, Gallup exploded with angry sarcasm in his next issue:

> Oh! horrible!! Shall a public newspaper, printed and published in this enlightened country—this boasted land of liberty and equal rights—where the liberty of speech and the liberty of the PRESS are held sacred—be permitted to "SPEAK APPROVINGLY" of the rising of the Irish tenants against their cruel and tyrannical lords, who have for centuries ground them in the dust? It must not be![2]

Similar sentiments welled up in Morrison, Near, and Guilford when the same measure was used to silence their reformist newspapers. In the 1920s, Minnesota judicial proceedings declared Morrison's *The Duluth Rip-Saw* and Near and Guilford's *The Saturday Press* to be public nuisances and threatened them with suspension unless they stopped offending government leaders and prominent citizens. Morrison died of a blood clot in the brain before he had the chance to fight the public-nuisance pronouncement, but Near—financed and assisted by *Chicago Tribune* publisher Robert McCormick—took his case to the Supreme Court of the United States.[3] There, in a landmark decision, the Supreme Court overturned the pub-


HELDERBERG ADVOCATE.

"We ask, for nothing but what is clearly RIGHT, and are DETERMINED to submit to nothing WRONG."

PUBLISHED EVERY OTHER WEDNESDAY AT BERNE ALBANY CO., N. Y., AND AT SCHOHARIE, C. H., N. Y.....PRINTED FOR THE COMMITTEE, BY WM. M'CALLUM, SCHOHARIE, C. H.

VOL. I. [NO. 8.] WEDNESDAY, DECEMBER 8, 1841. [TERMS—$1 IN ADVANCE.

In 1842, a grand jury in Schoharie County, New York, declared *The Helderberg Advocate* to be a "public nuisance" because of its support for tenant farmers during a rent rebellion. The little-known case was an early instance of prior restraint on press freedom.

lic-nuisance law as an unconstitutional prior restraint on press freedom. It was the first time in U.S. history that the Supreme Court decided a free-press case involving prior restraint.[4]

The "suppression as a public nuisance of a newspaper or periodical is unusual, if not unique, and raises questions of grave importance transcending the local interests involved in the particular action," Chief Justice Charles Evans Hughes wrote in the Opinion of the Court.[5] Expressing the majority's amazement at a public-nuisance presentation being used to restrain press freedom, Hughes noted, "The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right."[6] That the Supreme Court's majority in *Near v. Minnesota* chose to emphasize the virtual singularity of a public-nuisance statute being used as a prior restraint on the press indicates the importance of considering the *Helderberg Advocate* case. It may be instructive to examine this little-known early episode of a prior restraint on press freedom as a means of placing *Near v. Minnesota* in clearer historical context, and of better understanding the status of prior restraints in the nineteenth century.

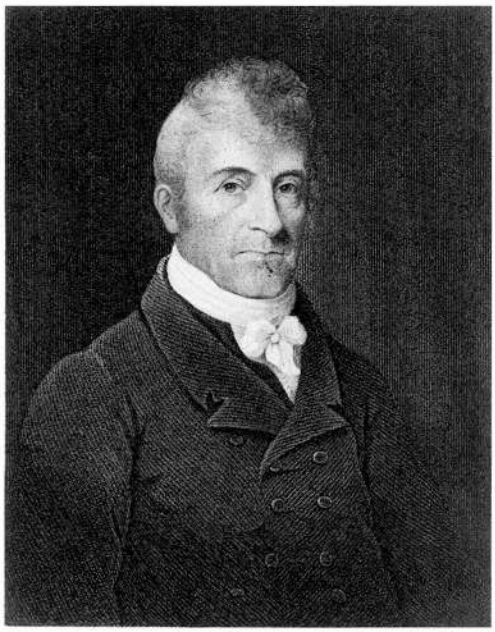
The Anti-Rent War

The Helderberg Advocate was published from 1841 to 1843 in Schoharie and in nearby Berne, New York during the "Anti-Rent War." This war was begun by tenants who rented land under the "patroon" system, a semifeudal land monopoly. The patroon system was created in the seventeenth century to promote Dutch colonization in North America. The Dutch government granted large tracts of land in remote regions of colonial New York to anyone willing to settle and develop them. These grantees, called patroons, had to establish a settlement of fifty adults on each tract before they could receive title to the land. The settlers paid rent to the patroons, most of whom were absentee landlords who remained in Holland. When the English expelled the Dutch from New York in 1675, the monarchy retained the patroon system and issued new royal indentures. Most leases were perpetual. Tenants who held leases were not allowed to buy the land they worked, and they had difficulty getting out of a lease once it was signed. If the land was turned over to another tenant farmer, even an heir, one-fourth of the transaction costs went to the patroon. Furthermore, the provisions of most land leases under the patroonship required the tenants to provide agricultural products and labor to the patroon.[7]

For example, Arent Van Der Carr entered into a typical perpetual-tenant lease with patroon Stephen Van Rensselaer III in 1797. In order to farm 148 acres in the mountain village of Berne, New York, Van Der Carr signed an indenture to pay a "yearly rent of sixteen bushels of good, clean, merchantable Winter Wheat" and to "perform one days service with carriage & horses" for Van Rensselaer. The lease required Van Der Carr "TO HAVE AND TO HOLD, the said farm . . . for ever."[8] Most contracts also required the tenant to pay all taxes and clear the property for agricultural

use, while the patroon reserved the right to all wood, mineral, and water rights. Thus, while the rent was not excessive, the patroon retained the advantages of landownership while foisting most of the obligations—such as taxes and property maintenance—off on the tenants.

By the nineteenth century, the patroonships in upstate New York were concentrated in the hands of a few powerful landlords, none of whom was more powerful than Stephen Van Rensselaer III. He was well-liked by his tenants, mostly because he was lenient about collecting rents.[9] However, following his death in 1839, his enormous Rensselaerwyck tract was divided between two of his sons: Stephen Van Rensselaer IV inherited the "west manor," or land west of the Hudson River, and William Van Rensselaer inherited the "east manor," in an area that covered four counties, with Albany at the center, and was home to more than 60,000 tenant farmers. The heirs proved to be strict landlords, who immediately launched resolute campaigns to collect the delinquent rents their father had ignored.[10] In an 1841 broadside appeal to tenants, Stephen Van Rensselaer IV asserted his legal right to collect the overdue rent. As a pro-tenant writer conceded, "No man can reasonably require him to sacrifice the interests of himself and his family in order that he might benefit others who are bound to take care of themselves."[11]



The rent war was started by tenants who rented land under the "patroon" system, a semi-feudal land monopoly that had been created in the seventeenth century to promote Dutch colonization in North America. Under this system, tenants paid property taxes to maintain the property, but were not allowed to buy the land they worked and had trouble getting out of their leases. Powerful patroon Stephen Van Rensselaer III (1764–1839) was well-liked because he was lax at collecting rent, but his sons were much harsher.

Although lawful, these rent collections stimulated latent dissatisfaction among tenants, who posited four main objections:

- They contended the feudalistic patroon system clashed with the concepts of republicanism, democracy, and self-determination that flourished in the Jacksonian era.
- They resented feeling compelled to support their landlord's political views, for fear of oppression.
- The perpetual nature of the leases resulted in the tenancy obligations being passed from father to son. This meant that rents had been paid on most tracts of land for generations, and many tenants, particularly in the area west and southwest of Albany, felt they had already paid enough to be entitled to own the land.
- Some renters even claimed they had a right to own the land because the American Revolution had effectively dissolved all patents issued by the British Crown.

Most of the tenants shared these objections. Soon, the discontentment among the Rensselaerwyck tenants spread to neighboring patroonships, notably that of General Jacob Livingston, which included much of Schoharie and Delaware counties. As a result, tenants began to organize in 1839, calling for modification or even cessation of the patroon system, and the opportunity to purchase outright the land to which they were bound by indenture.[12] "We demand the enactment of such

laws as will enable the tenants to purchase the land of the Patroons at a fair consideration, and if it be necessary, we call for an amendment to the State Constitution that will forever put an end to the Patroon system," the Blenheim Hill Anti-Rent Society asserted in its platform. Its members contended that "these leases ought to be shorn of their hateful traits of ancient feudalism, by the shears of legislative authority, and the tenants confirmed in the holding and enjoyment of the farms."[13] Others drew analogies between the anti-rent cause and the American Revolution, both as a form of legitimizing their activities and as a process of renewing their connection with their grandparents' struggle for independence and equality.[14] The Rensselaer County Libertymen's Association issued a "Declaration of Independence" from patroons, claiming that "Nobility and Lordships cannot constitutionally exist in the United States of America; and that Patroonry, *i.e.* Aristocracy, is repugnant to Democratic Republican principles."[15]

While most renters were united in their belief that the patroon system was flawed, they disagreed about how to resolve the matter. Some preferred the peaceful but time-consuming method of seeking redress in the judiciary or state government. "We say to our brethren in bonds, be not discouraged," the pseudonymous writer "Many Tenants" advised. If persuasion of judges or legislators succeeds, "ere long it shall be your privilege to behold the last relic of feudal times fall to rise no more."[16]

Others favored more aggressive tactics. Beginning in 1841, patroon agents collecting overdue rents and sheriffs serving eviction notices met armed resistance in the Helderberg region. The tenants blew tin dinner horns as a signal to alert each other, and began dressing as "Indians," in calico tunics and pantaloons, with war paint or calico masks covering their faces. They refused to allow eviction papers to be served, disrupted most attempted foreclosure sales of farm property, and tarred and feathered patroon or government agents who traveled up their mountains. Some of these conflicts became violent and resulted in the deaths of tenants, patroon agents, and law-enforcement personnel.[17] "There is great excitement in these parts," one observer wrote, noting "the indians are collecting to the amount of several thousands, they seemed determined to resist the laws. These are strange times."[18] Their resistance was met by shows of force by the sheriffs and their deputies, and occasionally the most troublesome mountain communities looked like military encampments. "If you were in our village now, you would think that we were indeed preparing for war—the drums beating every day, 100 men who have enlisted under the sheriff are marching the streets ready for duty when called which is every-day," an observer wrote from Schoharie to a relative in New York City.[19]

The patroons and the administrators who worked for them were amazed by this sudden uprising, after almost two centuries of relative calm among the tenants. "The purpose avowed by them is downright repudiation of all Compacts relating to Land held under leases of every description, and open resistance to the Laws, wherever they can combine in sufficient numbers to prevent by force the execution of legal process," patroon agent Charles Hathaway complained. "For this object they are instructed in a sort of tactic, and furnished with Specimens of Indian disguises to be worn when occasion shall require."[20]

The Helderberg Advocate

Despite the disagreement over how best to oppose the patroon system, tenants agreed early in their rebellion that they needed to establish a newspaper to represent their grievances in a public forum and unite disaffected renters throughout the region. A committee of tenants enticed William H. Gallup, editor of the politically partisan weekly *The Schoharie Republican*, to commence an anti-rent newspaper. He began publishing *The Helderberg Advocate* (named for the nearby Helderberg Mountains)

every other Wednesday, starting on September 1, 1841. "Printed for the Committee," *The Helderberg Advocate*'s nameplate bore the slogan, "We ask for nothing but what is clearly RIGHT, and are DETERMINED to submit to nothing WRONG."[21] Purporting to be "the *only* medium through which the views and the grievances of the tenants can be conveyed to the public," this four-page newspaper was intended to bring to the attention of state government in Albany the plight of the renters and the necessity of abolishing the antiquated system of land tenancy.[22] The newspaper also reported the efforts of the tenants to resist rent payments and evictions, compared their situation to those of colonial patriots, and chronicled their confrontations with patroons, law enforcement, and state militia.[23]

The twenty-eight-year-old Gallup was an active participant in community organizations. He was secretary of the Young Men's Literary Association and the County Agricultural Society, and chairman of the executive committee of the Temperance Society. Despite these seemingly tranquil activities, he could also be a strident agitator. The year before, he had edited a successful campaign newspaper on behalf of William Henry Harrison called *The Huge Paw*, and he proceeded to turn *The Helderberg Advocate* into a virulent anti-rent organ.[24] In an early issue, he chided Stephen Van Rensselaer IV for amassing a personal fortune and then offering no leniency to poverty-stricken tenants, and he branded sheriffs and their deputies sent to collect the overdue rent "so obnoxious a specimen of Natural History" that most people find their inclusion in the human species repulsive.[25] "Mr. Gallup was a careful, conscientious writer, modest to assume and direct, but when aroused, bold and forcible," a contemporary recalled.[26]

The bold and forcible tone of his newspaper attracted the attention of Irish radical and land-reform advocate Thomas Ainge Devyr. Born into poverty in Donegal, Ireland, Devyr spent his entire adult life crusading against land barons. In 1836, he wrote a pamphlet advocating the abolition of land monopoly in Ireland. Equal distribution of land, he said, "would civilize and refine the people, destroy intemperance and crime, root out misery from the land, [and] add to our strength and importance as a nation, by keeping at home the flower of our population, who now go to perish in the American wilds."[27] Forty-six years later, Devyr remembered that "when I saw any evil standing out from among the common order of things, I traced that evil to monopoly of the soil by a few, and exclusion from it of the many."[28]

After immigrating to the United States to escape prosecution for attempted overthrow of the British government in 1840, Devyr became editor of a small weekly in Williamsburg (now Brooklyn), New York. While there, he saw an early issue of *The Helderberg Advocate* and offered to contribute essays in the form of letters directly addressed to the most powerful patroon in the region, Stephen Van Rensselaer IV.[29] In one, Devyr reproached the patroon for being "content to forego the dignity of man's nature . . . by preying upon the produce of others' toil."[30] In another, he scolded Van Rensselaer, "You find around you wealth for which you never labored—you eat the bread of indolence and non-production, and if the wine of the midnight revelry be commingled with human tears, it makes no difference: it is swallowed down all the same."[31]

The tenant farmers warmly embraced Devyr as a man who saw a moral imperative in their struggle. He was fond of quoting from the Book of Leviticus: "For the land is mine, saith the Lord, for ye are strangers and sojourners with me."[32] They invited him to speak at the Independence Day celebration in the antirent stronghold of Rensselaerville, where they formed a pact: "they help me to free the Public Lands, to actual settlers only, I to aid them in their local war—write—attend their conventions," Devyr recalled.[33]

Devyr correctly perceived that one of the renters' foremost objections was the patroons'

control over the transfer of land among tenants. "There is a clause in the leases which provides that when a farm is sold you shall receive one fourth part of the price paid for it. This is itself a pretty cool piece of impudence; but the cool impudence does not stop here, it goes farther," Devyr addressed Van Rensselaer in *The Helderberg Advocate*. "When a farm is sold, a first offer of it must be made to your lordship, and if it pleases you to take it at *one fourth less* than the stipulated price you can do so." This provision, Devyr wrote, duped simple farmers "to expend their toil and capital in subduing the Wilderness; *nominally* for their own benefit, in *reality* for yours."[34]

Escalation of Civil Disobedience

Many of the region's editors thought Gallup and Devyr were pushing too hard against the established social order. Three months after *The Helderberg Advocate* commenced publication, one editor stated his belief that Gallup "has another touch of *mania*."[35] Another, a former newspaper co-worker of Devyr's, vilified Devyr as "the instrument of evil and the agent of mischief" whose "vanity, his assumption of infallible judgment upon all things, his dictatorial conduct, his acts of petty tyranny, his ungovernable temper and unregulated tongue, are wholly unbearable."[36]

Despite this censure from their peers, the journalistic tandem of Gallup and Devyr fomented revolution among the antirenters by giving public voice to their private complaints. The tenants' refusal to pay rent and opposition to legal authority, coupled with their pressure on neighbors hesitant to disobey the law, began to escalate in April 1842. After one tenant had informed neighbors he intended to pay his rent to patroon Livingston, a band of "Indians," led by tenant farmers Jacob H. Martin and Palmer Bouton, conducted a night raid on his house. They kidnapped the law-abiding tenant, brought him to a tavern and forced him to sit in a chair in the center of the room for five hours until he consented to jump up three times and shout, "Down with the rent!" Arrest warrants were subsequently issued for Martin, Bouton, and four others; sheriff's deputies pursuing them were harassed by "Indians."[37]

This rebellious episode required a response, New York Governor William H. Seward decided. He issued a proclamation, dated April 26 and published in most newspapers throughout the region, warning the antirenters he would tolerate no more disobedience. "It has been represented to me that civil authorities in Schoharie county have been unlawfully and forcibly resisted in the execution of legal process by tumultuous bodies of disguised and armed men," he stated. "I do therefore give notice that all the powers of the laws will be exercised to prevent the recurrence of such unlawful transactions, and to bring to condign punishment those who have offended, or shall hereafter offend in that manner." He also offered a reward of $700 for any information leading to the arrest and conviction of the suspects.[38] Martin and Bouton were arrested, tried, and convicted in Schoharie Circuit Court days later. They were fined $250 and $150, respectively, and both were imprisoned for thirty days.[39]

Rather than breaking the will of the tenants, as Seward intended, the convictions catalyzed riots and stiffened resistance. As the trials of other antirenters took place in Schoharie in the second week of May, their calico-clad brethren intercepted and threatened witnesses traveling to the court to testify against the protesters. The tactic worked. "The Sheriff by order of the Court, summoned a posse of men and proceeded to the town of Broome to secure the attendance of several witnesses, but without success—they were not to be found," *The Schoharie Patriot* reported.[40]

The Helderberg Advocate offered a sarcastic response to the witness tampering. "We have been informed this morning that the Indians in Broome are engaged in stopping the people who are on their way to attend the Circuit Court, which sits in Schoharie this week," an item titled "SCHOHARIE INDIANS" in

the May 11 issue noted. "We fear they have not seen the Governor's proclamation, or perhaps they are not sufficiently *acquainted* with the English language to read it."[41] When patroon Jacob Livingston read those words and others like them in the May 11 issue, he decided to strike back at the antirenters' incendiary newspaper.

The Grand Jury Presentation

Two related stories received prominent placement on May 11, 1842 in the nineteenth issue of *The Helderberg Advocate*. The first, titled "Anti Rent meeting," announced a planned gathering of tenants to discuss the convictions of Martin and Bouton. "The trial and conviction and the treatment received by two young men now confined in jail and the duty of the tenants towards these individuals will be taken into consideration," the article noted. Also, "some measures to *insure* a *fair* and *impartial* trial to those *who may hereafter* be brought *before our Courts of Justice* will be proposed and discussed at *this meeting*." To this notice was appended this suggestive statement: "It is *high time* that *more energetic measures* should be adopted to ensure to the tenants that *respect* which is justly due to them as citizens of a *free* Government."[42]

The second, titled "Proclamation," offered a sardonic response to Governor Seward's $700 bounty on the antirenters. "The *Indians* it is *true* have been rather troublesome in Schoharie County *but it is a question in the minds of the tenants* whether it would not be *equally proper* to issue a proclamation proclaiming all these *great Landlords a nuisance in Society and banishing them from this land of liberty and equal rights*," the article chided.[43] Gallup subsequently added that a more useful offer would be "a reward to any one who would invent some method to relieve the tenants from their present degraded condition."[44]

Livingston became concerned that the inflammatory nature of these articles would incite his manor's tenants, who had heretofore been less organized and more obedient than those in the neighboring Van Rensselaer manor. He instructed his lawyer and rent-collection agent, John O'Brien, to file a complaint with Judge John P. Cushman, the same judge who had sentenced Martin and Bouton days earlier.[45] Cushman scheduled the hearing immediately, and on May 13, the fourteen-member grand jury empaneled for the May term of the Schoharie County Court of Oyer and Terminer heard O'Brien's oral argument.[46]

At least four members of the grand jury may have been biased against Gallup. Dr. Samuel B. Wells was the chairman of the Schoharie County Whig Party—the political opponents of the Democrats, in whose service Gallup published *The Schoharie Republican*. George Bouck was a relative of the Schoharie County undersheriff. Ira Rose operated a tavern in Gilboa that the sheriff used as a headquarters when hunting antirenters in the southern reaches of the county. And, at the time of the action against *The Helderberg Advocate*, jury foreman Charles Watson was a judge on the county Common Pleas Court.[47]

O'Brien marked the offending articles in a copy of the newspaper and distributed them to the grand jury, calling them "dishonorable, seditious and insurrectionary sentiments." The jury agreed the articles were "highly improper and reprehensible," and issued a "Presentation" against *The Helderberg Advocate*. Also known as a "presentment," this declaration is a formal written accusation, initiated by a grand jury, that an indictment should be drawn by a prosecutor, immediately or in the future, for the commission of a crime. The fourteen jurors judged that "the tendency of said newspaper publications is in a high degree Seditious and calculated to unsettle the right of property in the Country generally." To reinforce the claim of seditiousness, the Grand Jury asserted that the newspaper's intention was "to cast unmerited disrespect and contempt upon the Government of this State, upon the laws thereof and upon the officers &

proceedings of our Courts of Justice within the State."[48]

The grand jury levied other charges against *The Helderberg Advocate*, proclaiming it to be "highly immoral and insurrectionary in its tendency, injurious to the rights and characters of the tenants themselves and a libel upon the good sense, morals and patriotism of the people." Most remarkably, though, the Grand Jury concluded, "we do hereby present the said newspaper as a *public nuisance*."[49]

Gallup was infuriated, particularly by the grand jury's judgment that his newspaper was a public nuisance because it "speaks approvingly of the spontanious [sic] rising of the Irish tenantry against Landlords and of 'Revolutions.'"[50] This court action was one more in a series of misfortunes for Gallup. His twenty-seven-year-old wife had died of "bilious cholic" less than eighteen months earlier, leaving him with a three-year-old daughter.[51] Making matters worse, Peter Mix, the pro-landlord editor of the rival *Schoharie Patriot*, had lately been conducting a journalistic assault on Gallup's character, questioning his sanity and accusing him of violating the Third Commandment by setting type and playing cards on Sunday.[52]

In the next issue of *The Helderberg Advocate*, the beleaguered Gallup responded sarcastically to the grand jury's verdict. He noted that many other publications throughout the state had criticized the state government and its laws generally, and that newspapers in New York and in other states had expressed support for the antirenters in particular. "Surely the next *intelligent* grand jury in Schoharie will not fail to notice these 'insurrectionary' publications . . . and present the same as '*public nuisances*,'" he wrote in the May 25 issue. "The grand jury of Schoharie county has certainly set a *glorious* example, and if it should be followed up by juries in other counties, we should soon hear of a great surplus quantity of the article called 'public nuisances,' in every county in the state."[53]

Gallup surely recognized the novelty of a newspaper being labeled a "public nuisance," and probably even recognized the irony in that pronouncement, just two days after he had used the same concept to describe the landlords. However, he had no way to know how unusual this charge would prove to be in legal and journalism history.

The Public-Nuisance Presentation in *Near v. Minnesota*

After the *Helderberg Advocate* case, it was a long time before a grand jury's "public nuisance" charge was used as a prior restraint on the press. More than eighty years later, moral reformer John L. Morrison used his weekly newspaper, *The Duluth Rip-Saw*, as a weapon. He printed sensational stories about politicians and candidates whom he disliked, sporting such headlines as "Pretty Chickies Pleased Georgie" and "Lommen Buys Booze For Aurora Voters." A Hibbing, Minnesota municipal court found Morrison guilty of criminal libel in December 1924.[54]

Soon thereafter, several of the state legislators whom Morrison had targeted drafted and secured passage of the Public Nuisance Law, declaring that the publisher of "an obscene, lewd and lascivious newspaper, magazine, or other periodical" or "a malicious, scandalous, and defamatory newspaper" is "guilty of nuisance, and all persons guilty of such nuisance may be enjoined." Although it applied to all Minnesota publishers, the 1925 law was chiefly intended to punish Morrison or intimidate him into obedience.[55]

The recalcitrant Morrison refused to relent. He took aim at gubernatorial candidate George Emerson Leach and Duluth Commissioner of Public Utilities W. Harlow Tischer, publishing "Minnesotians [sic] Do Not Want Loose-Love Governor" and "Tischer and His Gang Fail to Establish Graft Plan." Morrison was arrested and his newspaper temporarily restrained, but before he could be tried and *The Duluth Rip-Saw* permanently suppressed

under the new state law, he died of a stroke in a Superior, Wisconsin hospital in 1926.[56]

The Public Nuisance Law was used the following year against *The Saturday Press,* a newspaper edited and published by Jay Near and Howard Guilford. In their November 19 issue, they wrote that "ninety per cent of the crimes committed against society in this city are committed by Jew gangsters" who are "practically ruling Minneapolis," and they labeled County Attorney Floyd Olson a "Jew lover" who is "now under our journalistic guns."[57] Two days later, Olson filed a complaint with a Hennepin County court, alleging that *The Saturday Press* had run afoul of the state's Public Nuisance Law. Successive courts agreed, and *The Saturday Press* was permanently enjoined. Near (alone, after Guilford relinquished his interest in the newspaper), made an unsuccessful appeal to the Minnesota Supreme Court, which decided that a newspaper may be suppressed as a public nuisance when libel laws do not adequately protect the public from its defamations.[58]

More than eighty years after *The Helderberg Advocate* case, moral reformer John L. Morrison was found guilty of criminal libel for printing sensational stories in his publication, *The Duluth Rip-Saw.* Morrison's targets persuaded Minnesota legislators to pass a Public Nuisance Law intended to silence him, but he continued to publish his muckraking stories. Morrison was arrested, but died of a stroke in 1926 before his case went to trial.

Near exhausted his final appeal, to the Supreme Court of the United States. There, in a 5–4 ruling, the Court invalidated the Minnesota public-nuisance statute as a prior restraint and "an infringement of the liberty of the press guaranteed by the Fourteenth Amendment."[59]

Parallels Between *The Helderberg Advocate* and *Near v. Minnesota*

The link between the suppression of *The Saturday Press* and the grand-jury presentment of *The Helderberg Advocate*—a public-nuisance decree to censor the newspapers—was a device that allowed government to restrict speech and press freedom in a less direct manner. Other tactics, such as restraining orders, injunctions, and conspiracy laws, have also been used to suppress threats—ostensibly to public peace, but covertly to punish critics. However, the Supreme Court's decision in *Near v. Minnesota* "was an attempt to move away, and move the country away, from the use of informal local controls to limit freedom of expression," legal historian Paul L. Murphy wrote. "Just as the majority condemned the ongoing use of the police power to restrict civil liberties, so it condemned a situation which made it possible for local officials, often acting at the behest of private local power, to selectively use their discretion in the law enforcement process to curtail expression that was distasteful or threatening to the local power establishment."[60] To Near, the private local power was wielded by gangsters who had corrupted city politicians and police. To

A year after Morrison's death, the Public Nuisance Law was used against *The Saturday Press*, a newspaper published and edited by Jay Near (right) and Howard Guilford, for writing that "Jew gangsters" were "practically ruling Minneapolis." Minnesota courts permanently enjoined the newspaper, but when Near (alone, after Guilford relinquished his interest in the paper) appealed to the Supreme Court, the Justices ruled 5–4 to invalidate the public nuisance statute.

The Saturday Press

Vol. 1, No. 4 — Minneapolis, Minn., Oct. 15, 1927 — Price 5 Cents

A Direct Challenge to Police Chief Brunskill

The Chief, in Banning This Paper from News Stands, Definitely Aligns Himself With Gangland, Violates the Law He Is Sworn to Uphold, When He Tries to Suppress This Publication. The Only Paper in the City That Dares Expose the Gang's Deadly Grip on Minneapolis. A Plain Statement of Facts and a Warning of Legal Action.

Respectfully Submitted

There seems to be an impression among gentlemen of peculiar bent that the suppression of our street sales has rendered abortive our attempt to cleanse this city of gang rule. These gents are intellectual

testify before your body he would be more than glad to give you sufficient evidence upon which to base an indictment of the acknowledged gang-leader, Moss Barnett—the man who threatened Mr. Shapiro just a comparatively

Gallup, that power was wielded by patroons, and the legislative and judicial authorities who reinforced the status quo of land monopolies.

During their legal ordeals, neither Near nor Gallup received much encouragement from newspapers in their state. *The Minneapolis Tribune* identified Near's newspaper as one of Minnesota's "scandalmongering blackmailing sheets which thrive and prosper under the guarantee of a free press." After the Supreme Court verdict was announced, invalidating the public-nuisance law, *The Minneapolis Journal* lamented, "Minnesota must now grope for some other remedy for an evil which she thought had been effectively scotched."[61]

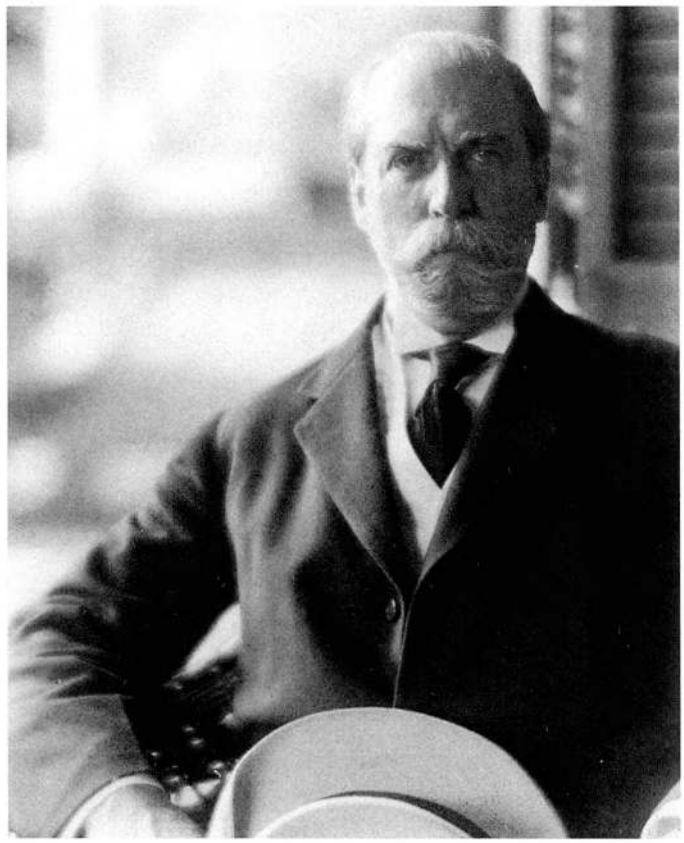
Gallup experienced a similar lack of media support. Most newspapers in New York were generally pro-landlord, denouncing the antirenters as "banditti"[62] and "infuriated ruffians" who preyed on "order-loving citizens."[63] One editor claimed that this editorial slant existed because newspapers published in Albany and Troy "were all more or less, in the pay, or under the control of the landlords and their agents, and of course, inclined to their interests."[64] Gallup's editorial contributor, Devyr, wrote that most newspapers published falsehoods against the antirent faction, and seemed to be "straining to tone up public opinion to a tension at once discordant and dangerous—stoutly insisting that 'law' must be enforced, (no talk of altering it,) whether good or bad, and at whatever cost, cheap or dear."[65] In response to the grand jury's presentment of *The Helderberg Advocate*, several newspapers published cautious and neutral blurbs[66] or avoided the subject entirely. *The Schoharie Patriot* secured a copy of the Presentation the same day it was filed with the court, and triumphantly published every word of it.[67]

The most significant link between *The Helderberg Advocate* and *The Saturday Press* is that they may have been the only two newspapers in United States history prior to the landmark *Near v. Minnesota* decision that were prosecuted as "public nuisances" for criticizing public officials and government policies.[68] Writing the opinion of the Court in *Near v. Minnesota*, Chief Justice Charles Evans Hughes referred to the *Near* case as "unusual, if not unique," and suggested that throughout the nation's history there was "almost an entire absence of attempts to impose previous restrictions upon publications." His use of the word "almost" is curious, because he identified no precedent cases in which a public-nuisance statute was used to restrain the press from commenting on public officials and issues. Most likely, it was a qualification he chose to employ in the event some prior episode, like the one involving *The Helderberg Advocate*, had escaped his attention.[69]

Although it is doubtful Hughes was familiar with "The Presentation of *The Helderberg Advocate*," he seemed keenly aware of the essential problem of using a public-nuisance statute against newspapers. "The statute not only operates to suppress the offending newspaper or periodical, but to put the publisher under an effective censorship," he wrote. "Thus, where a newspaper or periodical has been suppressed because of the circulation of charges against public officers of official misconduct, it would seem to be clear that the renewal of the publication of such charges would constitute a contempt, and that the judgment would lay a permanent restraint upon the publisher, to escape from which he must satisfy the court as to the character of the new publication."[70]

The Effect on *The Helderberg Advocate*

One important distinction between *The Saturday Press* and *The Helderberg Advocate* is that the former was enjoined until after the Supreme Court decision, while the latter continued to publish.[71] However, it is impossible to be certain about the circumstances of *The Helderberg Advocate's* continued publication. Only two copies—one dated December 8, 1841 and the other dated May 25, 1842—of the paper are known to exist in any historical repository or private collection in the United



Writing for the Court, Chief Justice Charles Evans Hughes referred to the *Near* case as "unusual, if not unique" and suggested that there was "almost an entire absence of attempts to impose previous restrictions upon publications." He failed to cite *The Helderberg Advocate* case or any other previous episode involving a public-nuisance statute.

States.[72] Furthermore, all mentions of the case against *The Helderberg Advocate* were obviously deliberately omitted from the court records.[73] Despite these obstacles, enough evidence exists in other sources to draw inferences about the effect the grand jury's public-nuisance presentment had on *The Helderberg Advocate*.

Chief Justice Hughes' explanation of the "effective censorship" a public-nuisance pronouncement would have is the most plausible explanation for what happened to the antirent newspaper. The presentment, which was essentially an accusation and instruction that an indictment be drawn, was intended to censor Gallup and his writers, notably the vituperative Devyr. Gallup did not immediately succumb, printing his sarcastic rejoinders and another Devyr "letter" to Van Rensselaer in the May 25 issue. Devyr took the opportunity to tell the patroon that his plan to turn Helderberg denizens into "obedient serfs" was doomed to fail. "You forgot entirely that men might neither submit to your insults and extortions, nor quit the homesteads won from the wilderness by their own toil," he wrote. "You quite forgot, my lord, that men finding they had been grossly deceived by accomplished lawyers, might fall back on the *Natural Right*" of rebellion.[74]

However, after Gallup received threats of jail and loss of advertising, the editorial tone of the newspaper changed. Gallup stopped publishing Devyr's letters, prompting the reformer to address the tenant farmers via a handbill he printed himself. "I have been shut out from the privilege of communicating with you for a period of many months, and I take this means of informing you that I have, within that time, made repeated attempts to obtain a hearing through the columns of the *Advocate*, but without effect," he wrote early

in 1843.[75] Devyr explained that Gallup was being intimidated with legal and financial threats. "Your paper is, in fact and reality, under the censorship of your enemies. On one side Mr. Gallup is threatened with fine and imprisonment if he publishes anything which may give offense to 'ears polite.' And on the other hand Mr. Gallup has been, I understand, threatened with loss of legal patronage. I do not pretend to judge what portion of this influence was directed against my humble productions. It is enough for me to know that they were first altered to suit the taste of the censors; and afterward shut out altogether."[76]

Librarian Donald Cameron, who had seen a since-vanished complete set of *The Helderberg Advocate*, reported a similar observation. Shortly after the public-nuisance presentment, *The Helderberg Advocate* "becomes less violent in its views and comes to be more of an ordinary newspaper," he wrote.[77] However, that did not appease Gallup's critics. Cameron noted that Gallup was compelled to cease publication in 1843 after being threatened with a loss of political financing and advertising for his other newspaper, *The Schoharie Republican*. On the eve of an election year, in which his party's frontrunner Martin Van Buren expected tough competition from Whig candidate Henry Clay (both of whom were ultimately defeated by James K. Polk), Gallup could look forward to substantial political-patronage revenue for his party newspaper. Evidently, he chose not to jeopardize that subsidy. Of *The Helderberg Advocate*'s final issue, dated August 16, 1843, Cameron noted that "there is not a word about rents, nor about injustice, nor any mention of the patroon."[78]

Epilogue

Despite the intentions of the pro-landlord legal establishment, the cessation of *The Helderberg Advocate* did not mean that the antirent cause went long without a newspaper outlet for its views. *The Helderberg Advocate* was succeeded by *The Guardian of the Soil*, sponsored by a union of antirenters from Albany, Delaware, Otsego, Rensselaer and Schoharie counties. While promising to be an "independent" newspaper, its purpose was to "lay before the public much useful information, correct all erroneous impressions as to our motives, and strengthen and encourage each other and defend and vindicate our principles against the assaults of our opponents."[79] This newspaper received little support and folded the following year.[80] Undaunted, antirent leaders Charles F. Bouton and Ira Harris founded *The Albany Freeholder* in 1845. They named Devyr the first editor, but dismissed him several months later. "Too vain and presumptuous to act a subordinate part, he is too rash and indiscreet to be a leader," Bouton wrote.[81] Devyr then founded a competing newspaper, *The Anti-Renter*. "I started *The Anti-Renter* and sank in it my last resources," Devyr recalled wistfully. It ceased publication after a year.[82] *The Albany Freeholder* succeeded where others had failed, though, boosting its circulation from 270 to more than 2,700 in its first year, and remaining in publication until 1852. "The Helderberg Advocate and Guardian of the Soil had failed for want of patronage," Bouton wrote. "We have succeeded beyond our expectation."[83]

Gallup continued to publish *The Schoharie Republican* until 1854. He revisited the Schoharie County court during his final year as editor, this time as plaintiff, to sue an advertiser who did not pay his bill. Gallup won, and collected $14.89 in damages.[84] He moved to Noyesville (now River Forest), Illinois in 1856, and died in 1862 at the age of 49. His passing was mourned by his old adversary, *Schoharie Patriot* publisher Peter Mix.[85]

The antirent war became bloodier by 1845, attracting national attention as the exemplar of the need for land reform. This became one of Horace Greeley's favorite causes, and he joined the Helderberg antirent movement as part of his crusade. "An earnest consideration of the causes and progress of the 'Anti-Rent' difficulties has led us to re-

gard with favor the . . . idea of stopping the sale and further monopoly of the Public Lands," he wrote.[86] The tenants finally prevailed in the courts and the voting booths, and by 1860 the leasehold system was virtually eliminated from upstate New York. Farmers became the owners, not merely the renters, of the land they tilled. This phenomenon of a semifeudal system of land ownership, which had existed for two centuries, finally yielded to the Jeffersonian ideal of America as a nation of small, independent farmers.

As for the press, "The Presentation of *The Helderberg Advocate*" demonstrated that it would take longer—until the 1931 case of *Near v. Minnesota*—for the Jeffersonian ideal of press freedom to be constitutionally protected.[87]

ENDNOTES

[1]Henry Rowe Schoolcraft, **Helderbergia; or, The Apotheosis of the Heroes of the Anti-Rent War** (Albany: Joel Munsell, 1855).

[2]*The Helderberg Advocate*, May 25, 1842.

[3]The best source on these episodes is Fred W. Friendly, **Minnesota Rag** (New York: Random House, 1981). *See also* Reed L. Carpenter, "John L. Morrison and the Origins of the Minnesota Gag Law," *Journalism History* 9 (Spring 1982): 16–17, 25–28; John E. Hartmann, "The Minnesota Gag Law and the Fourteenth Amendment," *Minnesota History* 37 (December 1960): 161–173; Paul L. Murphy, "*Near v. Minnesota* in the Context of Historical Developments," *Minnesota Law* 66 (November 1981): 95–160.

[4]*Near v. Minnesota*, 383 U.S. 697 (1931).

[5]*Ibid.*, 707.

[6]*Ibid.*, 718. Other than the prosecution of *The Helderberg Advocate* in 1842, the only other known case of a newspaper being declared a public nuisance was *Ex parte Neill*, 22 *Southwestern Reporter* 923 (1893). A Texas appellate court overturned a news dealer's fine for selling a Chicago newspaper that the Seguin, Texas city council had banned from within its corporate limits. However, the newspaper itself was not prosecuted.

[7]The literature about the patroon system and the resulting antirent war is extensive. *See, e.g.*, Martin Bruegel, "Unrest: Manorial Society and the Market in the Hudson Valley, 1780–1850," *The Journal of American History* 82 (March 1996): 1393–1424; Edward Potts Cheyney, **The Anti-Rent Agitation in the State of New York, 1839–1846** (Philadelphia: Publications of the University of Pennsylvania, 1887); Henry Christman, **Tin Horns and Calico** (New York: Henry Holt, 1945); David M. Ellis, **Landlords and Farmers in the Hudson-Mohawk Region, 1790–1850** (New York: Octagon, 1967); Jay Gould, **History of Delaware County** (Roxbury, NY: Keeny and Gould, 1856); Arthur B. Gregg, **Old Helleburgh** (Altamont, NY: Altamont Enterprise, 1936); Reeve Huston, "The Parties and 'The People': The New York Anti-Rent Wars and the Contours of Jacksonian Politics," *Journal of the Early Republic* 20 (Summer 2000): 241–271; Albert Champlin Mayham, **The Anti-Rent War** (Jefferson, NY: Frederick Frazee, 1906); S. G. Nissenson, **The Patroon's Domain** (New York: Columbia University Press, 1937); Eldridge Honaker Pendleton, "The New York Anti-Rent Controversy, 1830–1860" (Ph.D. diss., University of Virginia, 1974).

[8]Indenture of Arent Van Der Carr to Stephen Van Rensselaer III, May 25, 1797, manuscript collections, Town of Berne Historical Society, Berne, New York.

[9]He was eulogized as "emphatically a good man" in *The Albany Argus*, January 28, 1839. On the same date, *The Albany Evening Journal* identified him as "the liberal benefactor of all those noble Christian charities which adorn the age in which he has lived."

[10]Christman, **Tin Horns and Calico**, 2–11.

[11]*The Helderberg Advocate*, December 8, 1841.

[12]Cheyney, **The Anti-Rent Agitation**, 19–20; platform of the Blenheim Hill Anti-Rent Society, 1843, in Mayham, **The Anti-Rent War**, 31–32.

[13]Blenheim Hill Anti-Rent Society, in Mayham, **The Anti-Rent War**, 31–32. Mayham's grandfather was one of the leaders of the antirent movement, and he had access to documents not publicly available.

[14]*The Albany Argus*, December 6, 1839.

[15]"Libertymen's Declaration of Independence," June 8, 1844, in manuscript collections, New York State Library.

[16]*The Helderberg Advocate*, May 25, 1842.

[17]Christman, **Tin Horns and Calico**, *passim*.

[18]? to Silas Forbes, January 1, 1845, manuscript collections, New York State Library.

[19]M. E. Lintner to J. Albert Lintner, May 29, 1845, manuscript collections, New York State Library.

[20]Charles Hathaway to ?, July 12, 1844, manuscript collections, New York State Library.

[21]*See, e.g.*, *The Helderberg Advocate*, December 8, 1841; May 25, 1842.

[22]*The Helderberg Advocate*, May 25, 1842.

[23]*Ibid.;* Christman, **Tin Horns and Calico**, *passim*; Donald F. Cameron, "*The Helderberg Advocate*," *The Journal of the Rutgers University Library* 15 (December 1951): 19–21. Christman and Cameron both had the opportunity to see a complete run of *The Helderberg Advocate*. However, this set has long since vanished, and only

two copies of this newspaper are known to exist anywhere in the United States.

[24]*The Schoharie Patriot*, August 20 and September 3, 1840; John Homer French, *Gazetteer of the State of New York,* 8th ed. (Syracuse, New York: R. Pearsall Smith, 1860), 603.

[25]*The Helderberg Advocate*, December 8, 1841.

[26]William E. Roscoe, **History of Schoharie County, New York** (Syracuse, NY: D. Mason, 1882), 80.

[27]Thomas Ainge Devyr, **Our Natural Rights: A Pamphlet for the People**, reprinted in Thomas Ainge Devyr, **The Odd Book of the Nineteenth Century** (Greenpoint, NY: self-published, 1882), 112.

[28]Devyr, **The Odd Book**, 110.

[29]*Ibid.*, 42.

[30]"Letter III," February 22, 1842, reprinted in Devyr, **The Odd Book**, 42.

[31]*The Helderberg Advocate*, May 25, 1842.

[32]Leviticus 25:23. Devyr used this quote in his pamphlet **Our Natural Rights**, at the beginning of his letters to Stephen Van Rensselaer IV in *The Helderberg Advocate,* and in the nameplate during his brief editorship of *The Albany Freeholder*. *See*, *e.g.*, **The Odd Book**, 42; *The Helderberg Advocate*, May 25, 1842; and *The Albany Freeholder*, May 28, 1845. This Bible verse also seems to have been used by the antirenters as a sort of motto for their cause. *See* Mayham, **The Anti-Rent War**, 40.

[33]Devyr, **The Odd Book**, 43.

[34]*The Helderberg Advocate*, May 25, 1842.

[35]Peter Mix in *The Schoharie Patriot*, December 10, 1841.

[36]Charles F. Bouton, "The Progress of Disorganization," *The Albany Freeholder*, August 26, 1846.

[37]*The Schoharie Patriot*, April 22 and 29, 1842; Christman, **Tin Horns and Calico**, 45.

[38]William H. Seward, "A Proclamation," April 26, 1842, published in numerous newspapers, *e.g.*, *The Schoharie Patriot*, May 6, 1842.

[39]*The Schoharie Patriot*, April 29, 1842.

[40]*Ibid.*, May 13, 1842. *See also The Daily Albany Argus*, May 18, 1842.

[41]*The Helderberg Advocate*, May 11, 1842, reprinted in *The Albany Daily Advertiser*, May 13, 1842, and *The Daily Albany Argus*, May 14, 1842.

[42]*The Helderberg Advocate*, May 11, 1842, quoted in "The Presentation of *The Helderberg Advocate*," Schoharie County Court of Oyer and Terminer, May 13, 1842, manuscript collections, New York State Library (punctuation added).

[43]*Ibid.*

[44]*The Helderberg Advocate*, May 25, 1842.

[45]Christman, **Tin Horns and Calico**, 98–99; *The Helderberg Advocate*, May 25, 1842; *The Schoharie Patriot*, April 29, 1842.

[46]Court of Oyer and Terminer, Court Records, May Session, 1842, Schoharie County Courthouse; "The Presentation of *The Helderberg Advocate*."

[47]*The Schoharie Patriot*, October 29, 1841; Christman, **Tin Horns and Calico**, 137, 199; Roscoe, **History of Schoharie County**, 186.

[48]"The Presentation of *The Helderberg Advocate*."

[49]*Ibid.*

[50]*Ibid.*

[51]*The Schoharie Republican*, November 27, 1862; *The Schoharie Patriot*, November 26, 1840.

[52]In *The Schoharie Patriot*; *see*, *e.g.*, December 10, 1841 and March 11, 1842.

[53]*The Helderberg Advocate*, May 25, 1842.

[54]Carpenter, "John L. Morrison," 16–17, 25–26; Friendly, **Minnesota Rag**, 3–21.

[55]Senate House Bill, Act of April 20, 1925, Chapter 285, 1925 Minnesota Law, 358. The legislative evolution of the measure is described in Hartmann, "The Minnesota Gag Law," 161–173.

[56]Friendly, **Minnesota Rag**, 21–27.

[57]Quoted in *ibid.*, 45–49.

[58]*State ex rel. Olson v. Guilford*, 174 Minn. 457 (1929), at 461–62, 219 N.W. at 772; Friendly, **Minnesota Rag**, 82.

[59]*Near v. Minnesota*, 383 U.S. 697 (1931), at 723.

[60]Murphy, "*Near v. Minnesota*," 156.

[61]Quoted in Friendly, **Minnesota Rag**, 158–159.

[62]This term was used repeatedly to describe the antirenters. *See*, *e.g.*, *The Semi-Weekly Courier and Enquirer*, May 30, 1845; *The Schoharie Patriot*, May 13, 1842. Numerous newspapers, notably the Delhi, New York *Delaware Gazette*, *The Albany Evening Journal*, the New York *Morning Courier and New York Enquirer*, and *The New York Express,* vehemently attacked the antirent movement. *See* Wesley Gene Balla, "The Politics of Anti-Rentism," M.A. thesis, University of Rochester, 1985, 50.

[63]*The Schoharie Patriot*, April 22, 1842.

[64]*The Albany Freeholder*, April 8, 1846.

[65]*Ibid.*, April 9, 1845.

[66]*See, e.g., The Albany Daily Advertiser*, May 17, 1842; *The Albany Morning Atlas*, May 18, 1842; and *The Daily Albany Argus*, May 18, 1842.

[67]*The Schoharie Patriot*, May 13, 1842.

[68]However, there have been numerous instances in which newspapers and other publications have been prosecuted as public nuisances for obscene or pornographic content. *See* Thomas A. McWatters III, "An Attempt to Regulate Pornography Through Civil Rights Legislation: Is It Constitutional?" *University of Toledo Law Review* 16 (Fall 1984): 231–313; Roger Oglesby, "Porno Non Est Pro Bono Publico: Obscenity as a Public Nuisance in California," *Hastings Constitutional Law Quarterly* 4 (Spring 1977): 385–419. In *Ex parte Neill*, a city council declared a newspaper to be a public nuisance, but the newspaper itself was not prosecuted.

[69]*Near v. Minnesota*, 707, 718.

[70]*Ibid.*, 712.

[71]Near resumed publication in 1932 and continued it for several years, until his death in 1936. *See* Friendly, **Minnesota Rag**, 163–165.

[72]One copy is in the collections of the Esperance Historical Society and Museum, Esperance, New York. The other is at the Old Stone Fort Museum Complex of the Schoharie County History Society, Schoharie, New York. For more on the scarcity of this newspaper, *see* Ralph Frasca, "In Search of *The Helderberg Advocate*," *Schoharie County Historical Review* 64 (Fall-Winter 2000): 16–20. The complete run of copies that Christman appears to have used in his book about the antirent war, published in 1945, and that Rutgers University librarian Cameron reported acquiring six years later, has long since vanished, according to current Rutgers librarians. Christman, **Tin Horns and Calico**, *passim*, but especially 55–61; Cameron, "*The Helderberg Advocate*," 19.

[73]The Grand Jury presentment, the judge's subsequent decision regarding the case, and any mention of sanctions or settlements regarding *The Helderberg Advocate* are conspicuously absent from the otherwise thorough records of the Court of Oyer and Terminer, which is the court for which the grand jury was serving. *See* May Session, 1842, in Court Records, Court of Oyer and Terminer, Schoharie County, New York. There is also no other record of this case in the New York State Library, where the "Presentation" is filed.

[74]*The Helderberg Advocate*, May 25, 1842.

[75]Thomas Ainge Devyr, handbill, circa 1842–1843, reprinted in Christman, **Tin Horns and Calico**, 60.

[76]*Ibid.*, 60–61. Years later, Devyr wrote, "At the seventh letter, the printer, a 'Party Democrat,' would publish no more of my writings." Devyr, **The Odd Book**, 43.

[77]Cameron, "*The Helderberg Advocate*," 21.

[78]*Ibid.* For another source attributing the newspaper's demise to a lack of legal and political patronage, *see The Albany Freeholder,* April 8, 1846.

[79]"Prospectus," **The Guardian of the Soil**, 1843, in manuscript collections, Albany Institute of History and Art, Albany, New York.

[80]French, *Gazetteer,* 603.

[81]*The Albany Freeholder*, August 26, 1846.

[82]Devyr, **The Odd Book**, 43.

[83]*The Albany Freeholder*, April 8, 1846.

[84]*Gallup v. Potter,* May 10, 1855, Schoharie County Court, May Session, 1855, Schoharie County, New York.

[85]*The Schoharie Republican*, November 27, 1862; *The Schoharie Patriot*, November 27, 1862.

[86]*The New-York Weekly Tribune*, April 20, 1846. *See also* William Harlan Hale, **Horace Greeley: Voice of the People** (New York: Harper, 1950), 134–139.

[87]*See, e.g.*, Thomas Jefferson to James Madison, February 26, 1826, in Andrew A. Lipscomb and Albert E. Bergh, ed., **The Writings of Thomas Jefferson**, 20 volumes (Washington: Thomas Jefferson Memorial Association, 1904–1905), 16:156; Thomas Jefferson to Admantios Coray, October 31, 1823, in 15:486; Thomas Jefferson to Edward Carrington, January 16, 1787, in Julian Boyd, *et al.*, eds., **The Papers of Thomas Jefferson**, 28 volumes to date (Princeton: Princeton University Press, 1950), 11:49.

Just What the Doctor Ordered: The Harrison Anti-Narcotic Act, the Supreme Court, and the Federal Regulation of Medical Practice, 1915–1919

KURT HOHENSTEIN

> I want to commend those respectable doctors who prescribe narcotics to the addict only after examination of the patient as a last resort. This act will allow us to practically wipe out the morphine addict's habit in Atlanta before Christmas, and do so without imposing needless suffering on the part of the unfortunate.[1]
>
> Hooper Alexander, United States District Attorney,
> Atlanta District, June 15, 1915

> The Clinton Administration said Monday physicians in California and Arizona who order illegal drugs such as marijuana for their patients would lose their prescription-writing privileges . . . and face criminal charges. Attorney General Janet Reno said U.S. attorneys will proceed on a case-by-case basis in deciding whether to prosecute. . . . "We are not going to focus on any one profession. It is not just doctors; it is everybody involved." Criteria for federal action would include the absence of a legitimate doctor-patient relationship, a high volume of prescribing marijuana or other drugs, significant profits from such prescribing patterns, and providing drugs to minors, Reno said.[2]
>
> *Houston Chronicle*
> December 30, 1996

I. Introduction

In 1915, in the political and social throes of the Progressive movement, Congress passed the Harrison Anti-Narcotic Act,[3] which imposed a tax on the sale and use of opium and opium derivatives and required physicians and pharmacists to register and report their prescriptions to the Department of the Treasury. What ensued soon after passage of the act can fairly be de-

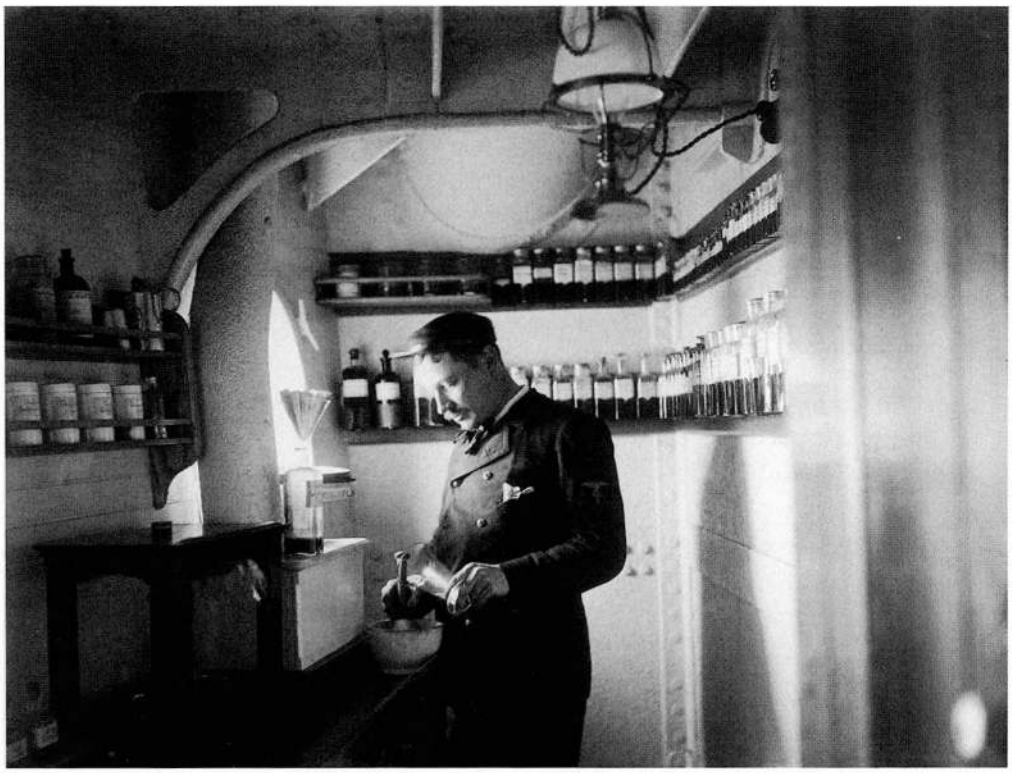
scribed as the most comprehensive general criminal enforcement of any law against medical professionals in U.S. history.

The law was structured as a regulatory tax measure to avoid potential constitutional conflict with state police power authority. The main feature of the act was found at Section 2, which required all physicians and druggists prescribing opium or opium-derivative products to attest to and report the prescription to the Treasury Department on federally mandated forms.[4] Prescribing opium for addicts and other patients was a commonly accepted practice. While the act did not prohibit the practice, it required that such prescriptions be issued "in the course of (the physician's) professional practice only."[5] The penalty for violation of the statute was a fine of up to $2000 and five years in prison.

In the early 1900s, the regulation of medical practice was exclusively a state function. The issuance of medical licenses and management of disciplinary actions against doctors and druggists was regulated by state boards of examiners, if at all.[6] Similarly, the regulation of the issuance of medical prescriptions, where it occurred, was exclusively a state function. Much of the impulse for such regulation came from reformers who desired to clean up the patent medicine business and vestiges of medical quackery. The progressive goal of professionalization naturally led to the regulation of medical practice by state officials.

The enforcement of the Harrison Act fell to the Department of the Treasury, which immediately issued regulations, registration forms, and reporting requirements for the act. The Bureau of Narcotics was created within

In 1915, Congress passed the Harrison Anti-Narcotic Act, imposing a tax on the sale and use of opium and opium derivatives and requiring physicians and pharmacists (such as this one in New York City) to register and report their prescriptions to the Department of the Treasury. The law was structured as a regulatory tax measure to avoid potential constitutional conflict with state police power authority.



The Harrison Act prompted the widespread arrest of doctors and druggists for unlawfully prescribing narcotics or failing to report under the law's provisions. In 1916, the Supreme Court dealt a blow to the act when it ruled narrowly in *Jin Fuey Moy* that a doctor who had prescribed opium to an unregistered addict could not be prosecuted because the narcotic was strictly for the addict's personal use.

the Treasury Department and was given authority to investigate and enforce violations of the act. Soon after passage, field revenue agents, in cooperation with the U.S. Attorney's Office, began arresting and prosecuting doctors and druggists for unlawful prescribing or failing to report under the law's provisions.

The Harrison Act marked the origin of a new policy that set out to control nonmedical use of narcotics and that evolved into the prohibition of nonmedical uses and the regulation and control of medical uses.[7] This was the first intrusion by national authorities into the regulation of local medical practices that had formerly been the exclusive province of state officials. By the time Treasury had drafted the enforcing regulations, the entire weight of the burden of compliance with the act's labyrinthine provisions fell squarely on the proverbial backs—and books—of the doctors.[8]

From the first days of the Harrison Act, revenue agents began to arrest doctors and druggists, and to warn others of potential arrest. All across the country physicians, wary of the law and uncertain of the rules for compliance, requested clarification. In 1916, the Supreme Court of the United States provided it in *United States v. Jin Fuey Moy*[9] when it ruled 7–2, in a decision written by Justice Oliver Wendell Holmes, that Dr. Fuey Moy did not violate the provisions of the act when he had prescribed opium for addict Willie Martin, despite Martin's failure to register under the act. Justice Holmes, strictly interpreting Section 8 of the act, found that since Martin did not "produce, import, manufacture, compound, deal in, dispense, sell, distribute or give away" the opium, but merely possessed and used it, there was no conspiracy between Dr. Fuey Moy and Martin when the good doc-

tor prescribed opium for his personal use.[10] Only "persons" so defined were subject to the act.

This decision dealt a devastating blow to the enforcement activities of the Bureau of Narcotics, but it did not dissuade their further efforts. A short three years later, a set of two cases appeared to negate the *Jin Fuey Moy* restriction. In *United States v. Doremus*[11] and *Webb v. United States*,[12] the Supreme Court fully sustained the Harrison Act and made the provisions of the act apply to "dope fiends," whom the government argued had escaped its clutches in *Fuey Moy*. Only doctors who prescribed opium to their patients in the course of medical treatment, said the Court, could avoid the registration, enforcement provisions, and potential criminal liability laid down in the act. The 5–4 decision in *Doremus* sustained the constitutionality of the statute by the barest of margins, but *Webb*, decided the same day by the same slim margin, left no doubt as to the act's vitality.

Dr. W. S. Webb was a doctor in Memphis, Tennessee, one of the hotbeds of narcotic prosecution, who had cooperated with a pharmacist to regularly prescribe morphine to habitual users. He issued prescriptions based on their need, without "consideration of the applicant's individual case, and in such quantities and with such direction as, in his judgment, would tend to cure the habit or as might be necessary or helpful in an attempt to break the habit, but without such consideration and rather in such quantities as the applicant desired for the sake of continuing his accustomed use."[13] The Court sustained the lower court's finding that "to call such an order for the use of morphine a physician's prescription would be so plain a perversion of meaning that no discussion of the subject is required."[14] This apparently dramatic shift from *Fuey Moy* to *Doremus* and *Webb* sanctioned the increased involvement in the regulation of individual medical practices by the authority of the federal government.

Commentators have variously attempted to ascribe political and social meanings to the apparent change in constitutional position. David Musto, the most renowned expert on narcotic law and enforcement, attributed the change in judicial outlook to a change of social attitudes between 1916 and 1919. World War I and the imposition of the Eighteenth Amendment, he argues, combined with the Red Scare of 1919–1920 to change judicial opinion. Musto claims that drug use came to be widely viewed as an antisocial and degenerative activity and that by 1918 drug addiction was not simply immoral but had become a "threat to the national war effort,"[15] and that the Justices ultimately endorsed those reactionary social attitudes. For Musto, the dynamics of cultural change "explain the remarkable change of opinion in the Supreme Court to the point that the maintenance of addiction—the pandering to the sensual desires of habitués—was considered so obviously an immoral notion that the majority of the Court thought it not worthy of discussion or justification."[16] Musto placed the genesis of this "remarkable change of opinion" clearly on the doorstep of reactionary and changing social attitudes.

Other historians have taken a different, but equally externalist view. The second stream of argument asserts that antivice crusaders, who supported the Treasury Department's unbending enforcement efforts against doctors, shifted public opinion against the "dope doctors"—those who prescribed large quantities of opium without actually examining their patients. As prosecutions and publicity increased, public opinion rose against the maintenance of addicts by the doctors, who became, not healers, but purveyors of the drugs that led to a myriad of social ills.[17] The demonization of the addict, often with stereotypical racial overtones, and the attendant impact on maintenance doctors was responsible for the 1919 reversal of *Fuey Moy*. This view began to define and to critically examine the role of the "dope doctors," but in the main it continued to find the impetus for the apparent judicial reversal in factors exclusively external to the judicial and administrative processes.

World War I and the Red Scare of 1919–1920 transformed drug use into an anti-social and degenerative activity that was considered, not simply immoral, but a "threat to national security." This 1919 cartoon portrays it as more dangerous than alcohol abuse.

A final corollary view, which confuses the *Fuey Moy*, *Doremus*, and *Webb* discourse, examines the internal rationale of those judicial opinions from a purely legalistic viewpoint. The Harrison Act, after all, was a tax act, and was part of a continuous line of tax acts by which Congress sought to regulate activity that it could not otherwise constitutionally regulate through the police power given to the state legislatures. The Court, argue these scholars, was a conservative bastion that generally protected the status quo against the assault of reformers.[18] In *Fuey Moy*, the Court interpreted the Harrison Act strictly as a tax matter, and defined "person" so as to prevent conviction. Strictly presented as tax cases, *Doremus* and *Webb* simply permitted the Court in 1919 to assert the full power, short of arbitrary and unreasonable action, to impose a tax on narcotics. By limiting the construct to a tax provision, the Supreme Court was consistent in all three cases.

None of these views can be fully sustained. A close examination of the record of the cases, the briefs, and the Court files, as well as an examination of the primary archival evidence of the enforcement arm of the Treasury Department, offers a distinct, fuller understanding which eschews the externalist explanation. Yet it also gives credence to the Court's understanding of the relationship between the federal government's taxing authority and the states' police power relating to the regulation of medical practice. The cases in 1916 and 1919 can be read together to support both the congressional intent of the Harrison Act and the legitimate practice of doctors and druggists.

This article will assert and document this new and richer understanding as the clearest explanation for the apparent change in Supreme Court opinion from *Fuey Moy* to *Doremus* and *Webb*. This view maintains that the Supreme Court decisions are fundamentally consistent and were a response to a cooperative federal effort to regulate dangerous narcotics. The excesses of enforcement were not the consequences of a radically expansionist interpretation by the Supreme Court in *Doremus*; instead, they were caused by federal law enforcement authorities' success in gradually shifting public opinion about the nature of certain medical practices and the legitimacy of federal regulation.

II. Origins of the Harrison Act

While the story of the Harrison Act's creation is well known, certain specific issues have not been fully examined.[19] Two of these issues relate to the motivation of the supporters of the act, which were not uniformly accepted. The third issue relates to the treaty-making origins of the act, which appears most notably as a missed opportunity for the government lawyers in *Fuey Moy*.

The debates in Congress in the fall of 1914 were replete with intentional dissembling. The progressive supporters of the act—such as Representative Francis Burton Harrison (D-NY), a Tammany Democrat, and Representative James R. Mann (R-IL), who was best known for his sponsorship of the White Slave Act which bore his name[20]—wasted no time in characterizing the act as a measure that would limit and eventually eliminate the use of opium. However, all parties to the debate recognized the potential unconstitutionality of an act of Congress, under the Commerce Clause of the Constitution, which prohibited the use or possession of any narcotic then legal in most states.

An exchange taken from a colloquy between Representative Harrison and Representative Sisson (D-GA) during debate on the portion of the three-part Harrison Act that dealt with the prohibition on smoking opium makes the issue clear.

> Mr. Sisson: Is it the purpose of the bill to raise revenue?
>
> Mr. Harrison: The purpose of the bill can hardly be said to raise revenue,

Representative Francis Burton Harrison (D-NY) was a Tammany Democrat who supported the act in order to limit and eventually reduce the use of opium. However, he and other politicians responsible for the act did recognize its potential unconstitutionality under the Commerce Clause of the Constitution because it prohibited the use or possession of any narcotic then legal in most states.

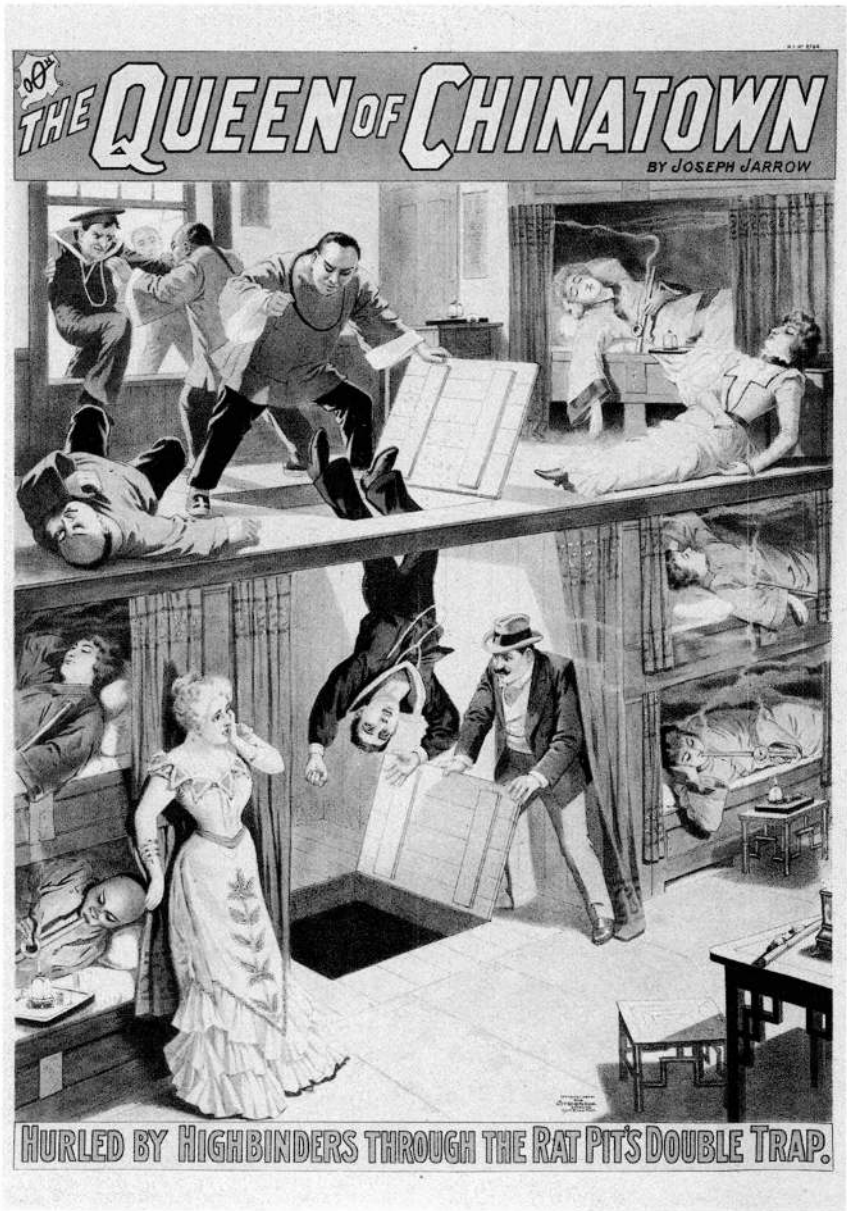
> because it prohibits the importation of something upon which we have heretofore collected revenue.
>
> Mr. Sisson: The gentleman bases the right of Congress to make this legislation upon the Interstate Commerce Clause of the Constitution?
>
> Mr. Harrison: I do.
>
> Mr. Sisson: Does the gentleman believe that the regulation of interstate commerce under the decisions of the Supreme Court will permit a law to absolutely prohibit commerce entirely?[21]

At this point, Harrison cited the constitutional doctrine, expressed by Justice John Marshall Harlan, that granted Congress wide latitude to regulate commerce between the states and foreign countries, which could be construed to prohibit such commerce in certain instances. Representative Sisson, however, was not content to let the issue die. He focused the debate:

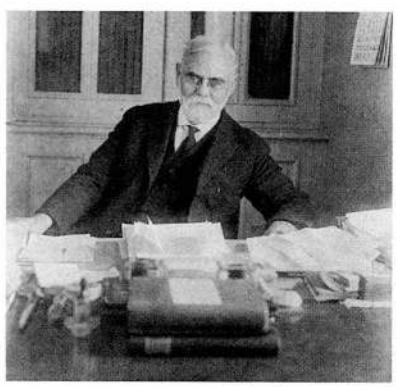
> Mr. Sisson: The gentleman now gets at the point of the case. Does the gentleman believe that the Constitution construed as a whole ever contemplated that Congress would exercise either of those powers in the exercise of a police power? The purpose of this bill—and we are all in sympathy with it—is to prevent the use of opium in the United States, destructive as it is of human happiness and human life; but the question now is whether or not the purpose you desire to reach is a purpose that would be permitted under any clause of the Constitution.[22]

Representative Sisson had framed the constitutional dilemma perfectly. The progressive reformers were faced with the problem of exercising federal power to remedy what they perceived as a whole set of social evils, yet without violating the constitutional limitations on the federal authority. Since police powers had not been given to the central government by the Framers, being reserved to the states, any law that looked like the exercise of that sort of authority was constitutionally suspect.[23] So the reformers who considered the state governments unable to cope with the scope and degree of these emerging social ills created another method to achieve their goals.

Over a period of years, Congress had effectively created a national police power through an expansive use of the taxing power. Since Article I, Section 8 of the Constitution is limited only by the requirement of uniformity and by the prohibition against levying duties on goods exported from any state, the grant to Congress of the "Power to lay and collect Taxes, Duties, Imposts and Excises,



Representative James Robert Mann (R-IL, right), a Harrison Act supporter, was best known for his sponsorship of the White Slave Act which bore his name. His fears that opium drove women into white slavery as they were forced to become prostitutes to support their habits were reflected in the popular press.



[and] to pay the Debts and provide for the common Defence and general Welfare of the United States"[24] is broad indeed.

The Supreme Court gave wide latitude to that congressional power to tax, checking it only when it could find little or no connection between the taxing power and the purpose of the act. Representative Sisson was making the point of that connection. If the Harrison Act was going to be ultimately construed as a tax act, as was the drafters' intention, there must be some legitimate connection between the provisions of the act and its revenue character. Simply using the taxing authority of Congress, however broadly defined, to prohibit the then legal and widely accepted medical use of opium would have imposed a constitutional infirmity on the act, making it doubtful it could have been sustained.

This development toward an expansive interpretation of congressional taxing authority to counter "social evil" faced an uncertain fate in the Supreme Court. Decisions seemed to depend on the particular evil and the Justices' social values and constitutional principles.[25] A decision could ultimately rest on whether a majority of the Court thought the social ill was evil enough to be exterminated by sustaining the congressional tax. When the Supreme Court invalidated regulatory taxes, it generally did so on the basis of "dual federalism," which maintained that the national government is one of separately enumerated powers and that, within their respective spheres, the national and state governments were sovereign and equal.[26] In the years prior to the Harrison Act cases, the Court approved taxes on oleomargarine, adulterated foods, and phosphorus matches as progressive measures whose end was to remedy social ills. These cases provided hope and a legal roadmap for the reformers wanting to rid the American scene of opium use.

The second issue, however, was more difficult to navigate. Opium in 1913 did not have the same social stigma of today. Thousands of doctors regularly prescribed opium to numerous patients. Medical practitioners commonly prescribed opium

> [t]o mitigate pain, to allay spasm, to promote sleep, to relieve nervous restlessness, to produce perspiration and to check profuse mucous discharges from the bronchial tubes and gastro-intestinal canal. But experience has proved its value in relieving some diseases in which not one of these indications can be at all times distinctly traced.[27]

Physicians recognized the problems of addiction, and developed treatment regimens that understood the complicated medical dilemma created by the use of a miracle medicine with the potential for addiction.

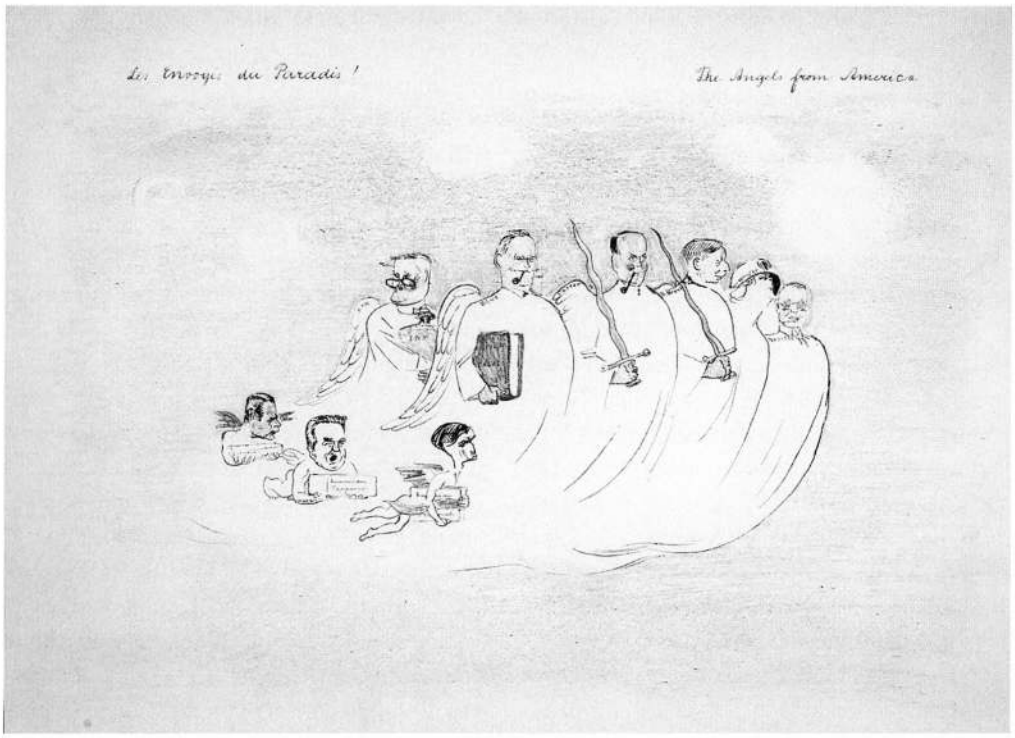
The states also recognized that potential abuse, and, in conjunction with their traditional role as regulator of state medical practices, many had passed laws controlling and regulating the use and dispensing of narcotics. New York took the lead in passing several acts that sought to address both legitimate medical treatment and the problem of doctors who prescribed without recognition of the potential for addiction. Under the direction of Dr. Charles E. Terry, Florida established a method of addiction control in Jacksonville in 1912; other state attempts at control had proven ineffective. A year before the Harrison Act, the state of Tennessee passed legislation that permitted limited maintenance prescriptions to opium addicts in an effort to ease their suffering and still prevent "the traffic in the drug from getting into underground and hidden channels."[28]

Clearly, prior to the passage of the Harrison Act, states had taken the initiative in regulating medical practice generally and the use of opium medicines in those practices particularly. Given the dual-federalism bent of the Supreme Court, unless the Harrison Act was construed primarily as a taxing measure, it was likely the Court would defer to those states that

An 1880 American-Chinese commercial treaty forbade American citizens from engaging in the sale of opium in any of the open ports in China. However, the export of opium to America continued to be a major source of tension in Chinese-American relations. Pictured is an opium trader boat in Hong Kong in 1900.

had traditionally been regulating medical practice under their independent police power and constitutional reserve of authority in the Tenth Amendment.

The final issue, which looms in hindsight as a lost legal opportunity for the government in *Jin Fuey Moy*, was the international origin of the Harrison Act. Long before the debates among Reps. Sisson, Harrison, and Mann on the act itself were ringing in the House chamber, several medical and political professionals were stirring the pot in hopes of advancing their social recipe of opium regulation and prohibition. Internationally, opium in the Far East, particularly in China, had become a major source of tension. A series of treaties to which the United States was a signatory party attempted to regulate the importation and use of opium. The 1880 American-Chinese commercial treaty forbade American citizens to engage in the importation of opium into any of the open ports in China.[29] However, China



Dr. Hamilton Wright, a dashing reformer, was appointed to a State Department commission in charge of investigating the international opium trade and its impact on the use of opium in the U.S. He is one of the angels depicted in this cartoon of reformers at the international conference on opium held in Geneva in 1923.

was one thing; the Philippines, by then a U.S. possession, were something altogether different. When the opium problem in the Philippines became evident, the voices of the likes of Dr. Hamilton Wright, a dashing, ebullient reformer with a political bent and experience in the Far East, began to dominate the debate.[30] Wright was appointed to a State Department commission in charge of investigating the international evil of opium and its consequent impact on the use of the drug in the United States. All of this was done in preparation for the Shanghai Opium Commission in 1909. These efforts ultimately led to the Second International Opium Conference, held in 1913, which ratified the imposition of strict international and domestic laws intended to restrict the use of opium and allied narcotics to strictly medicinal purposes. All but ten of the world's nations signed this convention.[31]

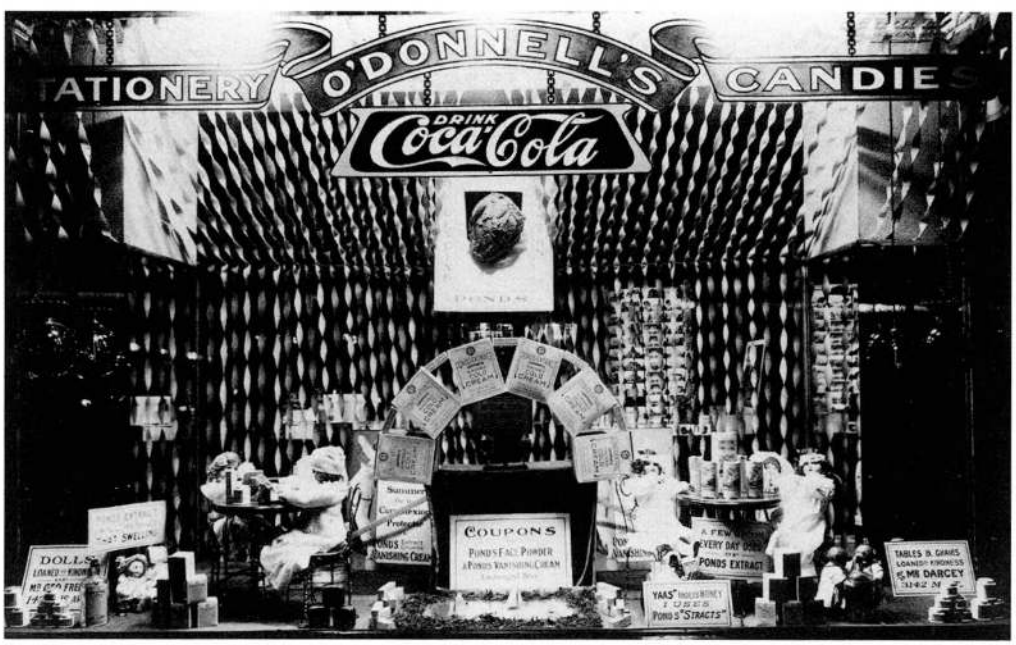
Wright ignored no prejudice in promoting his panacea. After the conference ended, knowing that no strict domestic legislation existed on the books that would keep the American promise given at the conference, Wright began to stress the evils of the rampant use of cocaine, especially among the "humbler ranks of the Negro population in the South."[32] Together with Representative Mann, he tied cocaine use to criminal classes, especially those that were promoting the white slave traffic. Wright's reports asserted the need for stricter control of opium and its derivatives, since "[i]t has been stated on very high authority that the use of cocaine by the Negroes of the South is one of the most elusive and troublesome questions which confront the enforcement of law in the Southern states."[33] Even Coca-Cola was not exempt: politicians argued that it was habit-forming, and Representative Harrison thought coca leaves ought to be included in an early version of the bill, since from them were

made "Coca-Cola and Pepsi-Cola and all those things that are sold to Negroes all over the South."[34]

The significance of these appeals was not their blatant prejudice, though that certainly affected their political palatability, but the fact that that the Harrison Act arose from treaty obligations and in response to the Second Opium Conference. The Southern congressional contingent opposed the increased federal influence the conference mandated, but were persuaded by the appeals to accept it. The domestic legislation that became the Harrison Act was promoted, drafted, and encouraged by the Department of State in order to comply with the conference convention. By 1915, then-Secretary of State William Jennings Bryan was solidly behind the legislation, for his own social and moral reasons.

The Harrison Act had its early legislative origins in the Foster Act.[35] By 1913, it had become a streamlined proposal that required physicians and druggists to register and provided for standard order and reporting forms to be used by any purchaser of narcotics, which had to be kept for two years and to be available for inspection by revenue agents at will. Physicians could dispense drugs without keeping such records if doing so in actual attendance on their patients. Retail druggists and practicing physicians could obtain a tax stamp upon proper registration for one dollar a year.

When the bill finally passed Congress on December 14, 1914, its practical significance was still being debated among the professional groups affected, and there was no general agreement on what would be the actual or desirable method of enforcement of the law.[36] The act's supporters had kept the promise of the international conference by passing a bill that regulated domestic opium use. Soon, however, the parameters and the omnivorous nature of the enforcement by the Bureau of Narcotics became painfully evident to the many physicians and druggists affected by the act.



Although coca and its derivatives had been lauded as a miracle drug in the 1880s, Dr. Wright's reports called for stricter controls on Coca-Cola, and politicians argued that it was habit-forming. Representative Harrison thought coca leaves ought to be included in an early version of his anti-narcotic bill.

III. Enforcement of the Harrison Act

While it was clear that the record-keeping and tax stamp provisions of the act would inevitably place burdens on doctors and druggists, the onerous nature of the act did not become fully apparent until mid-January 1915, when the Treasury Department began to promulgate regulations. These regulations were the directions to the agents of the Bureau of Narcotics and to the U.S. Attorneys regarding how the act ought to be read and enforced.[37] Treasury decisions added new requirements to the act. Significantly, while Section 2(a) exempted doctors who dispensed narcotics "in the course of [their] professional practice only," the regulations interpreted the statute to mean that exemption applied only when the physician *personally* attended—that is, visited away from the office—any such person. Also, the regulations did not allow addicts to register personally, and thus put the entire burden on the physician or druggist prescribing or dispensing any affected drug.

The debate in the House had covered the first issue and appeared to resolve the conflict: it was not the visit away from the office, but the repeated filling of opium prescriptions without examining the patient that Section 2(a) addressed. Again, a colloquy between Representative Sisson and Representative Harrison is instructive.

> Mr. Sisson: Then it requires . . . the physician . . . shall be in personal attendance upon such patient. Suppose a patient were sick or were addicted to the use of the drug, would it be necessary for the patient to have a doctor to come and visit him, and in addition to that have a prescription written . . . would the patient have to have a new visit from the doctor and a new prescription and be compelled to pay for it every time he went to him?
>
> Mr. Harrison: I know of no better way to control it than that . . . one of the witnesses before the hearings . . . stated it as his opinion that over half of the cases acquired the habit from doctors' prescriptions, and I invite to the consideration of the gentleman from Mississippi the misfortune that would come in permitting an unrestricted refilling of old prescriptions by persons who in that way acquired the drug habit. There are two horns of this dilemma, and I think we have chosen the lesser.[38]

It seems obvious that Congress cared less about the location of the doctor's visit—be it a house call or at his regular office—than about unregulated refilling of prescriptions.

This was fundamental to the Harrison Act, and to what would become and remain the most misunderstood feature of its enforcement and judicial interpretation. This "good doctor-bad doctor" dichotomy was readily apparent in the Wright report, in the House floor debates on the measure, even in the extant medical journals, which weighed in regarding the burdens of enforcement on the practice of medicine. ("Good doctors" prescribed opium only to patients under their direct care. Medical societies and organizations began to countenance action against "bad doctors" and druggists who prescribed the drug on a more random and less professional basis.) However, the Treasury Department and the Bureau of Narcotics did not fully account for that dichotomy in their regulations or in their early strategy of enforcement. This myopia led to the legal rebuff in *Jin Fuey Moy*, the near defeat in *Doremus* and *Webb*, and the fundamental misunderstanding by the commentators and scholars of the nature of judicial decision-making in the area of medical practice.

By June 30, 1916, 124,000 physicians, 47,000 retail druggists, 37,000 dentists, 11,000

veterinarians, and 1,600 manufacturers, importers, and wholesalers had registered with the Treasury Department.[39] Almost immediately, agents began to make arrests and prosecutions were instituted against hundreds of doctors and druggists. Initially, the Treasury officials attacked maintenance doctors who regularly prescribed doses of narcotics to addicted patients as a medical regimen to maintain, rather than cure, their habit. In 1915, maintenance as a medical treatment was widely accepted by the medical community. When prosecutions of these doctors began to reach federal district courts, they generally interpreted the language of the act strictly as a tax measure, and since it did not permit the registration of addicts, as thus construed the act did not prohibit their simple possession of narcotics. Conspiracy cases filed alleging the doctors conspired with the addicts to permit their unlawful possession were routinely dismissed. In Pittsburgh, Memphis, Atlanta, and Jacksonville, where prosecution was most zealous, and in numerous other jurisdictions, U.S. Attorneys questioned the nature of the enforcement effort. Even Assistant Attorney General William Wallace conceded that it would be difficult to enforce the act against a physician who issued a prescription to a "drug fiend," even if he was not attempting to perfect a cure.[40] The growing sense was that, until the Supreme Court clarified the law, efforts at widespread enforcement would be sporadic and uncertain.

Still, the enforcement continued. The Bureau of Narcotics maintained scrapbooks that detailed the extent and vigorousness of the enforcement effort. These scrapbooks contain newspaper articles dramatizing local arrests and prosecutions, and detail the growing distinction between "drug doctors" and those physicians who were practicing legitimate medicine. An article in the *Memphis Press* described "drug doctor" Benjamin Friedman as having engaged in "the practice of damning human souls by writing prescriptions for drug slaves for money."[41] It continued, "[t]he vilest murderer or midnight assassin is no worse than a doctor or druggist who promotes the dope traffic. Such people should be drummed out of the city by an aroused public." The *Atlanta Constitution* headlined a common presumption when it reported in a June 15, 1915 headline that "Federal Agents Claim Harrison Act is Violated Extensively Here."[42] In Atlanta, the U.S. Attorney drew a distinction between respectable doctors and those who needlessly perpetuated the suffering of the dope fiend.

The articles often had difficulty drawing the distinction between good and bad doctors. They came closest to that fine line by focusing on the doctors' volume of business. The Treasury regulations and decisions also required its agents to consider a doctor's volume of prescriptions in relation to a normal supply.[43] Though this important determinant was ostensibly intended to provide a means of separating users who could evade the tax provisions of the act from those who could not, the field agents arrested and the newspapers publicized stories about *any* physician or druggist who appeared to be prescribing more than the normal amount of narcotics. Dr. W. A. Allen was convicted and sentenced to one year and one day in jail for a violation of the act; it was emphasized that he had over one hundred dope patients and had issued over 400 prescriptions to those "dope fiends" in a sixty day period. Sensational stories of "dope fiend babies" and wide-scale police raids on "drug rings" and enormous profits being made by drug doctors help explain the increasingly strident enforcement efforts, even in light of the repeated judicial setbacks.[44]

Those setbacks did not go unnoticed: the Bureau of Narcotics scrapbooks contain numerous letters from field attorneys requesting advice on policy, and other articles and commentary on the judicial reaction to the effort. A May 29, 1915 letter from the Commissioner of Internal Revenue to U.S. Attorney Hubert F. Fistus of the Western District of Tennessee explained the meaning of Treasury Regulation 2200. It stated that

> [A] doctor can prescribe only such amount as is necessary to meet the immediate needs of a patient in the ordinary care . . . or a physician should include on the prescription, if it is to meet needs beyond that, the purpose for which the unusual quantity of a drug so prescribed is to be used.[45]

In a Savannah, Georgia clipping of March 25, 1915, the essence of the debate was made plain when the article stated, "The law nowhere forbids the administration of sufficient narcotics by the physicians to ease the dope 'fiend' while curing the habit."[46] The target of the Harrison Act—the evil to be prevented—was as much the unscrupulous practice of doctors and druggists as it was the evil of opium itself.

Medical journals weighed in on what the profession came to regard as the onerous and illogical requirements of the act. One early commentator, clearly representing the views of the "good doctors," contended that the restriction on refilling prescriptions added unnecessary cost to the patient with a persistent medical condition. The added cost of consulting the physician each time a patient needed a prescription filled "discriminates in favor of the physician and against the poor man, who . . . is compelled to pay the physician every time he desires a new supply of any prescribed narcotic mixture."[47] Another commentary detailed recent prosecutions of doctors for prescribing opium and reminded physicians that merely using a prescription was not a protection, "unless it is for legitimate purposes."[48] In an editorial entitled "The Narcotic Drug Evil," a commentator detailed recent New York hearings in response to the Harrison Act enforcement, and lamented that doctors and druggists were involved in the matter at all. "The gratifying assertion," the article stated, "that the medical profession and the pharmacists are not involved to any appreciable extent in the illegitimate traffic in narcotic drugs, was further confirmed by the statistics furnished by the District Attorney of the County of New York, who said that less than ten percent of the offenders against the narcotic drug laws were either doctors or druggists."[49] Further restrictions on the "legitimate practice of medicine" was a gross injustice to the profession and patients who had a legitimate need for the drugs.

Not to be outdone, the pharmacists, too, offered their opinion on the Harrison Act. In a journal replete with advertisements for patent medicines and drug cures, including an advertisement for the New York Quinine and Chemical Works Company, the American Pharmaceutical Association proposed a Model State Narcotic Law that would clarify the uncertain liability of druggists under the act. The article added that the drafting committee "does not advocate the enactment of this or of any other measure unless there is a real need for new legislation to correct existing state laws or to bring them into compliance with Federal law, known as the Harrison Act."[50]

Despite the mixed signals sent by and the uncertainty of the act, its enforcement against primarily doctors and druggists progressed to a final judicial resolution of those uncertainties. In the first fourteen years of the act, U.S. Attorneys prosecuted over 77,000 violations. Most were medical professionals. While the average sentence for Volstead Act violations during Prohibition was between 20 and 30 days, the length of sentences for Harrison Act violations steadily rose until the average sentence in 1928 was one year and 10 months.[51] Even in the early years of enforcement, before the Supreme Court decisions, there existed the very real possibility of prosecution and a prison sentence upon conviction. The federal prison system created special wings in their prison facilities specifically for the doctors and druggists caught in the snare of the act, and Congress authorized "two narcotic farms" to house drug convicts in 1928.[52] Because of this enforcement, all across the country affected professionals paid great heed to the judicial decisions winding their way through

lower courts to the ultimate resolution of those uncertainties before the Supreme Court.

IV. The Supreme Court Response: *Jin Fuey Moy, Doremus*, and *Webb*

At first glance, the three Supreme Court cases decided in 1916 and 1919 appear to be nearly inapposite. A cursory examination of them out of historical context reveals a Court which strictly interprets the Harrison Act, almost finds it unconstitutional in 1916 as an overreaching of the federal power to regulate otherwise lawful state matters, but is persuaded a short three years later by the immorality of the drug trade and its social and moral effect on the country to reluctantly sustain the act as a necessary tool against the evil of opium. That romanticized view gives greater weight to outside influence and to social and moral suasion and reflects minimally on the shape of the cases as they appeared on appeal, on the nature of the litigants and on their arguments, on the Court's commitment to precedent, and on cooperative federal-state relations.[53] That view, which has been the predominant one for decades, tends to ignore the hard facts of law and the hard law of facts in ascribing a revelatory epiphany to judicial decision-making.

The truth of the matter is far more complicated. A contextual scrutiny of those decisions permits a broader, fuller view of the judicial decision-making the Supreme Court employed in the Harrison Act cases, and offers a different vision of the judicial view of federal regulation of medical practice, one that the predominant view has obscured.

Dr. Jin Fuey Moy was a Pittsburgh physician who prescribed a dram, or about one-sixteenth of an ounce, of morphine sulfate to Willie Martin, an addict. The indictment charged Fuey Moy with conspiring with the addict to place in the addict's possession morphine, not for medical purposes, "but for the purpose of supplying one addicted to the use of opium."[54] According to the Treasury Department's interpretation of the Harrison Act, it was illegal for anyone not registered under the act to obtain morphine except by a prescription written in good faith. It followed that Martin's possession and Fuey Moy's complicity in permitting that possession constituted a conspiracy to violate the Harrison Act.

Fuey Moy's attorneys filed a motion to quash the indictment, alleging that, since Martin was not a "person" who was required to register under the act, being a mere possessor rather than an "importer, producer, manufacturer, dealer, dispenser, seller or distributor," it was not a violation for Martin to possess the drug, and consequently, there could be no conspiracy by Fuey Moy to violate any law, since none had been violated. The district court sustained the motion to quash; the state appealed it. As is common practice, there was no evidentiary hearing on the motion; other than the bare assertions in the indictment, the record is devoid of any evidence, beyond the indictment, about the nature or extent of Fuey Moy's medical practice.[55] Significantly, that is the entirety of the evidence that would ultimately be considered by the Supreme Court.

The appellate briefs of both sides amply detail the issues in the case before the Court, with one notable exception. For the parties, the case revolved around the strict interpretation of the Harrison Act's constitutionality as a revenue measure, and of the act's applicability to the particular facts of one medical transaction. Fuey Moy merely needed to convince the Justices that the only persons regulated by the act were the classes of "persons" enumerated. The government was left to argue, essentially, that Congress could not draft an act that excluded the kind of enforcement it specifically intended to encourage. Relegated by the language of the act itself to that backdoor persuasion, the government was content with saving the act itself. Their brief weakly contended that because the lower court had not found the Harrison Act unconstitutional, the Supreme Court should not do so either, stating that "when the question is properly raised, it will be time to consider whether the Act is not

constitutional as an exercise of the taxing power."[56]

The missed opportunity described above, which the government first argued in a reply brief, was the impact of the treaty power on national legislation. While that topic is beyond the scope of this article, it should be noted that there was substantial congressional testimony and extensive history that the Harrison Act was in fact passed as a result of and in accordance with a treaty obligation. It is possible that, had the treaty authority been considered, the act would have been more broadly construed under the broad logic of the treaty powers of the Constitution.[57] While it would not have changed the factual issue of what constituted a person under the act, the Court clearly could have considered the act to be constitutional under the treaty powers and the *Holland* doctrine. The failure to present the issue full-square to the Court may be explained by the lack of any evidentiary basis for the presentation of that argument due to the procedural method employed in resolving the case in the lower court.

Jin Fuey Moy was decided June 5, 1916, by a vote of 6–2, with Justice Oliver Wendell Holmes, Jr., delivering the majority opinion. (Justice Joseph R. Lamar heard arguments but was off the Bench by the time of the vote, and Justice Louis D. Brandeis had not yet taken his seat.) Chief Justice Edward Douglass White and Justices Joseph McKenna, Willis Van Devanter, William Rufus Day, and James C. McReynolds were in the majority; Charles Evans Hughes and Mahlon Pitney dissented with no opinion.

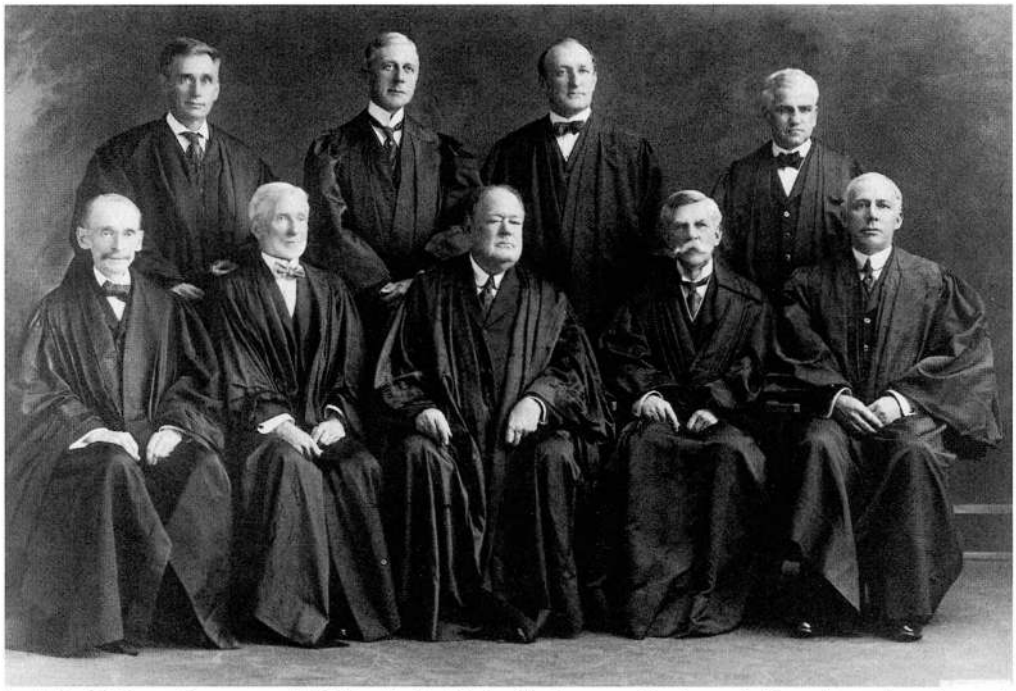
The decision of the Court followed in lockstep with the lower court finding, and held firm to a strict interpretation of a revenue measure that also regulated commerce. The Court drew the line with the same definitional precision Congress had employed, but there was more to the decision, which would become apparent in the later cases. Most notably, there was no indication that Dr. Fuey Moy was a bad doctor; the allegation that he had prescribed one dose to one addict hardly seemed to be the kind of medical abuse the Harrison Act intended to remedy. The Court took the straightest line of decision, factual and specific, and drew it in the legal sand in freeing the good Dr. Fuey Moy from prosecution. The Court held:

> The act is a revenue act and cannot apply by construction to a class of persons who are not permitted to comply therewith or otherwise affect the revenue, but is limited in scope to requiring persons specified to register and pay the tax imposed; . . . to construe said act as a police regulation to suppress the traffic in opium and other drugs, within the several states would be to render it unconstitutional.[58]

Absent from the opinion was any discussion of the social evils of opium or on any limitation of the medical practice of doctors. The case, and the limited factual foundation for it presented to the Court because of the indictment and motion to quash procedure, did not allow any broad discussion of the facts or social ills that the Harrison Act sought to prevent. Dr. Fuey Moy was content with a dismissal of the indictment against him, and the government was satisfied with preserving the act until another day. It would be nearly three years before that day would come.

United States v. Doremus and *Webb v. United States* were decided by a sharply divided Court on the third day of March, 1919. Justice William Rufus Day delivered the opinion for the Court, signed on by Holmes, Pitney (who, unlike Day and Holmes, showed consistency with his vote in *Fuey Moy*), Brandeis and John Clarke. True to their earlier stances, Chief Justice White dissented—on the grounds that the federal government did not have authority to pass the Harrison Act—and Justices McKenna, Van Devanter, and McReynolds concurred in the dissent.

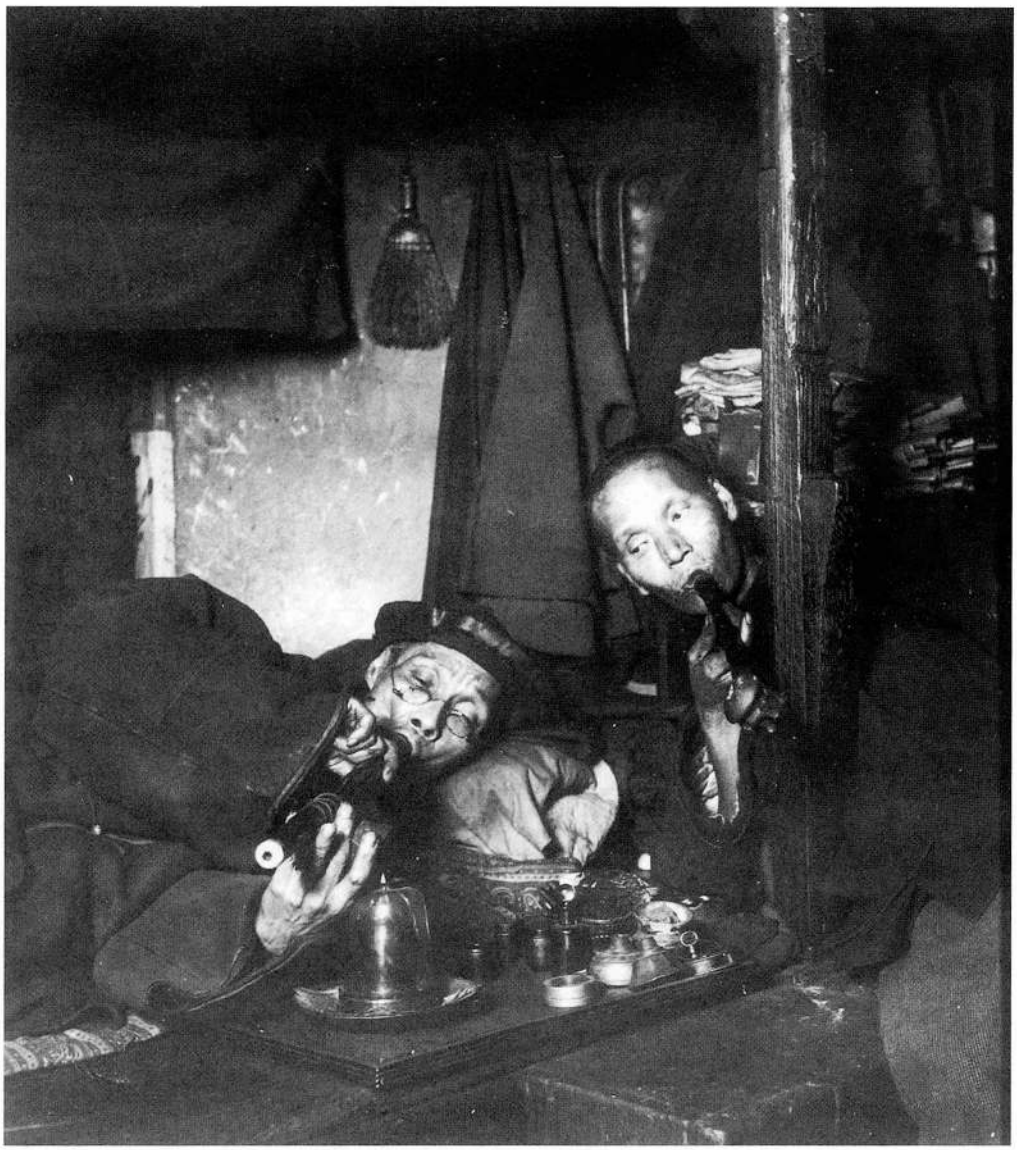
The Bureau of Narcotics had changed



In *United States v. Doremus* and *Webb v. United States*, the Supreme Court reverted from its previous stance in *Fuey Moy* by fully upholding the Harrison Act. *Doremus* and *Webb* were decided 5–4 on March 3, 1919, with Oliver Wendell Holmes, Jr. (seated, second from right) and William Rufus Day (seated at left) switching from their earlier stance in *Fuey Moy*.

much about its enforcement strategy in the time between *Jin Fuey Moy* and these two cases. Because the Supreme Court had not ruled on any new Harrison Act cases, that change remained obscured. However, the records of the Bureau of Narcotics and reports and accounts of those enforcement efforts dramatize a steady shift away from the prosecution of doctors who were intermittent prescribers of opium towards a concerted effort to identify and prosecute "drug doctors," those who, by the sheer numbers of prescriptions they issued, appeared to cross the boundary that Congress, the progressive reformers, and the medical profession had drawn.[59] Interestingly, there was less jubilation about the *Jin Fuey Moy* decision than might have been expected from doctors. This attitude, exemplified in an American Medical Association opinion piece that called for state regulation of doctors' practice in light of the decision,[60] reflected the growing movement among the medical profession to clean up its own act. No doctors wanted federal intervention in and regulation of their practices, but most recognized that abuses *were* occurring.

The *Doremus* case arose from a San Antonio, Texas prosecution of Dr. C. T. Doremus, who had duly registered and paid the Harrison tax. He was accused of supplying one Alexander Ameris with 500 one-sixth-gram tablets of heroin, of supplying one Frank Halamoody with twenty-five one-half-gram tablets of morphine, of supplying one Tom Walsh with twenty-five one-half-gram tablets of morphine, and finally of supplying one May Moore with twenty-five one-half-gram tablets of morphine, all on or about the 31st day of October, 1916. It was alleged that all four *individuals* were "dope fiends" and that Dr. Doremus did not treat any of these people as patients but rather simply prescribed the



In *Doremus* and *Webb*, the Court said that doctors who prescribed opium to their patients in the course of medical treatment could avoid the registration and enforcement provisions, but that addicts had to comply. Unlike these Chinese-Americans, none of the addicts cited in the Supreme Court cases were of Asian origin.

drugs to them as a supplier of their habit. Specifically, the indictment stated the treatment was "not in the regular course of [his] professional practice."[61]

In the same manner, the grand jury indicted Dr. Webb, along with Jacob Goldbaum, a druggist, for repeated and continuing violations of the act. The *Webb* case was the only one of the Harrison triad that actually went to trial, and thus had the fullest factual record developed and presented to the Court. Webb and Goldbaum had registered and paid the tax *required* by Section 1 of the act, and all records had been properly kept. However, beyond the procedural record-keeping, the facts disclosed that Webb and Goldbaum practiced a kind of medicine few would have acknowledged as either professional or ethi-

cal. The District Court of Tennessee and the Sixth Circuit Court of Appeals adopted a factual finding, which the Supreme Court later adopted nearly verbatim. The finding made it evident that the bad Dr. Webb was not the ordinary doctor.

Webb and Goldbaum practiced in Memphis, Tennessee. As a regular custom and practice, Webb prescribed morphine to habitual users upon their application to him, not after an office consultation or examination, and not with such directions as "in his judgment would tend to cure the habit or as might be necessary or helpful in an attempt to break the habit, but without such consideration and rather in such quantities as the applicant desired for the sake of continuing his accustomed use."[62] In advance of the requests for drugs for Webb's patients, Webb and Goldbaum had cooperatively agreed on a plan to acquire and stock morphine which would be used, at fifty cents a dose, to refill the prescriptions of Webb's "patients." In a period of eleven months, Goldbaum purchased from wholesalers, pursuant to this arrangement, thirty times as much morphine as was bought by the average retail druggist doing a larger business, and he sold narcotics in 6,500 instances, filling over 4,000 of Webb's prescriptions. In one instance, a shady character named Rabens came from another state and was given ten so-called prescriptions by Webb, which Goldbaum generously filled in ten separate and fictitious names.[63] The circuit court certified three questions to the Supreme Court based on its decision in *Jin Fuey Moy*, but made clear in its opinion that it was not disposed to give Dr. Webb the benefit of the medico-legal doubt.

Doremus and *Webb* typified the changing nature of the enforcement policy and target of the Bureau of Narcotics, emphasizing the type of practice of the physician rather than simply the nature of the opium evil. The "good doctor-bad doctor" dichotomy promoted by the medical journals and the mainstream press was the kind of evil that Representative Harrison had sought to address with the original bill. He had conceded the acceptability of the medical use of opium, and the credibility of the economic interests in the country that imported the drug, manufactured it, and made it available to the medical community. In floor debate on the branding, or labeling, of opium, Harrison admitted that Parke Davis and Company—a major pharmaceutical company—alone made 3,600 different opium preparations, which demanded a uniform system for identifying those among such preparations that had medicinal uses.[64] The Harrison Act did not intend to bar the medical use of opium; it was designed to regulate through the taxing authority exactly the kind of abuse that Drs. Doremus and Webb exemplified.

When the Supreme Court decided *Doremus*, it was within the context of both cases and of the unique and egregious factual understanding of Doremus's and Webb's medical practices, and in light of the previously described constitutional implications of the taxing authority of Congress. Equally importantly, here the Justices had a factual basis *detailing* a pattern and scale of abuse with which they could frame the cases. The jury trial in *Webb* and details of Doremus's and Webb's indiscriminate issuing of prescriptions to addicts was significantly distinct from Dr. Fuey Moy's issuance of one tablet to one patient he had examined. In *Doremus*, the issue came down to whether the act, which clearly invaded the police power authority of the states more than had any prior legislation, could be sustained under the broad aegis of the taxing power of the Constitution.

Doremus and *Webb* were decided by the barest of majorities, yet the dissenters did not assert that the underlying purposes of the Harrison Act were invalid. Instead, they held to the belief that the control of both narcotics and physicians' practice were powers not delegated to Congress, and that this invaded the police power of the states.[65] What distinguished the conundrum was the belief that certain medical practices were illegitimate and

thus within the proper regulatory scheme of the federal government. Justice Day's opinion made it clear that the majority did not consider Dr. Doremus to be acting as a legitimate physician in his "treatment" of the "dope fiend" Ameris. The Court went so far as to assume that "Ameris, being as the indictment charges an addict, may not have used this great number (500) of doses for himself. He might sell some to others without paying the tax . . . [and] Congress may have deemed it wise to prevent such dealings because of their effect upon the collection of the revenue."[66] The Court sustained the taxing powers since they were reasonably related to the goal of the act. Representative Harrison had not contemplated a scenario precisely like Doremus's, but he had anticipated multiple refilling of opium prescriptions and had insisted on the requirement of a separate doctor visit each time. Doremus circumvented that provision by prescribing an initially excessive amount of opium in order to prevent the need for a multiple visit. Either way, the Court saw a legitimate need and sustained the congressional mechanism and mandate.

After *Doremus*, deciding *Webb* was easy. If Doremus had found a way to circumvent the multiple refilling predicament, Webb had found a way to circumvent the entire law. Not only did Webb not have to actually see a patient, he arranged for them to see his cooperative neighborhood druggist Goldbaum directly, using forms he would simply sign, to fill quantities of opium the patients could not possibly need themselves. In answering the certified question of whether a physician's prescription to an addict for morphine falls under Section 2(b) of the act, which excepted physician's prescriptions "in the course of their professional practice," Justice Day dismissed the question out of hand, stating "As to question three—to call such an order for the use of morphine a physician's prescription would be so plain a perversion of meaning that no discussion of the subject is required."[67] Justice Day was not saying that Section 2(b) was invalid, merely that Webb was not acting like a good doctor, and that his orders to druggist Goldbaum were not legitimate medical practice protected by the exception. In this, Day was restating an opinion that held wide sway in the medico-legal community, in the popular press, and among the moderate progressive reformers. In both cases, the tax element of the act was strictly interpreted in light of the facts of particular medical practices. It was an opinion entirely consistent with the Court's decision in *Jin Fuey Moy* and represented no major break in legal thought from 1916.

R. Alton Lee has described the development of regulatory taxation as a process that "[I]n all cases . . . depended upon the thinking of the Justices in terms of the individual members' social values and constitutional principles."[68] He asserts that "if the Justices agreed [that] the problem was 'evil' and should be exterminated, the tax was upheld, [and] if they believed the item was not 'evil', the tax was struck down as an unconstitutional abuse of power."[69] This simple appraisal of the power of the Supreme Court over policy questions does not take into account the full procedural and factual evidence that often implicate the features of a case. The appellate records of *Jin Fuey Moy, Doremus* and *Webb* show in dramatic fashion how lower court procedure can delimit or expand an evidentiary record, such that the Court is able to read and consider the broader political, social, and even medico-legal parameters of a controversy in a way not dependent on individual social and jurisprudential predilections.

The Supreme Court had occasion to clarify what commentators have called an apparent shift in opinion from *Jin Fuey Moy* to *Doremus* when, in 1922, it heard another Harrison Act case from Utah. In *United States v. Wong Sing*,[70] the defendant was indicted as a purchaser of opium, not for medical reasons. Significantly, a 1919 amendment to the act had expanded the definition of "person" crucial to Dr. Fuey Moy's, adding consumer possessors to that category of persons who could not lawfully obtain narcotics without a valid

medical purpose and prescription.[71] While the government relied on the 1919 precedents for the broad construction to justify the prosecution after Wong Sing had demurred to the indictment, the Court overruled the demurrer and sustained the prosecution. It ruled that, since in *Doremus* and *Webb* it had sustained as a complement to a revenue measure the criminalization of sale, barter, or exchange of regulated narcotics except under certain prescribed conditions, all designed to make the law effective as a revenue measure, clearly Congress could put like conditions on purchasers.[72]

Fully sustained as a valid tax measure by the early 1920s, the Harrison Act became the standard of enforcement in the battle against unlawful, nonmedical opium abuse for the following fifty years.

V. Conclusion

The progressive movement to banish the evil of opium was part of a broader social movement in an age of reform that stretched from the 1890s to World War I. Scholarly debate has produced an undulating change of opinion about those years, when social problems engendered reform movements such as pure-food and drug crusades, antiprostitution reforms, child labor advocacy, and juvenile justice reforms, where proponents carved out their distinctive niche of interaction with the law as it then existed.[73] Early scholars attempted to classify these movements independently, using schools of thought and neat identifiers such as the state hypothesis theory, the urban/rural conflict theory, the rise of reform Darwinism theory, and the social control theory, among others. The discordant nature of this interpretation undercut the notion that there was a singular progressive movement and one explanatory theory equally applicable to all reform experiences.[74]

Recent work has more fairly examined the context of progressive reform that gives agency to "the structures of politics, power, and ideas."[75] Yet even the most recent literature on the Harrison Act has not kept pace with these new interpretations of reform ideology. Just as significantly, the new reformist interpretations, which give credit to the law and to legal institutions for their influence, often do not fully appreciate the institutional, operational, and procedural mechanics of the legal system as it interacts with specific people and facts and the political and social questions inherent in those controversies.

In the earliest days of the Harrison Act, America's doctors were frightened. Like the private doctor from Cedar Rapids, Iowa, who, in anticipation of the ruling in *Jin Fuey Moy*, wrote the Supreme Court on his humble office stationery seeking directions about his own practice, physicians and druggists across the country were aware of the act and of the nascent but vigorous enforcement effort being directed primarily at them.[76] Echoing that concern, medical journals sought answers and focused on the key issue for the majority of practitioners: how would the Harrison Act affect the treatment of patients? The director of the Medical Society for the State of New York feared that "[w]e seem to be approaching the time in this country when privacy will be a thing of the past, and when even the secrets of family life must be recorded for inspection by some state department of commission."[77] One can imagine the reaction of the good doctor from Cedar Rapids who, rising one morning, was greeted by a morning newspaper that contained the kind of stories regularly appearing in the country's press print in 1915:

> Dr. J. E. Jones, physician on West Goodde Street, former president of the North Side Chamber of Commerce and one of the members of the State Board of Library Trustees was arrested . . . on a charge of violating the Harrison Anti-narcotic act.[78]

> Dishonest physicians are responsible for the ease with which victims get dope.[79]

> No physician can prescribe for a dope fiend . . . if absolutely essential that narcotic be used, it must be administered to a patient in his own office.[80]

Not only doctors were fearful. Reformers and law enforcement officials struggled with a culture that seemed infused with narcotics. In the 1880s, coca and its derivatives were lauded as miracle drugs, as ingredients in elixirs, extracts, infusions, pastilles, wines, cordials, cigarettes, inhalants, and medicated soft drinks. The reformers saw a more sinister pattern to coca's use.[81] Prostitutes "hitting the pipe" on Dope Alley, criminals unable to control their drug usage, racially motivated fear of the "cocaine-crazed Negro" and stories of the ordinary citizen in a social and moral spiral due to drug usage all fueled the fear of rampant, uncontrolled opium addiction that sparked the passage of the Harrison Act.[82] America's promise could not be reached so long as it fell under the influence of the "un-American" sway of the evil opium.

Finally, there was a fear among the "unfortunates," those addicts who lived mostly regular lives provided they could be maintained by a limited but steady supply of narcotics. Narcotic clinics in larger cities—such as Jacksonville, Florida, New Haven, Connecticut, Albany, New York, Knoxville, Tennessee, Augusta, Georgia, Houston, Texas, and dozens of other cities—provided regulated prescriptions to an addict population estimated at between 200,000 and 4,000,000 people.[83] While more addicts received their drugs from private physicians and druggists than from clinics, the early enforcement vigor of the Bureau of Narcotics quickly throttled the availability of those drugs from all sources.

The goals of these different groups were clearly at cross-purposes within the confines of the Harrison Act, and in the early years, the Supreme Court walked a fine regulatory line between legitimate medical practice and abusive, uncontrolled issuance of prescriptions. Congress had established a scheme intended to regulate, not bar, the medical use of narcotics. The registration, reporting, and tax requirements of the act were intended to place a burden on what the doctors ordered for their patients, but one to which no "good doctor" would object. However, the enforcement directives of the Department of the Treasury, spurred on by reformers such as Dr. Wright and the culture in which the Mann and Volstead Acts had been passed, were intended to press upon the medical community a moral prescription that would increasingly limit and then eradicate the drug curse that they envisioned as the root of many social ills. Their imperative was the interpretation of the Harrison Act as a tool to end opium addiction, especially as encouraged by what they saw as immoral and dubious medical practices involving indiscriminate issuance of narcotic prescriptions by unscrupulous doctors.

When the Supreme Court decided the set of cases between 1916 and 1919 discussed above, it was cognizant of these trends and imperatives. However, those external influences and the international tumult that had precipitated these attitudes were not the guideposts it used to decide *Jin Fuey Moy, Doremus*, and *Webb*. Contrary to scholarly opinion, it was instead internal and institutional constructs that guided the Court.[84] The broad reign given Congress in regulating conduct and economic activity with revenue laws that bore a reasonable relation to the purpose of the law generally received judicial acquiescence. Yet the Court did not rule in a social vacuum, and where those legislative attempts interfered with state police power prerogatives such as the regulation of medical practice, the high court would, with a nip and a tuck, curtail that legislative interference.

Central to any understanding of constitutional interpretation is the recognition that facts matter. The procedural meanderings of a particular case can either disclose or disguise the key facts, and recognition of the relevance of the factual record is instrumental to a full

comprehension of judicial decision-making. Dr. Fuey Moy prescribed one small dose to one patient and was set free; Drs. Doremus and Webb were in the business of supplying large and unregulated quantities of narcotics to addicts they rarely or never saw and paid the price for their conduct. The "good doctor/bad doctor" dichotomy that Congress and the medical community recognized was no less apparent to the Justices when they were presented with a factual record replete with that evidence. Just as the story of the Harrison Act continued a line of cases that had developed a doctrine of regulatory taxation cognizant of the implications of that regulation on legitimate medical practices, so too would a full and fair appraisal of the internal and external influences on judicial decision-making in relation to social policies aid in understanding what portended to be a continuing medico-legal dilemma in the years ahead.

ENDNOTES

[1]Newspaper clippings relating to the Harrison Narcotic Act, 1915–1946: "Federal Agents Claim Harrison Act Violated Extensively Here," *Atlanta Constitution,* June 15, 1915, General Records of the Bureau of Narcotics, Department of the Treasury; Record Group 170 (RG 170), National Archives Building, College Park, MD (NACP). This record will be referred to as Newspaper Clippings, Record Group 170. It consists of two threadbare scrapbooks of newspaper articles, opinion pieces, and editorials about the enforcement of the Harrison Anti-Narcotic Act of 1915. Many of the articles have personal notes on them, being referred from or to a particular person in the Bureau of Narcotics. There is no indication of who kept the scrapbooks, but it is clear that they were maintained by officials who were making enforcement policy for the Bureau of Narcotics.

[2]William E. Clayton, Jr., "Federal Government Plans to Counteract States' New Drug Laws," *Houston Chronicle* December 30, 1996, 1.

[3]38 *Statutes at Large* 785, Chapter 1, December 17, 1914.

[4]*Ibid.*, Section 2.

[5]*Ibid.*, Section 2(a).

[6]*See*, generally, James C. Mohr, **Doctors and the Law: Medical Jurisprudence in Nineteenth-Century America** (Oxford University Press: New York, 1993).

[7]William Butler Eldridge, **Narcotics and the Law: A Critique of the American Experiment in Narcotic Drug Cases**, 2d. ed., rev. (The University of Chicago Press: Chicago, 1967), 9.

[8]David F. Musto, **The American Disease**, 3rd ed. (New York: Oxford University Press, 1999), 122.

[9]241 U.S. 394 (1916).

[10]*Ibid.* at 399.

[11]249 U.S. 86 (1919).

[12]249 U.S. 96 (1919).

[13]*Ibid.*, 98.

[14]*Ibid.*, 99–100.

[15]Musto, 133.

[16]*Ibid.*, 134.

[17]Eva Bertram, Morris Blachman, Kenneth Sharpe, and Peter Andreas, **Drug War Politics: The Price of Denial** (Berkeley: University of California Press, 1996), 70–71.

[18]R. Alton Lee, **A History of Regulatory Taxation** (Lexington: The University Press of Kentucky, 1973), 119.

[19]For general histories of the Harrison Act, *see* Charles E. Terry, **The Opium Problem** (New York: Bureau of Social Hygiene, Inc., 1928); W.W. Willoughby, **Opium as an International Problem: The Geneva Conferences** (Baltimore: The Johns Hopkins Press, 1925); Musto; Ansley Hamid, **Drugs in America: Sociology, Economics, and Politics** (Gaithersburg, MD: Aspen Publishers Inc., 1998); and Mike Gray, **Drug Crazy** (New York: Random House, 1998).

[20]For a full discussion of the Mann Act and the enforcement of its provisions by the Department of Justice, *see* David J. Langum, **Crossing Over the Line: Legislating Morality and the Mann Act** (Chicago: University of Chicago Press, 1994). There are interesting social and legal parallels between the passage and enforcement efforts of the Mann Act and the Harrison Act. For the purposes of this paper, the only issue considered is Representative Mann's influence on the floor debate of both bills.

[21]U.S. Congressional Record (63/1), June 26, 1913, 2193.

[22]*Ibid.*, 2194.

[23]Lee, 1.

[24]United States Constitution, Article I, Section 8.

[25]Lee, 9.

[26]*Ibid.*, 9–10.

[27]Musto, 70. Quoting Dr. Jonathan Pereira, from his standard medical British text, **The Elements of Materia and Medica and Therapeutics**, published in 1854 and widely used in America. The medical profession believed that opium was "undoubtedly the most important and valuable remedy in the whole Materia Medica" (1036–1046).

[28]Musto, 100.

[29]Terry, 631.

[30]Musto, 31.

[31]Terry, 649–650. The ten nations that did not sign the convention were Bulgaria, Greece, Turkey, Switzerland, Austria-Hungary, Norway, Sweden, Roumania, Montenegro, and Serbia.

[32]Musto, 43–44. It is likely that this appeal had the perhaps unintentional effect of causing some southern congressmen and senators to reconsider their traditionally strong view of states' rights in the areas of police power regulation, since their vote for the Harrison Act could be seen in the light of this discourse as protection against the rampant and unnatural desires of a drugged Negro population.

[33]*Ibid.*, 43–44, quoting "Report on International Opium," in "Opium Problem: Message from the President of the United States," S. Doc. 377, 61st Congress, 2d session (1910), 48–49.

[34]*Ibid.*, 46.

[35]In 1910, Representative David Foster of Vermont, Chairman of the House Committee on Foreign Affairs, proposed legislation intended to uncover all traffic in opiates, cocaine, and cannabis. The legislation included a record-keeping requirement and prescribed fines of no less than $500 and no more than $5000, and from one to five years of imprisonment, for violation of the act. The bill did not permit even the smallest use or prescription of the drugs, and would have made such medical use onerous, probably eliminating the trade. *See* Musto, 42.

[36]Musto, 61. Prior to 1913, the American Medical Association was a relatively small group of physicians generally located in the eastern states. By 1913, the organization had 36,000 members (Musto, 56) and was involved at all political levels. The organization generally opposed any legislation that portended federal domination of the medical profession. Physicians and druggists uniformly disapproved of the additional record-keeping duties, but there is little evidence that either group foresaw the potential level of enforcement they soon encountered after the act's passage.

[37]Internal Revenue Regulation no. 35, "Law and Regulations Relating to the Production, Importation, Manufacture, Compounding, Sale, Dispensing, or Giving Away of Opium or Coca Leaves, Their Salts, Derivatives, or Preparations," Commissioner of Internal Revenue, January 15, 1915 (GPO, 1915).

[38]U.S. Congressional Record (63/1), June 26, 1913, 2203.

[39]Musto, 121.

[40]*Ibid.*, 127.

[41]Newspaper Clippings, Record Group 170, "The Business of Damning Human Souls," *Memphis Press*, June 3, 1915.

[42]*Ibid., Atlanta Constitution*, June 15, 1915.

[43]U.S. Treasury Decision, 2172, March 9, 1915 and 2200, May 11, 1915; Musto, 122.

[44]Newspaper Clippings, Record Group 170, Volume 1 (articles do not show the name of the publication or location of the prosecution).

[45]Newspaper Clippings, Record Group 170, Letter from Commissioner of Internal Revenue to US Attorney, (WD, Tennessee), May 29, 1915.

[46]*Ibid.*, untitled article, Savannah, Georgia, March 25, 1915.

[47]"An Assault on the Harrison Narcotic Act," 65 *Journal of The American Medical Association,* September 23, 1916, 958.

[48]Current Comment, "Some Rulings on the Harrison Act," 67 *Journal of the American Medical Association*, December 23, 1916, 1945.

[49]"The Narcotic Drug Evil," 104 *New York Medical Journal*, December 9, 1916, 1154–1155.

[50]"The Model State Narcotic Law," 4 *The Journal of the American Pharmaceutical Association*, May 1915, 611–631.

[51]Musto, note 6 at 368, which details hearings before the House Committee on Appropriations, Treasury Department Appropriation Bill 1926; December 4, 1924, 68th Congress, 2nd Session, 472.

[52]Musto, note 7, at 368.

[53]Jane Perry Clark, **The Rise of A New Federalism** (Columbia University Press: New York, 1938). Clark contends that, from the inception of the country, the question of the relation of the states to the federal government has been central to the constitutional system. While much of the country's history has seen state resistance to federal involvement, certain areas of cooperative federalism, where states and the national government share duties and enforcement, have developed. When examined as a regulation of an illegal narcotic presenting a national problem, instead of merely the regulation of local medical practice, the Harrison Act fits that model. However, the early years of enforcement were hardly cooperative. Perhaps the most accurate assertion is that, once the emphasis shifted to the regulation of the drug and not the medical practice, Clark's model of cooperative federalism becomes compatible.

[54]Records of the Supreme Court, *United States v. Jin Fuey Moy*, Transcript of Proceedings, Indictment, 1–8; National Archives Building, Washington, D.C.

[55]*Ibid.*

[56]*Ibid.*, Brief of the United States, 19.

[57]In *Missouri v. Holland,* 252 U.S. 416 (1920), the Supreme Court asserted that, if powers were exercised pursuant to the treaty-making powers of the Constitution, there were virtually no limits to federal authority. Justice Holmes declared that treaty powers were broader than the enumerated powers of Congress: in short, a treaty could accomplish anything so long as its substance related to the general welfare. *See also* Norman Bindler, **The Conservative Court: 1910–1930** (Millwood, NY: Associated Faculty Press, Inc., 1986), 99–101.

[58]241 U.S. at 398.

[59]A recent law review article draws the same distinction today regarding the appropriateness of prosecuting physicians for prescribing narcotics. While the Harrison Act was repealed in 1970, the federal government still regu-

lates scheduled controlled substance distribution under the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970, which was strengthened in 1984 by the Comprehensive Crime Control Act. The article contends that a "bad faith" threshold is often used to separate, in a medically acceptable sense, those doctors whose practices are legitimate and those whose are not. That same argument was made in 1919. *See* Sharon B. Roberts, "All 'Pushers' Are Not Created Equal! The Inequities of Sanctions for Physicians Who Inappropriately 'Prescribe' Controlled Substances," 23 *Nova Law Review* 3 (Spring 1999), 880–897.

[60]"States' Rights, State Duties, and the Harrison Narcotic Law," 65 *Journal of the American Medical Association* 1, July 1, 1916, 37–38.

[61]Records of the Supreme Court, Criminal Indictment, Case no. 2254, *United States v. Doremus*, December 17, 1916, National Archives Building, Washington, D.C. It should be noted that this indictment was not issued until six months after *Jin Fuey Moy* had been decided. It is interesting to compare this indictment of multiple prescriptions of large quantities of narcotics with Dr. Fuey Moy's prescription of one dose to one patient.

[62]Records of the Supreme Court, *W. S. Webb, et al., v. United States*, Opinion of the United States Court of Appeals for the Sixth Circuit, February 11, 1918, National Archives Building, Washington, D.C. 249 U.S. at 97–99.

[63]*Ibid.*, 3.

[64]U.S. Congressional Record (63/1), June 26, 1913, 2204.

[65]249 U.S. 86 at 95.

[66]*Ibid.*

[67]249 U.S. 96 at 99–100.

[68]Lee, 9.

[69]*Ibid.*, 9–10.

[70]260 U.S. 18 (1922).

[71]U.S. Statutes at Large 40, 1130, 24 February 1919.

[72]260 U.S. 18 at 21.

[73]Richard F. Hamm, **Shaping the Eighteenth Amendment: Temperance Reform, Legal Culture, and the Polity, 1880–1920** (Chapel Hill: The University of North Carolina Press, 1995), 3.

[74]*Ibid.*, 2–3.

[75]*Ibid.*, 3. Hamm's account does not deal directly with the antinarcotic movement, but his analysis of the political interplay and legal institutions involved in the Progressive Era temperance movement helps, analogously, to understand the reformist implications in the history of the Harrison Act.

[76]The Supreme Court files contain numerous letters to the Clerk asking for advice and seeking opinions about how the writers should conduct their medical practices. Telegrams, notes, and letters from across the country show that these cases were acutely important to the doctors practicing medicine in towns, villages, and cities and that the Harrison Act was not an abstract notion but a very real, very chilling act that concerned America's medical profession. Records of the Supreme Court, *United States v. Jin Fuey Moy,* Court File, National Archives Building, Washington, D.C.

[77]Newspaper Clippings, Record Group 170, "Year of the Drug Law," *Boston Evening Transcript*, February 26, 1916.

[78]Newspaper Clippings, Record Group 170, "The Business of Damning Human Souls," *Memphis Press,* June 3, 1916.

[79]*Ibid.*, "Federal Agents Claim Harrison Act is Violated Extensively Here," *Atlanta Constitution*, February 28, 1916.

[80]*Ibid.*, "C. A. Hascell, Government Inspector, Addresses Ogden Physicians," *Ogden Utah Newspaper*, April 27, 1918, quoting C. A. Hascell, government field inspector for the Bureau of Narcotics, addressing a group of Utah physicians.

[81]Hamm, 14–15.

[82]*Ibid.*, 15.

[83]Musto, 152. Most clinics had a small clientele, usually comprising fewer than 2,500 patients. The average age of addicts of both sexes was 40, but there were individual variations in age and sex for many clinics. Overall, however, the established clinics were not a major source of drug supply for addicts.

[84]Musto, 132. Musto contends that there was a distinct change in judicial attitude from 1916 to 1919, which was to a great degree precipitated by the Red Scare of 1919 and the public's growing awareness and fear of drug addiction as a morally corrosive force in society. While he is correct to assert that those forces affected the enforcement effort, he is mistaken to attribute to those same ideas the catalytic power for what was *not* essentially a change in judicial opinion.

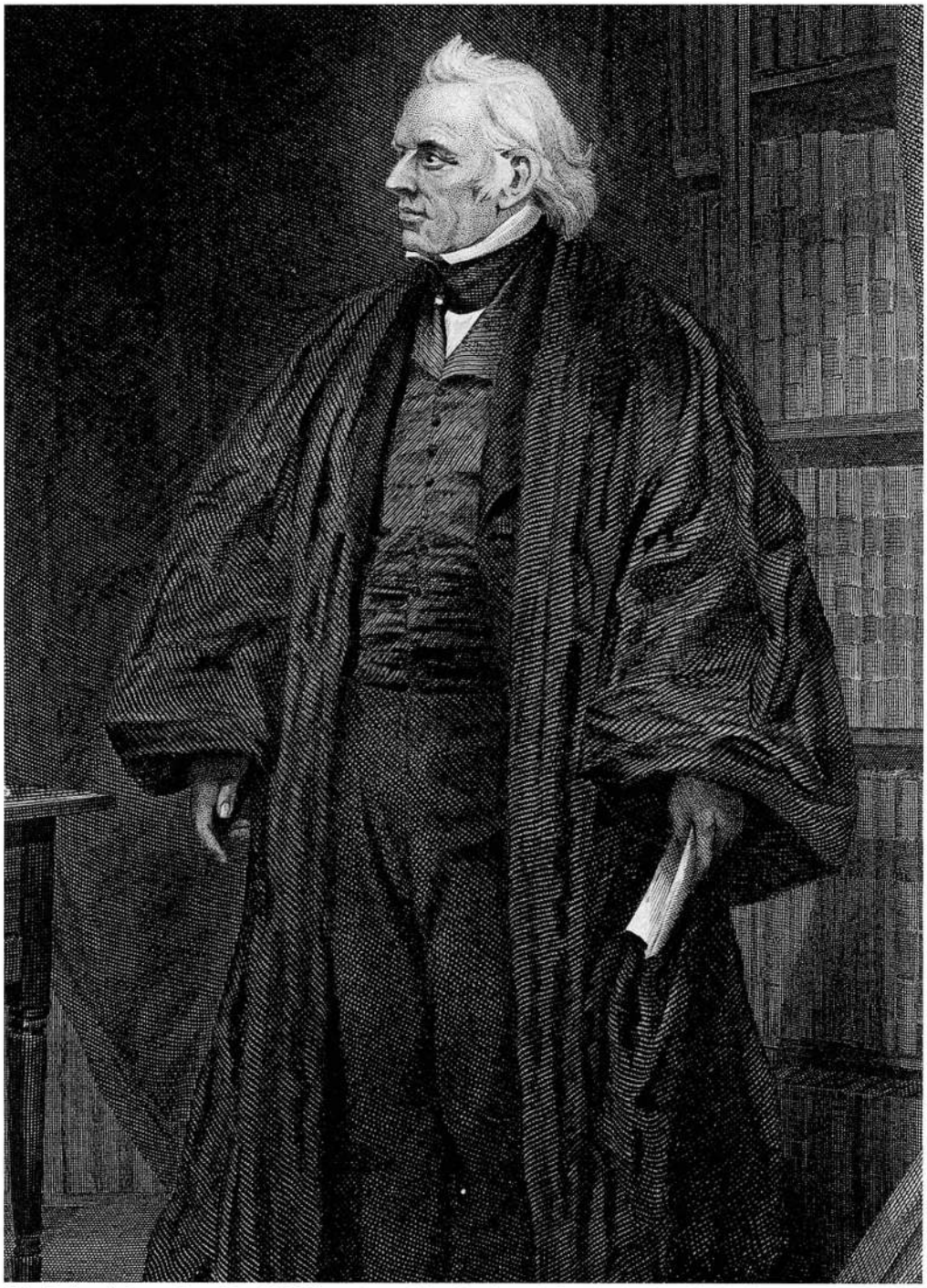
Brandeis, *Erie*, and the New Deal "Constitutional Revolution"[1]

EDWARD A. PURCELL, JR.

Considered as a historical artifact, Justice Louis D. Brandeis's opinion in *Erie Railroad Co. v. Tompkins*[2] is an American cornucopia. It pours forth an abundance of fascinating issues that range from the Olympian heights of legal philosophy and constitutional theory through the tangled jungles of political, economic, and social conflict to the street-smart litigation practices of forum shopping and ambulance chasing. From the variety of issues it raises, I would like to consider one that I noted but did not address in my book:[3] the relationship between Brandeis's opinion in *Erie* and what is commonly called the New Deal "constitutional revolution."[4]

Scholars disagree, of course, about when, why, and even whether a "constitutional revolution" occurred, about its nature and significance, and about its causal connection with the New Deal itself. Regardless of the disagreements, however, few question the basic proposition that between approximately 1937 and 1943 the Supreme Court made substantial changes in American constitutional law.[5] Those changes included increasing the power of government at all levels, vastly expanding the authority of Congress and the President, and narrowing the role of the federal judiciary in supervising the actions of other branches of state and federal governments.

Erie came down in 1938, in the midst of those changes, and overruled Justice Joseph Story's ninety-six-year-old decision in *Swift v. Tyson*.[6] Story had ruled that, in cases presenting questions of "general" common law, the federal courts were not bound to follow the decisions of state courts. Rather, in such cases the federal courts could make their own "independent judgment" as to the proper common law rule to be applied. *Erie* changed matters drastically. First, it terminated the power of the federal courts to lay down their own "independent" rules of general common law and required them, instead, to follow the decisions of state courts in common law matters. Second, it subordinated the federal judiciary to the law-making primacy of Congress. It held that the federal courts could not make nonconstitu-



Erie Railroad Co. v. Tompkins (1937) overturned Justice Joseph Story's decision in *Swift v. Tyson* (1842) in which Story had ruled that the federal courts, in cases presenting questions of "general" common law, were not bound to follow the decision of state courts.

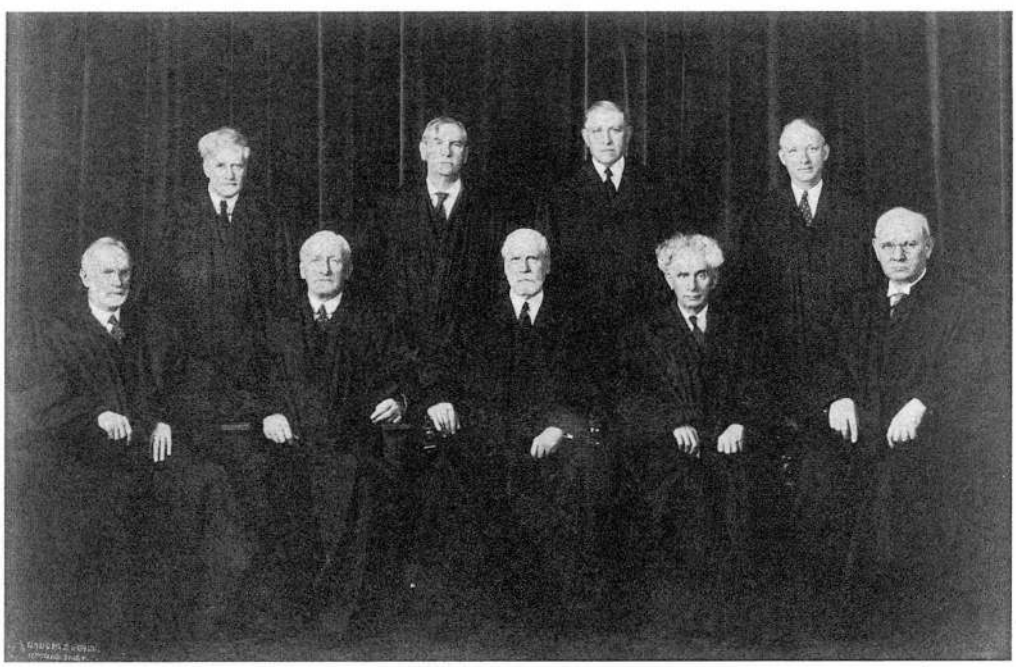
tional rules of law in areas where Congress lacked power to act and, further, at least suggested that they should not make law in areas where Congress did have the power to act but had chosen not to do so. Finally, *Erie* not only condemned *Swift* for bringing "injustice and confusion"[7] to the law, but also leveled the stunning charge that its doctrine violated the Constitution of the United States.

While great variety exists among scholarly views concerning both *Erie* and the New Deal, it is probably fair to say that those who believe that there was a New Deal "constitutional revolution" are more likely to call attention to *Erie* and to see it as further evidence of drastic change.[8] Conversely, those who stress continuities with earlier and later periods are more likely to ignore *Erie* or discount it as an arcane outlier.[9]

My purpose here is not to consider the nature and scope of the "constitutional revolution" itself. I use the term only for convenience, to refer to the series of decisions the Court made after the spring of 1937 that upheld the constitutionality of critical New Deal measures and helped bring major changes to American constitutional law. Rather, I wish to consider the relationship between those changes and Brandeis's opinion in *Erie*.

I.

At first glance, *Erie* seems to fit comfortably within the "constitutional revolution." It came down during the crucial years from 1937 to 1943, and—by overruling a ninety-six year old precedent—surely appeared "revolutionary." Moreover, the alignment of the eight sitting Justices confirmed the Court's New Deal orientation. All of the "progressive" and "swing" Justices voted to overturn *Swift*;[10] the only dissenters were the two remaining holdovers from the legendary anti-New Deal "Four Horsemen." Furthermore, the Court's



The eight Court members who heard *Erie* included only two dissenters—Justices Pierce Butler (seated at right) and James C. McReynolds (seated second from right)—stalwart conservatives who were holdovers from the anti-New Deal era. Benjamin Cardozo (standing at left), was too ill to participate.

opinion expressly relied on the positivist jurisprudence of Justice Oliver Wendell Holmes, Jr., a hero to most New Dealers and the fountainhead of reformist "legal realism." Similarly, Brandeis, the opinion's author, was a nationally known progressive who had for more than twenty years defended regulatory and reform measures that came before the Court.[11] Finally, in political and social terms, *Erie* extinguished the pro-corporate federal common law and placed new limits on the lawmaking authority of the "conservative" federal judiciary. Thus, it promised to benefit progressive causes and assist social groups associated with the New Deal.[12]

Further reflection, however, suggests three reasons to question that preliminary conclusion. One focuses on statements in Brandeis's opinion that appear to impose limits on the powers of Congress. That language seems directly contrary to two major themes of the "constitutional revolution": its expansion of legislative and executive powers and its embrace of "judicial restraint," a broad deference to the actions of those other branches of government. A second doubt arises from the fact that *Erie* required the federal courts to follow state common law and, consequently, transferred lawmaking power from the national government to the states. Such a devolution of power seems inconsistent with the centralizing drive of the New Deal and the expansion of national power that marked the "constitutional revolution." The third doubt emerges from the fact that *Erie* limited the federal judicial power at exactly the same time that the Supreme Court was expanding that power in certain selected areas.[13] The New Deal "constitutional revolution" involved not only the expansion of national power and a new "judicial restraint" but also the articulation, and sometimes enforcement, of doctrines that authorized the federal courts to give "stricter scrutiny" to government acts that impinged on certain favored non-economic rights. In the late 1930s, as the Court abolished the doctrine of "liberty of contract" and expanded congressional power, it also advanced the idea that certain individual rights—such as those specified in the Bill of Rights—held a "preferred" position that required the judiciary to protect them with special vigilance and vigor. *Erie*'s limitation on federal judicial power seems inconsistent with this other aspect of the "constitutional revolution."

Careful consideration, I submit, dispels each of these doubts. The "congressional power" doubt misunderstands Brandeis and *Erie*, while the "decentralization" doubt misunderstands *Erie* and the New Deal. The last, the "stricter scrutiny" doubt, presents a more complex question and requires a more extended analysis. Ultimately, however, it, also, misconceives both Brandeis and his opinion.

II.

The "congressional power" doubt rests on the fact that Brandeis's opinion contains language that appears to set limits on the powers of Congress. *Erie* stated that "Congress has no power to declare substantive rules of common law," and it seemed to invoke the Tenth Amendment, declaring *Swift* unconstitutional because it allowed the federal courts to invade "rights which in our opinion are reserved by the Constitution to the several States."[14]

However, Brandeis was neither placing limits on the power of Congress nor relying on a substantive Tenth Amendment. Rather, the constitutional theory he advanced was based on two other and quite different propositions, neither of which mandated any particular limit on congressional powers. The first was what Brandeis viewed as a fundamental constitutional principle: that the powers of the legislative and judicial branches of the federal government are "coextensive."[15] The second was Brandeis's factual minor premise: that *Swift v. Tyson* allowed the federal courts to declare common law rules "which Congress was con-

The author of the *Erie* opinion, Louis D. Brandeis, did not intend to limit the power of Congress but to limit the powers of the federal courts. He also favored extending both federal *and* state power to address the nation's social and economic problems.

fessedly without power to enact as statutes."[16] And on that factual point, Brandeis was surely right: under *Swift*, the federal judiciary made common law rules controlling insurance contracts and determining legal rights in disputes between states, two areas over which the Court had held that Congress lacked legislative authority.[17]

Thus, in *Erie* Brandeis did not hold that there was any new or particular limit on congressional authority. His opinion limited the lawmaking power of the federal courts, not that of Congress. The statement that "Congress has no power to declare substantive rules of common law"[18] meant only that Congress had no general lawmaking authority over common law matters independent of its constitutionally delegated powers. As a consequence, under the axiom of coextensive powers, the federal courts were equally limited and could, therefore, claim no common law power to make general law.

Given that constitutional theory, the Tenth Amendment in *Erie* necessarily played only a derivative role.[19] *Swift*'s fatal flaw was not that it transgressed a substantive limit on federal power created by the Tenth Amendment. Rather, its flaw was that it allowed federal judicial lawmaking in areas that were considered —as of 1938—beyond the lawmaking power conferred on Congress. Accordingly, and solely as a corollary, such judicial lawmaking also transgressed the Tenth Amendment.

That Brandeis did not intend to rely on a substantive Tenth Amendment seems clear. First, he favored recognition of broad federal legislative powers and repeatedly rejected the Tenth Amendment as an independent limit on those powers. Second, in the formative drafts of his opinion, where he developed and articu-

lated *Erie*'s constitutional theory, he ignored the amendment, framing his constitutional argument without reference to it. Third, even when, in response to comments from Chief Justice Hughes and Justice Butler, he added apparent references to the amendment late in the drafting process, he still carefully denied it explicit recognition. He refused to identify it by name, to cite it formally, or to place any of the words of his opinion in quotation marks. Finally, his purpose in *Erie* was not to limit the powers of Congress but, rather, to limit the powers of the federal courts.[20] Thus, the "congressional power" doubt is easily resolved.

III.

The second doubt about *Erie*'s congruence with the "constitutional revolution"—the "decentralization" doubt—rests on the fact that Brandeis's decision transferred lawmaking power from the national government to the states. This suggests that *Erie* was inconsistent with the dominant thread of New Deal constitutionalism, the expansion of national power.

This doubt, however, also proves insubstantial for two distinct—if related—reasons. First, the decentralization doubt fails to distinguish between progressive and New Deal attitudes toward the different branches of the federal government. The New Deal expanded national legislative, executive, and administrative power, but not national judicial power. Indeed, this last power it sought to limit.

For more than half a century, populists, progressives, and New Dealers had criticized the federal courts as protectors of private property and major obstacles to essential social and economic reforms. They had tried repeatedly to limit the power of the federal courts, and Brandeis had frequently supported their efforts.[21] Legal progressives fastened their hopes for social and economic progress on far-reaching and expertly designed programs of legislative reform, and they cast wary eyes on the ill-informed and "conservative" courts.

Erie was entirely consistent with those views and with the long political campaign of these groups to limit the "conservative" federal courts.[22] Brandeis's opinion did not limit the powers of Congress but, rather, used the given scope of congressional power to reign in and discipline the federal courts. Indeed, Brandeis implied, federal judicial lawmaking power was limited not only to those areas over which Congress had constitutional authority but also to those areas in which Congress had chosen to act. State law controlled, *Erie* declared, "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress."[23] *Erie*, then, stood for the proposition that Congress—not the federal judiciary—was the primary lawmaking agency of the national government. Aside from enforcing independent constitutional mandates, the federal courts should defer to Congress both when it asserted national authority and when it decided that national authority should not be asserted in a specific area.

The second reason why the decentralization doubt lacks substance is that it is based on an erroneous factual premise. It assumes that increasing national power was the sole thrust of the New Deal and its "constitutional revolution" and that expanding federal power inevitably meant a lessening of state power. Enlarged national power was essential, but the New Deal supported the extension of governmental power at all levels. The desire to regulate economic behavior and to ameliorate the harsh consequences of the Great Depression led New Dealers to favor the expanded use of legislative and administrative powers at the state and local level as well as at the national level. Moreover, the New Deal changed substantially over time. While much of its early thrust emphasized national planning and the power of federal government to direct and control economic behavior, by 1938 it had largely abandoned that approach. After the middle of 1937, in fact, it moved toward more indirect regulatory approaches that left more authority with both private enterprise and state and local governments.[24]

Similarly, the "constitutional revolution" involved more than merely expanding national power. In repudiating the doctrine of "liberty of contract," for example, the Court freed state legislatures from judicial constraints every bit as much as it freed Congress. And, while it expanded congressional power under the Commerce Clause, it also expanded state legislative power under the same constitutional provision by narrowing the constraints imposed on local regulations by the dormant Commerce Clause.[25]

In expanding the regulatory powers of both state and national governments, the "constitutional revolution" followed an approach that Brandeis had long advocated. "My own opinion," he explained during his early years on the Court, "has been that it was wise (1) to treat the constitutional power of interstate Com. as very broad & (2) to treat acts of Congress as not invading State power unless it clearly appeared that the federal power was intended to be exercised exclusively."[26] In other words, Brandeis's goal was to see an expansive use of both state and federal powers to address the nation's social and economic problems. The "recognition of Federal powers," he insisted, "does not mean denial of State powers."[27]

Thus, while *Erie* did shift lawmaking power to the states, that result was not inconsistent with the "constitutional revolution." The decentralization doubt lacks substance, then, for two equally compelling reasons. It fails to distinguish between attitudes toward judicial and legislative power, and it overlooks the fact that the New Deal "constitutional revolution" expanded governmental powers at all levels and assumed that those expanded powers would complement one another.[28]

IV.

That brings us to the third—and, by far, most intriguing—doubt about *Erie*'s congruence with the New Deal "constitutional revolution," the "stricter scrutiny" doubt. Indeed, given the arguments I have already made, *Erie* seems quite inconsistent with this other aspect of the "constitutional revolution." Put most bluntly, if *Erie* limited federal judicial power, proclaimed the lawmaking primacy of Congress, and transferred judicial power from federal to state courts, was it not inconsistent with the idea of a stricter scrutiny standard that would enhance federal judicial power?

That question, of course, implicates what has arguably been the central issue in American constitutional law since the New Deal: the development of different levels of judicial review—minimal scrutiny for government actions dealing with "economic" activities and stricter scrutiny for government actions touching special "noneconomic" rights. My concern here is with but one part of that overarching issue. It is not a normative concern with the justifications for using different levels of scrutiny, but an empirical concern about a specific historical relationship: Was Brandeis's opinion in *Erie* consistent or inconsistent with ideas of stricter scrutiny that emerged during the New Deal "constitutional revolution"?

The answer, I suggest, is that *Erie* and the stricter scrutiny idea were not only consistent, but mutually reinforcing. Understanding why that is so illuminates key elements of Brandeis's constitutional jurisprudence, highlights some of the distinctive characteristics of the "constitutional revolution," and helps us understand the ways in which the federal courts —and our ideas about them—have changed over the course of the twentieth century.[29]

The historical congruence between *Erie* and the stricter scrutiny approach holds on three separate levels: political, theoretical, and institutional.

A.

The first connection between *Erie* and the stricter scrutiny idea lay in the political and social sympathies they shared. *Erie* was rooted in Brandeis's suspicion of large corporations, his conviction that those corporations often abused their power, and his concern for the

THAT BRANDEIS APPOINTMENT

CHORUS OF GRIEF-STRICKEN CONSERVATIVES: Oh, what an associate for such a pure and innocent girl! And we have tried to bring her up so carefully, too!

Erie was rooted in Brandeis's suspicion of large corporations, his conviction that those corporations often abused power, and his concern for the plight of ordinary human beings forced to litigate against such overpowering foes. This cartoon satirizes the fears of industrialists and business leaders over the nomination of the "people's attorney" to the Supreme Court in 1916.

plight of ordinary human beings forced to litigate against such overpowering foes. The general federal common law under *Swift* was widely regarded as favoring corporate defendants, and diversity removal jurisdiction allowed those corporate defendants to take their cases from state to federal courts and thereby gain access to *Swift*'s more favorable federal common law.[30] Thus, in abolishing the *Swift* doctrine, *Erie* promised to deprive those corporations of a substantial advantage and to assist ordinary individuals in enforcing their legal rights against their much stronger adversaries.

The doctrine of *Swift v. Tyson*, Brandeis charged, "rendered impossible equal protection of the law."[31] Because the Equal Protection Clause of the Fourteenth Amendment applied only to the states, while *Erie* condemned the "course pursued"[32] by the United States courts, this invocation of "equal protection" seemed to have no clear or even intelligible doctrinal meaning. To Brandeis, however, his statement had a meaning that was both clear and compelling. It identified not the legal basis of his decision but rather a factual predicate. Paired with diversity removal jurisdiction, *Swift*'s general federal common law gave corporate defendants the invaluable advantage of being able to choose not only between different courts but also between different bodies of substantive law. That, Brandeis declared, constituted a systemic "injustice."[33] *Swift* was responsible for a "discrimination" that was "far-reaching," one that "in practice" disadvantaged ordinary citizens who sought to enforce their legal rights against national corporations.[34]

Thus, *Erie*'s social and political sympathies were attuned to the systemic exploitation of weak and disadvantaged individuals by large, organized, and well-financed adversaries. Those sympathies were characteristic of Brandeis's jurisprudence,[35] and they helped shape the New Deal "constitutional revolution" as well.[36] More to the point, those sympathies paralleled the intuitive sympathies that helped inspire and justify the emerging idea of stricter scrutiny.

Indeed, a decade before the New Deal came to power, the Court began—albeit cautiously and sporadically—to expand the protections of the First and Fourteenth Amendments. Reacting in part to progressive charges that it was biased in favor of wealth and property, the Court began to expand the scope of the "liberty" it protected and to show a new sensitivity to certain types of social and political abuses. Between 1923 and 1937 it issued a scattering of path-breaking decisions that protected certain noneconomic individual rights: the speech rights of unpopular political dissidents, the educational and child-rearing rights of religious and ethnic minorities, the voting rights of African Americans in the South, and, for criminal defendants—who in most of the Court's major decisions were, in fact, outrageously abused Southern blacks—the right to a fair trial free from intimidation, coercion, and torture.[37]

These diverse lines of cases shared two striking characteristics. One was their intervention in legislative and executive matters to enforce judicially defined standards of fairness and legal integrity. The other was their enforcement of those new standards on behalf of relatively weak, scorned, and politically oppressed groups and individuals.

From the beginning, Brandeis supported the Court's tentative new direction in all four of these lines of decisions. In the free speech cases, in particular, he took an advanced and aggressive position (usually, during the 1920s, in dissent). In his famous 1927 concurrence in *Whitney v. California*,[38] for example, he maintained that the nation's founders had placed their faith "in the power of reason as applied through public discussion" and had made that belief "a fundamental principle of the American government."[39] To encourage judicial enforcement of that principle, Brandeis reshaped the "clear and present danger" idea into an elaborate and highly speech-protective limitation on government action. A state could not

"ordinarily" prohibit political speech, he insisted, even when "a vast majority of its citizens" regarded the speech as "false and fraught with evil consequence."[40]

In the 1930s, while the Court continued hesitantly to expand the protections it offered, world events combined to magnify the importance of its new decisions and to strengthen the idea that the federal judiciary was an essential guardian of the civil rights and liberties of disfavored groups and individuals. Looking abroad, Americans witnessed the spread of "totalitarian" movements in Europe and in 1933 the shocking triumph of Nazism in Germany. Increasingly, they worried about the possibility that the United States might be vulnerable to some similar homegrown movement, and opponents of the New Deal warned that the increasing centralization and expanded executive authority of the federal government threatened to introduce a presidential dictatorship. Many Americans—supporters as well as opponents of the New Deal—responded by embracing the ideal of the "rule of law" as the nation's fundamental bulwark against such radical dangers. Central to that ideal was the conviction that courts should be independent of government and, when necessary, willing and able to compel government officials to answer at the bar of justice.

At the same time, looking inward during the Great Depression, many Americans also began to recognize that certain domestic groups had been particularly disadvantaged by a variety of social and political forces, often including the prejudices of government agencies and even of the courts themselves.[41] African Americans, Jews, Catholics, organized labor, diverse immigrant groups, and various radical factions drew increasing sympathy as they began raising the banner of constitutional right to protect their interests and activities. During the 1930s, moreover, the political visibility and influence of those outsider groups grew substantially, and with Roosevelt's triumphant reelection in 1936 they established themselves as major components of a newly dominant national Democratic coalition.

Given those dramatic domestic and international challenges, and Brandeis's own abiding commitment to the value of personal privacy and the importance of governmental integrity, it is not surprising that he would look favorably on efforts to generalize the Court's scattered new civil liberties decisions into a broader and more coherent doctrine of constitutional stricter scrutiny.[42] Nor, to the present point, is it surprising that the progressive Justice who sought to expand federal judicial power in *Whitney*'s context would seek to restrict it in *Erie*'s.

Although the Court's civil liberties decisions involved widely different issues than those *Erie* presented, *Erie* and the civil liberties decisions showed one paramount similarity: in each, the Court found grounds to intervene on behalf of the weak confronted by the strong. Limiting federal judicial power in *Erie* led to the same generic consequence that expanding the federal judicial power brought in the civil liberties cases. The result in each was that those who lacked influence and resources would receive from the courts some increased protection against those who held and exploited society's multiform levers of power.

B.

The second connection between *Erie* and the stricter scrutiny idea was doctrinal and theoretical. Brandeis's decision came down the same day the Court announced its path-breaking opinion in *United States v. Carolene Products Co.*,[43] the fountainhead of stricter scrutiny theory. *Carolene Products* was written by Justice Harlan F. Stone, a member of the Court's progressive wing who had worked closely with Brandeis for more than a decade. Stone was one of the Justices who joined to give Brandeis his bare majority in *Erie*, and in *Carolene Products* Brandeis did the same for Stone, casting the vote that gave Stone a bare majority for his tentative new proposals about stricter scrutiny.[44]

Brandeis's vote in *Carolene Products* gave Justice Harlan F. Stone (pictured here with his wife, Agnes) a bare majority for his tentative new proposals about "stricter scrutiny" for non-economic rights and liberties. Stone had earlier joined other Justices to give Brandeis a similarly slim majority in *Erie*.

Carolene Products is recognized as a seminal case for two reasons. One is that it explicitly articulated for the first time the flaccid "rational basis" test that the Court would subsequently use to review "regulatory legislation affecting ordinary commercial transactions."[45] That test represented the Court's highly deferential "New Deal" attitude toward the regulation of commercial activities, and it promised vast discretion to state and federal legislatures. Needless to say, *Carolene Products*'s highly deferential standard of review fit quite snugly with *Erie*'s premise of legislative primacy. On that point, the two cases, quite obviously, were one.

Carolene Products did something else, of course, something that proved far more provocative than its "rational basis" test. The case contained a footnote, numbered four, commonly called the most famous footnote in Supreme Court history.[46] In it, Stone suggested that legislation might be required to show more than a mere "rational basis" in three special situations: first, when it impinged upon rights expressly protected by the Constitution (such as those in the Bill of Rights); second, when it restricted normal democratic "political processes" through which people could "ordinarily" protect themselves (as did statutes that deprived citizens on racial grounds of the right to vote); and, third, when it operated against "discrete and insular minorities" (such as disfavored racial or religious groups) that might be prevented by "prejudice" from protecting themselves through the democratic "political processes" upon which people could "ordinarily" rely.[47]

In retrospect, then, *Carolene Products* seems to be a critical transition point. Stone's opinion expressly embraced a sweeping judicial deference toward economic regulation while at the same time beginning to explore the theoretical bases for a limited new judicial activism that would provide special protection for noneconomic civil rights and liberties.

When Stone proposed in *Carolene Products* that the courts give "more exacting judicial scrutiny" to legislation that interfered with normal political processes, he was extending an idea that Brandeis himself had tried to make central to First Amendment jurisprudence since 1920.[48] Freedom of speech deserved special protection, Brandeis had repeatedly argued, not just because it was an individual right but because it was a social good, a necessary instrument of intelligent democratic government. In his *Carolene Products* footnote, Stone cited Brandeis's concurrence in *Whitney*,[49] where Brandeis had elaborated that exact point. The Founders embraced freedom of speech, Brandeis maintained there, because they had "confidence in the power of free and fearless reasoning applied through the processes of popular government."[50] Thus, proposing that the courts should intervene to preserve the open processes of democratic government, Stone's *Carolene Products* footnote generalized Brandeis's own distinctive First Amendment jurisprudence.

In terms of formal doctrine, of course, *Carolene Products* addressed issues that were entirely unrelated to those raised in *Erie*. Across widely separated constitutional fields, nonetheless, the two opinions blended in giving voice to similar constitutional values and similar institutional prescriptions.

The fundamental congruence between the two opinions held on two distinct levels. The first centers on the core idea in Stone's footnote: that the judiciary should give more searching scrutiny to government actions when they either blocked or resulted from blockage in "those political processes" which "ordinarily" operated to prevent the passage of "undesirable legislation."[51] In such special cases, Stone reasoned, judicial intervention might be necessary to open up and protect the operation of normal democratic processes. That proposition paralleled the progressive theory that underlay *Erie*. *Swift*'s fatal constitutional flaw, after all, was that it allowed nonconstitutional federal judicial lawmaking in areas where Congress could not act. By prohibiting judicial lawmaking in those areas,

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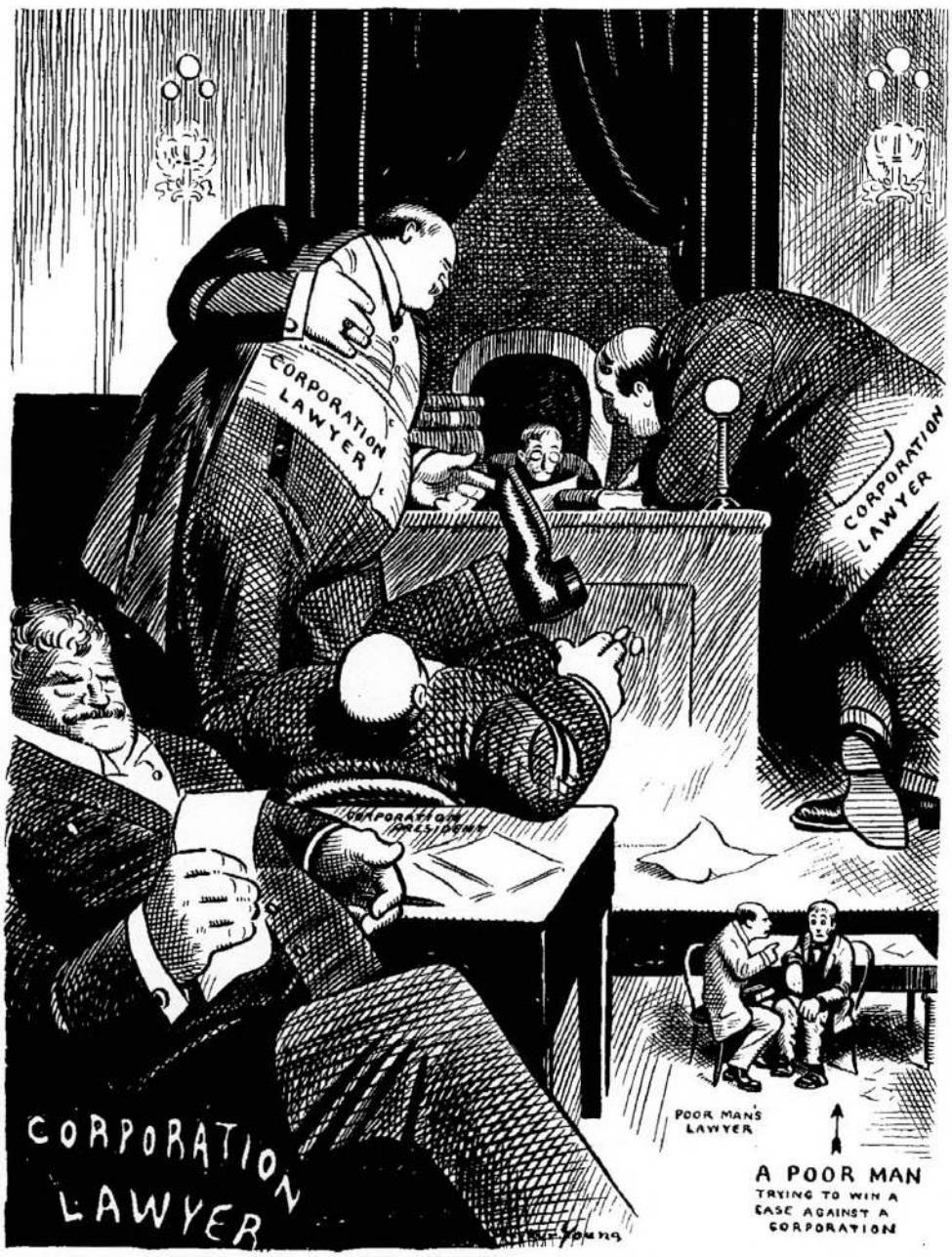


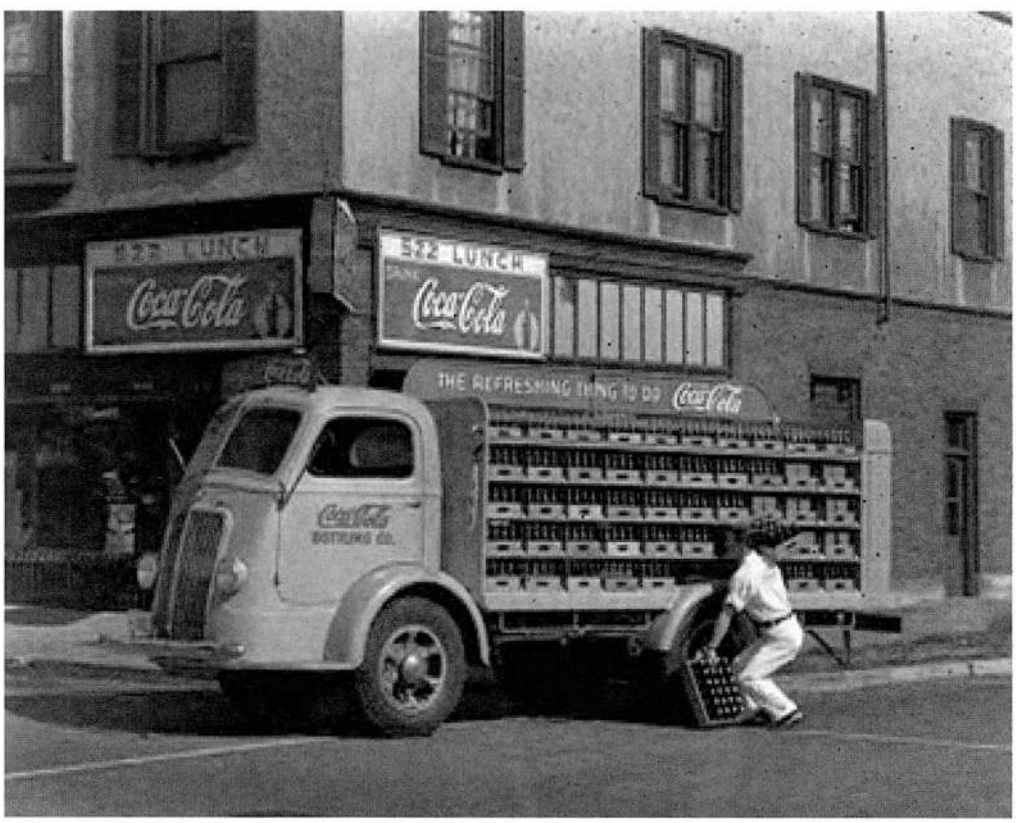
WHAT STANDS LESS CHANCE THAN A SNOWBALL IN ——— ?

Since the late nineteenth century, corporations operating in interstate commerce had regularly—and, in Brandeis's mind, quite unfairly—exploited diversity removal jurisdiction to impose heavy legal and extra-legal burdens on individuals who sued them. Plaintiffs' attorneys fought back with their own tactics to defeat corporate removal tactics, causing litigation to mushroom to such an extent that Brandeis sought to render the process more efficient. This cartoon suggests that corporations had the upper hand.

Erie ensured that—absent a constitutional bar—Congress would be able to alter or abolish any federal judge-made rule of law. Thus, in *Erie*, Brandeis acted, as *Carolene Products* suggested was proper, to eliminate a long-standing legal rule that blocked up normal democratic lawmaking processes.[52]

The second parallel between *Erie* and *Carolene Products* centered on Stone's idea that "discrete and insular minorities" might suffer from disabilities that prevented them from protecting themselves through ordinary political processes. To recognize the parallel between *Erie* and *Carolene Products* on this level, we must backtrack a bit.

Two months before *Erie* and *Carolene Products* came down, Stone wrote for the Court in *South Carolina State Highway Department v. Barnwell Brothers, Inc.*[53] In *Carolene Products*, Stone cited his *Barnwell* opinion in support of his proposition about "discrete and insular minorities." In *Barnwell*, the Court heard a challenge to a state statute that prohibited trucks from using the state's highways unless they conformed to certain size and weight limits. Reviewing the statute under the dormant Commerce Clause, Stone suggested that the Court's jurisprudence in the area rested, in significant part, on an underlying "thought" that he traced back to the Marshall Court and the constitutional convention.[54] That thought was that the residents of a state could use their local political power to enact commercial regulations that discriminated against nonresidents because those nonresidents were not represented in the enacting



In Justice Stone's *Barnwell* opinion, he reasoned that residents of a state could use their local political power to enact commercial regulations that discriminated against non-residents because those non-residents were not represented in the enacting state's political process and thus could not defend their interests. The case challenged a South Carolina statute that prohibited trucks from using the state's highways unless they conformed to certain size and weight limits.

state's political process and, hence, could not defend their interests in that process. As a result, Stone reasoned, when states passed legislation that unfairly favored the interests of their own residents or unfairly burdened the interests of nonresidents,[55] judicial intervention voiding the statutes was proper because such statutes had not been enacted subject to the "political restraints" of democratic representation which "normally" operate to ensure fairness and balance in the legislative process.

The thought that Stone advanced in *Barnwell* echoed in both *Carolene Products* and *Erie*. In *Carolene Products*, Stone gave the thought a broad and theoretical form, generalizing it to state a fundamental principle. Legislative action required "more searching judicial inquiry,"[56] *Carolene Products* proposed, when it disadvantaged identifiable groups that could not protect themselves in the ordinary democratic political process. In *Erie*, Brandeis gave the thought a different form, specific and quite practical. He used it to underwrite *Erie*'s particular finding that federal law created a "far-reaching" discrimination that denied "equal protection" to an identifiable class of persons.

While Stone's application of *Barnwell*'s thought in *Carolene Products* appears obvious, Brandeis's use of it in *Erie* is not as readily apparent.[57] The key to understanding the unity of the three opinions lies in recognizing the ways in which Brandeis had to recast *Barnwell*'s thought to adapt it to the different situation that *Erie* presented.

First, the law of diversity jurisdiction involved in *Erie*—unlike the dormant Commerce Clause analysis in *Barnwell*—was framed not in terms of "residents" and "nonresidents" but in terms of "citizens" and "noncitizens." Thus, Brandeis had to translate *Barnwell*'s distinction into the appropriate cognate distinction: "residents" became "citizens," and "nonresidents" became "noncitizens." Then Brandeis had to relate the distinction, as Stone had done in *Barnwell*, to an identifiable and unfair "discrimination." For more than half a century, populists and progressives had condemned *Swift* and diversity jurisdiction for unfairly benefiting national corporations and heavily burdening ordinary citizens who sought to sue them. Brandeis shared that view, and in *Erie* he gave voice to that progressive critique in the form of his "citizen/noncitizen" distinction. "*Swift v. Tyson*," Brandeis declared, "introduced grave discrimination by noncitizens against citizens."[58]

Second, and less obvious, the "discrimination" Brandeis identified in *Erie* was structurally the obverse of the discrimination at issue in *Barnwell*. Thus, Brandeis had to invert *Barnwell*'s reasoning. While *Barnwell* addressed the situation where local law favored local residents over out-of-staters, *Erie* addressed the reverse situation, where national law favored national actors—that is, noncitizen corporations operating in interstate commerce—over local residents. Instead of local residents using local law to disadvantage nonresidents (as in *Barnwell*) *Erie* presented a situation in which national actors used national law to disadvantage local actors. In diversity litigation, congressional jurisdictional statutes and Supreme Court rulings under *Swift*—national policy determinations—combined to aid outsider noncitizens and to disadvantage local citizens. And on such national policy issues, Brandeis believed, it was those noncitizen foreign corporations that had enjoyed the only effective voice in the relevant "ordinary" political process—that of national politics.

Revealingly, Brandeis's opinion specifically pointed to the fact that national "legislative relief has been proposed" to remedy the discrimination against citizens, and he cited a number of unsuccessful bills that had been introduced in Congress over the years to limit or abolish diversity jurisdiction and to overturn *Swift*.[59] All of those legislative efforts had failed,[60] and as a matter of formal legal analysis, they had neither weight nor meaning. Consequently, Brandeis's references to them seemed puzzling. With the

Barnwell/Carolene Products thought in mind, however, Brandeis's statements about the long and futile efforts to obtain "legislative relief" become both understandable and salient: the unsuccessful bills evidenced the inability of local citizens to protect themselves against noncitizens in the "ordinary" *national* political process.

Thus, *Erie* shared not only the distinctive democratic fairness values of *Barnwell* and *Carolene Products* but also a similar theory of judicial intervention. All three opinions sought to recognize the primacy of the legislature, while making room for special situations where the courts—still remaining true to democratic ideals—might act more vigorously and independently.[61] Tentatively, and with great caution, the three opinions suggested the same fundamental guiding principle: when ordinary democratic political processes were blocked up, or when they were used in systematic ways to exploit the weak and disadvantaged, the courts might properly intervene to provide relief.

C.

The third connection between *Erie* and the stricter scrutiny approach was less direct and, to some extent at least, unintended. Nonetheless, it was important and, in the long run, perhaps of greatest significance. That third connection lay in the way that Brandeis and *Erie* helped to reshape the very idea of the federal judiciary as an institution of American government.

Brandeis was a sophisticated and broad-visioned judge, and his jurisprudence was complex and ambitious. As much as he believed in social justice and legislative primacy, he believed equally in the need for systematization and efficiency.[62] Beyond his immediate political and social goals, Brandeis designed *Erie* to help structure an integrated judicial system in the United States, to rationalize the relationship between federal and state courts, and to bring greater order and efficiency to their work.

In the years after World War I, Brandeis had grown increasingly concerned over the proliferation of elaborate, exploitative, and sometimes unethical litigation practices.[63] Since the late nineteenth century, corporations operating in interstate commerce had regularly—and, in Brandeis's mind, quite unfairly—exploited diversity removal jurisdiction to impose heavy legal and extra-legal burdens on individuals who sued them. In response to that practice, an emerging urban personal injury bar had gradually developed a variety of counter-tactics to defeat corporate removal practices. As a result, by the 1890s large and increasing amounts of federal litigation centered on jurisdictional disputes that were generated by the struggle over removal.[64] After 1910 plaintiffs' attorneys escalated their tactical warfare by widening the range of procedural devices they used to disadvantage corporate defendants and by shopping their cases interstate in search of particularly hospitable forums. Minnesota became a particular favorite: its pro-plaintiff procedures and liberal juries with well-deserved reputations for largesse attracted tort plaintiffs like a big, legal "blue-light special." Corporate counsels reacted with their own tactical innovations. They counterattacked by forcing claimants into costly multiple litigations, developing new theories to expand corporate access to federal courts, using equity to defeat claimants' forum choices and deny them trials by jury, and—after passage of the federal Declaratory Judgment Act in 1934—initiating suits in the federal courts for preemptive judgments of nonliability under the *Swift* doctrine.[65]

Disturbed by the mushrooming tactical escalation and the compounding waste of social resources, Brandeis began exploring ways to impose greater order and efficiency on litigation practice. He experimented with the Commerce Clause, the Full Faith and Credit Clause, and even the politically dangerous Due Process Clause as devices to minimize incentives for interstate forum shopping.[66] *Erie*

was a part of his overall campaign. Abolishing the general federal common law would eliminate a major incentive for intra-state forum shopping and reduce the utility of a variety of popular manipulative tactics. That achievement, in turn, would mean that courts and litigants could concentrate their efforts on addressing the substantive merits of disputes. The result would be to simplify litigation practice, conserve social resources, and rationally order the overall business of the nation's judicial system.

In attempting to systematize the work of the courts, *Erie* pulled two related ideas in its wake. One was relatively obvious, and surely one that Brandeis intended. Systematizing the judicial system implied specialization, and *Erie* identified the special roles that state and federal courts should play in an integrated national judicial system. *Erie* expressly held that state courts were properly the authoritative exponents of state law. It directed state law issues to the state law experts, the state judges who were most familiar with local rules and local policies. *Erie* did not prescribe the role of the federal courts so explicitly, but it implied that they—as the courts of the nation sitting in every state in the Union—should specialize in issues of national significance and serve as comparable experts on questions of national law. That, indeed, was Brandeis's belief, and he worked to spread that idea on and off the Bench.[67]

The second idea that trailed in *Erie*'s wake was not clearly stated, and it was not a logically necessary implication of Brandeis's opinion. Indeed, as the law would subsequently develop, Brandeis might well have qualified or even rejected it. Nonetheless, implicit in *Erie* was a parallel idea: if state courts were the authoritative voices of state law, then the federal courts were the authoritative voice of federal law. That idea contained two related elements. One was that it was the federal judiciary as an integrated institution—not just the Supreme Court, but the lower courts as well—that constituted the authoritative voice of federal law. The other was that, when the federal judiciary ruled on issues of federal law, its decisions constituted truly "federal" law; that is, they carried the mandate of the Supremacy Clause and hence compelled obedience from the states and their courts.[68]

The latter element was especially important. Under *Swift*, the federal courts had made what was called "federal" common law, but established doctrine—and the jurisprudential theory that underlay *Swift*—defined their decisions as merely "independent judgments" as to what was properly "state" law. Consequently, issues arising under *Swift*'s federal common law did not present "federal questions" that conferred either original jurisdiction on the lower federal courts or appellate jurisdiction on the Supreme Court of the United States. Even more important, because decisions under *Swift* did not constitute truly "federal" law, they were not binding on the states under the Supremacy Clause.[69] In its fundamental institutional significance, then, *Swift* had been quite equivocal. It did give the national courts power of a kind, but in other ways—less obvious but ultimately more important—it squandered their power and dissipated their influence. *Swift* placed the federal courts in a position of ambiguous equality with state courts, and it obscured the extent to which they could create judge-made rules that would have the full force of the Supremacy Clause behind them.

Thus, *Erie* advanced—albeit with different degrees of directness and intent—three powerful and interrelated ideas about the nature of the federal courts and their proper role in American government: first, that they constituted a special national system of courts; second, that they properly specialized in—and were the experts on—issues of national law; and third, that they were the authoritative institutional voice of national legal supremacy. Brandeis's opinion, then, did not simply limit federal judicial power. Rather, it refocused and redefined that power. It is doubtful that Brandeis either saw or intended all of the

implications and consequences that would eventually flow from these ideas, but flow they would.[70]

Indeed, if timing is all, then *Erie*'s timing in this regard was critical. The broader ideas that were implicit in Brandeis's opinion resonated deeply with the nation's experiences and felt needs in the late 1930s and early 1940s. The New Deal's innovative and far-reaching social welfare and economic regulatory programs, and the massive social and institutional demands of World War II, combined to expand drastically the scope of federal law and to extend it into all aspects of American life. Ironically, in fact, *Erie*'s axiom of coextensive powers—announced at a time when congressional authority was being expanded substantially—had the logical consequence of expanding equally the power of the federal judiciary. To identify state courts with state law, while implicitly granting the federal courts a special portfolio for federal law, at just such a time, was in fact to confer on the national judiciary immense new powers, a clearer institutional identity, and a potentially commanding new status.

Strengthening those jurisprudential and institutional developments, the late 1930s and early 1940s witnessed an unusual convergence of political forces in favor of expanding the role of the federal courts and continuing their institutional reorientation, which had begun in the late nineteenth century.[71] Political conservatives, long enamored of the federal courts as the guardians of economic liberty and private property, became even more intensely committed to them and to the idea that they played a special role in American government. Their passionate campaign to defeat Roosevelt's Court-packing plan in 1937 elevated the federal judiciary to an almost sacred position. Moreover, in their efforts to portray the Supreme Court as the great bulwark of American constitutional rights, they sought to broaden the Court's appeal by proclaiming it the essential safeguard not just of private property but of a much wider set of individual rights and freedoms—as not merely the protector of the wealth that the few enjoyed but, far more broadly, the protector of the fundamental liberties that all Americans shared. Furthermore, political conservatives were determined to constrain and control the New Deal's activist regulatory agencies, and the federal courts readily appeared as their most promising instrument. Accordingly, they fought persistently to establish new procedures that would allow or require more extensive and exacting federal judicial review of the actions of those agencies.[72] Throughout the 1940s, the need to defend and expand the role of the national judiciary remained an article of conservative faith.

At the same time, political liberals were beginning to view the federal courts far more favorably than their progressive forebears had done. By the early 1940s, in fact, Roosevelt's judicial appointments had transformed both the political orientation and the public image of the national courts. As the ideology of late New Deal liberalism coalesced and spread, encouraging activist government and increased federal involvement in social and economic matters of national concern, its values began gradually to seep into thinking about the proper role of the federal courts. Moreover, liberals were beginning to force new issues to the center of American politics. Increasingly, they decried the evils of racial discrimination and urged vigorous federal action to combat segregation and remedy other racial abuses in the South. Similarly, they gave new emphasis to the importance of protecting individual civil rights and liberties, and they called for severe limitations on administrative discretion in regulating intellectual and cultural activities of First Amendment concern.[73] One after another, these new liberal issues suggested ever more persuasively the need for a more active and exacting federal judiciary.

Thus, in the decade after *Erie*, a pivotal, if largely unarticulated, consensus began to form. The federal judiciary appeared as an at-

SECTION III EDITORIALS *Special Articles*

The Washington Post

NEWS REVIEW *America Speaks • Books* SECTION III

WASHINGTON: SUNDAY, FEBRUARY 21, 1937

Roosevelt Supreme Court Proposal Boldest in U. S. History

Six Changes Made to Date By Congress

None, However, Seen as Deliberate Attempt at Tampering.

Three Obviously Result of Congestion and New Territories.

Congestion In Judiciary Now Claimed

"Midnight" Judges Law Defended as More Than "Jobbery."

Historians Deny Grant 'Packed' High Tribunal in 1869.

Long enamored of the federal courts as the guardians of economic liberty and private property, political conservatives were intensely committed to the special role they played in American government. Their passionate campaign to defeat Roosevelt's Court-packing plan in 1937 elevated the federal judiciary to an almost sacred position.

tractive and preferred institution for many groups—liberal and conservative alike—with important political and social interests that stood in need of special protection.

Recognizing *Erie*'s broader institutional implications, then, and understanding the particular resonance those implications had in the decade after 1938, we are in a position to identify more precisely the third and final connection—indirect and subtle, but nevertheless powerful and pervasive—between Brandeis's decision and the emerging stricter scrutiny idea. *Erie* advanced ideas of federal judicial systematization, specialization, and supremacy, and those ideas combined—in the context of a tumultuous period of foreign crises and domestic transformations—to help inspire and spread a compelling belief among a broad range of Americans that the federal courts were the chosen and essential institutional vindicators of certain fundamental individual federal constitutional rights. As that idea crystallized and spread, normative theories of stricter scrutiny began to emerge and compel attention. When fundamental federal constitutional rights were at stake, the new special role of the federal courts required the use of some type of stricter scrutiny.

D.

Understood in their historical context, then, *Erie* and the stricter scrutiny idea were not only compatible but mutually reinforcing. In spite of differences between widely varying doctrinal areas, and in spite of complexities in a period of sweeping historical change,[74] *Erie* and the stricter scrutiny idea were united by three fundamental and overriding characteristics: first, a political and social sympathy with the weak and disadvantaged; second, a theoretical congruence in seeking the grounds on which the judiciary, in a democratic society,

may properly act to make new law and, if necessary, counter the decisions of the legislative and executive branches; and, third, an institutional assumption that the federal courts have a special role in developing federal law, vindicating federal rights, and protecting the Constitution's great principles of procedural fairness, personal freedom, and popular representative government.

V.

With the force of the three doubts dissipated, *Erie* stands as an easily recognizable element of the New Deal "constitutional revolution." Brandeis's opinion shared the characteristic social, economic, political, and intellectual sympathies that informed the New Deal Court's distinctive jurisprudence that developed in the critical years after 1937.

This is not to say, of course, that either the New Deal or the "constitutional revolution" was simple, unified, unchanging, wholly new, or fully coherent. Quite the opposite: they were both complex, multifaceted, continuously evolving, and marked by inconsistencies and incompletions. That, however, has been the nature of America's democratic government and, for better or worse, the nature of its constitutional law as well.

ENDNOTES

[1]This essay is a modified and expanded version of the Griswold Prize Lecture delivered to the Supreme Court Historical Society, Washington, D.C., on May 23, 2001. The author wishes to thank David Chang, William P. LaPiana, Jethro K. Lieberman, Rachel Vorspan, Harry H. Wellington, and Donald Zeigler for helpful comments on an early draft.

[2]304 U.S. 64 (1938).

[3]Edward A. Purcell, Jr., **Brandeis and the Progressive Constitution: *Erie*, the Judicial Power, and the Politics of the Federal Courts in Twentieth-Century America** (New Haven, CT, 2000), 3.

[4]*E.g.*, Walton H. Hamilton and George D. Braden, "The Special Competence of the Supreme Court," 50 *Yale Law Journal* 1319 (1941); Edwin S. Corwin, **Constitutional Revolution, Ltd.** (Claremont, CA, 1941). C. Herman Pritchett, who regarded the 1941–1942 Term as "a turning point for the Roosevelt Court," found that between 1937 and 1947 the Court overruled 28 cases that had been decided prior to 1937. Pritchett, **The Roosevelt Court: A Study in Judicial Politics and Values, 1937–1947** (Chicago, 1969 [1948]), 300–301. Another scholar counted 30 such decisions between 1937 and 1946. Robert Harrison, "The Breakup of the Roosevelt Supreme Court: The Contribution of History and Biography," 2 *Law and History Review* 165 (1984).

[5]*E.g.*, G. Edward White, **The Constitution and the New Deal** (Cambridge, MA, 2000), 199, 233; Barry Cushman, **Rethinking the New Deal Court: The Structure of a Constitutional Revolution** (New York, 1998), ch. 12; William M. Wiecek, **The Lost World of Classical Legal Thought: Law and Ideology in America, 1886–1937** (New York, 1998), ch. 5; Colin Gordon, "Rethinking the New Deal," 98 *Columbia Law Review* 2029, 2051–2052 (1998); Richard A. Epstein, "The Mistakes of 1937," 11 *George Mason University Law Review* 5, 9 (1988); Michael E. Parrish, "The Great Depression, the New Deal, and the American Legal Order," 59 *Washington Law Review* 723, 728–735 (1984).

[6]41 U.S. (16 Pet.) 1 (1842).

[7]304 U.S. at 77.

[8]*E.g.*, Pritchett, **The Roosevelt Court**, 62–63; Cass R. Sunstein, **The Partial Constitution** (Cambridge, MA, 1993), 54–55; Bruce Ackerman, **We the People: Transformations** (Cambridge, MA, 1998), 370–372. There are, of course, exceptions. *E.g.*, William E. Leuchtenburg, **The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt** (New York, 1995).

[9]Cushman, **Rethinking the New Deal Court**; White, **The Constitution and the New Deal.**

[10]Justice Stanley Reed voted to overturn *Swift* solely on statutory grounds and concurred separately. 304 U.S. at 90.

[11]Brandeis was, of course, critical of the New Deal tendency toward excessive centralization. *See* Stephen W. Baskerville, **Laws and Limitations: An Intellectual Portrait of Louis Dembitz Brandeis** (Cranbury, NJ, 1994), ch. 7. At the same time, he consistently supported the exercise of national power in "national" areas and sympathized with many of the New Deal's efforts as well as with its "progressive" orientation. Most important, he was with the Court's slim majority in all of the critical decisions in 1937 and 1938 that marked the beginning of the "constitutional revolution."

[12]Edward A. Purcell, Jr., **Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870–1958** (New York, 1992), especially ch. 10; Purcell, **Brandeis and the Progressive Constitution**, 141–149.

[13]Some scholars have argued that the New Deal Court was inconsistent in this regard. *E.g.*, Raoul Berger, "The Activist Legacy of the New Deal Court," 59 *Washington Law Review* 751 (1984).

[14]304 U.S. at 78, 80.

[15]Purcell, **Brandeis and the Progressive Constitution**, 184–185, 204–205.

[16]304 U.S. at 72.

[17]Purcell, **Brandeis and the Progressive Constitution**, 55–60, 63, 168–173, 177, 187–189.

[18]304 U.S. at 78.

[19]304 U.S. at 78.

[20]*See* Purcell, **Brandeis and the Progressive Constitution**, 172–180.

[21]*See, e.g.*, Purcell, **Brandeis and the Progressive Constitution**, chs. 1, 3, 5–7; William G. Ross, **A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890–1937** (Princeton, NJ, 1994).

[22]Purcell, **Brandeis and the Progressive Constitution**, chs. 1, 3, 5, and 6.

[23]304 U.S. at 78. *See* Purcell, **Brandeis and the Progressive Constitution**, 172–177.

[24]*See, e.g.*, Alan Brinkley, "The New Deal and the Idea of the State," in Steve Fraser and Gary Gerstle, eds., **The Rise and Fall of the New Deal Order, 1930–1980** (Princeton, NJ, 1989), 85–121.

[25]*See generally* John R. Schmidhauser, **The Supreme Court As Final Arbiter in Federal-State Relations, 1789–1957** (Chapel Hill, NC, 1958); Michael E. Parrish, "The Great Depression, the New Deal, and the American Legal Order," 59 *Washington Law Review* 723, 739–745 (1984); Stephen Gardbaum, "New Deal Constitutionalism and the Unshackling of the States," 64 *University of Chicago Law Review* 483, 520–532 (1997).

[26]Melvin I. Urofsky and David W. Levy, eds., *"Half Brother, Half Son":* **The Letters of Louis D. Brandeis to Felix Frankfurter** (Norman, OK, 1991).

[27]"Conversations Between L[ouis]. D[embitz]. B[randeis]. and F[elix] F[rankfurter].," Frankfurter Papers (Library of Congress), Box 224 at 24. *See, e.g.*, *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co.*, 273 U.S. 83, 91 (1927) (Brandeis, J., dissenting). Brandeis was aware that the "general" federal common law could also be used to constrain state legislative powers. Purcell, **Brandeis and the Progressive Constitution**, 170–172.

[28]Given his concern with the New Deal's centralizing tendencies, Brandeis surely valued *Erie* additionally as an opportunity to shift power back to the states. *See* Purcell, **Brandeis and the Progressive Constitution**, 134–36.

[29]*See, e.g.*, Purcell, **Litigation and Inequality**, 262–291; Edward A. Purcell, Jr., "Reconsidering the Frankfurterian Paradigm: Reflections on Histories of Lower Federal Courts," 24 *Law & Social Inquiry* 679 (1999).

[30]The paradigmatic situation involved a resident plaintiff with a tort or contract claim who sued a corporation doing a local business but chartered out of state. By removing the action to federal court under diversity jurisdiction, the "foreign" corporation would gain a variety of advantages, one of which was often a more favorable substantive law under *Swift*'s federal common law. *See* Purcell, **Litigation and Inequality**, chs. 2–3.

[31]304 U.S. at 75.

[32]304 U.S. at 78.

[33]304 U.S. at 77.

[34]304 U.S. at 75.

[35]*E.g.*, *Di Santo v. Pennsylvania*, 273 U.S. 34, 37 (1927) (Brandeis, J., dissenting, joined by Holmes, J.); Purcell, **Brandeis and the Progressive Constitution**, 116, 159.

[36]*Compare, e.g., Adkins v. Children's Hospital*, 261 U.S. 525, 557–58 (1923) *with West Coast Hotel v. Parrish*, 300 U.S. 379, 399, 409–10 (1937).

[37]*See generally* John Braeman, **Before the Civil Rights Revolution: The Old Court and Individual Rights** (New York, 1988); Howard Gillman, "Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence," 47 *Political Research Quarterly* 623 (1994).

[38]*Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring, joined by Holmes, J.).

[39]*Id.* at 375.

[40]*Id.* at 374.

[41]*See, e.g.*, Harvard Sitkoff, **A New Deal for Blacks: The Emergence of Civil Rights as a National Issue** (New York, 1978); Jerold S. Auerbach, **Labor and Liberty: The La Follette Committee and the New Deal** (Indianapolis, IN, 1966).

[42]*See, e.g.*, Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," 4 *Harvard Law Review* 193 (1890); *Olmstead v. United States*, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting); Melvin I. Urofsky and David W. Levy, **Letters of Louis D. Brandeis** (New York, 1978), Vol. 5, 224, 226, 228.

[43]304 U.S. 144 (1938).

[44]Justices Cardozo and Reed did not participate in *Carolene Products*. Justice Butler concurred in the result only, while Justice McReynolds merely stated his disagreement with the Court's decision to reverse. Justice Black concurred in the result and in parts of Stone's opinion but not in the part that included footnote number four. 304 U.S. at 155.

[45]304 U.S. at 152.

[46]The footnote has spawned a substantial literature. *E.g.*, Milner S. Ball, "Judicial Protection of Powerless Minorities," 59 *Iowa Law Review* 1059 (1974); Louis Lusky, **Our Nine Tribunes: The Supreme Court in Modern America** (Westport, CT, 1993), 119–132, 177–190; Lewis F. Powell, Jr., "*Carolene Products* Revisited," 82

Columbia Law Review 1087 (1982); John Hart Ely, **Democracy and Distrust: A Theory of Judicial Review** (Cambridge, MA, 1980).

[47]304 U.S. n. 4 at 152–153.

[48]*Pierce v. United States*, 252 U.S. 239, 253, 273 (1920) (Brandeis, J., dissenting); *Gilbert v. Minnesota*, 254 U.S. 325, 334, 337–338 (1920) (Brandeis, J., dissenting). *See* David M. Rabban, **Free Speech in Its Forgotten Years** (Cambridge, UK, 1997), chs. 5, 7–8; Mark A. Graber, **Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism** (Berkeley, CA, 1991), 87–104, 115–121.

[49]304 U.S. at 153, n. 4.

[50]274 U.S. at 377 (Brandeis, J., concurring).

[51]304 U.S. at 152, n. 4.

[52]*Carolene Products* did not, of course, purport to articulate a comprehensive theory of judicial intervention, and, to the extent that it suggested a "value-free" or "neutral" theory based solely on procedural guarantees, it was misleading. Like *Erie*, *Carolene Products* assumed a complex set of substantive political and social values. *See, e.g.*, J. M. Balkin, "The Footnote," 83 *Northwestern University Law Review* 275 (1989); Powell, "*Carolene Products* Revisited."

[53]303 U.S. 177 (1938).

[54]303 U.S. at 186.

[55]303 U.S. at 185, n. 2. *See also id.* at 185–186.

[56]304 U.S. at 153, n. 4.

[57]When Brandeis read Stone's draft opinion in *Barnwell*, he told his colleague that it was "admirably done, wise and well said." Quoted in Alpheus Thomas Mason, **Harlan F. Stone: Pillar of the Law** (New York, 1956).

[58]304 U.S. at 74. *See* Purcell, **Brandeis and the Progressive Constitution**, 155–162.

[59]304 U.S. at 77 and n. 21. *See also id.* at 77, n. 20.

[60]Brandeis himself was actively involved in some of these efforts. *See* Purcell, **Brandeis and the Progressive Constitution**, 77–85, 141–145.

[61]In this regard, *Erie* was an easy case. Because the *Swift* doctrine was judge-made, it merited less deference than the statutory law hypothetically considered in *Carolene Products*.

[62]Purcell, **Brandeis and the Progressive Constitution**, 149–155.

[63]*See, e.g.*, Urofsky and Levy, **Letters of Louis D. Brandeis**, Vol. 5, 232.

[64]Purcell, **Litigation and Inequality**, chs. 4–5.

[65]*Id.*, chs. 7–9.

[66]Purcell, **Brandeis and the Progressive Constitution**, 150–155, 182–185.

[67]*See* Purcell, "Reconsidering the Frankfurterian Paradigm," 681–688, 698–706.

[68]These ideas have not been universally accepted, but they came increasingly to inform basic thinking about the nature and role of the federal courts. *See, e.g.*, Donald H. Zeigler, "Gazing into the Crystal Ball: Reflections on the Standards State Judges Should Use to Ascertain Federal Law," 40 *William and Mary Law Review* 1143 (1999).

[69]Purcell, **Litigation and Inequality**, 59–60; Purcell, **Brandeis and the Progressive Constitution**, 185–186.

[70]The ideas seeped into numerous areas, shaped by their changing political implications. They reached their fullest doctrinal development during the later Warren Court (*see, e.g.*, Lucas A. Powe, Jr., **Warren Court and American Politics** [Cambridge, MA, 2000]; Morton J. Horwitz, **The Warren Court and the Pursuit of Justice** [New York, 1998]) and their fullest institutional and administrative development under the Rehnquist Court (*see, e.g.*, Judith Resnik, "The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act," 74 *Southern California Law Review* 269 [2000]; Resnik, "Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III," 113 *Harvard Law Review* 924 [2000]).

[71]Purcell, **Litigation and Inequality**, 262–291.

[72]*See, e.g.*, George B. Shepherd, "Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics," 90 *Northwestern University Law Review* 1557 (1996).

[73]*See, e.g.*, Reuel E. Schiller, "Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment," 86 *Virginia Law Review* 1 (2000); Alan Brinkley, **The End of Reform: New Deal Liberalism in Recession and War** (New York, 1995).

[74]*E.g., Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941); *Korematsu v. United States*, 323 U.S. 214 (1944).

The Judicial Bookshelf

D. GRIER STEPHENSON, JR.

The Declaration of Independence captured the core of democratic theory when it referred to "Governments . . . deriving their just powers from the consent of the governed." Eighty-seven years later, when the American states were at war with each other after eleven of them refused to accept the outcome of the election of 1860, President Abraham Lincoln restated the principle of consent as "government of the people, by the people, and for the people." However phrased, this founding principle must be made functional. Otherwise, the "dependence on the people" that James Madison acknowledged in 1788 in *The Federalist*, no. 51, as "the primary control on the government" will not be achieved.[1]

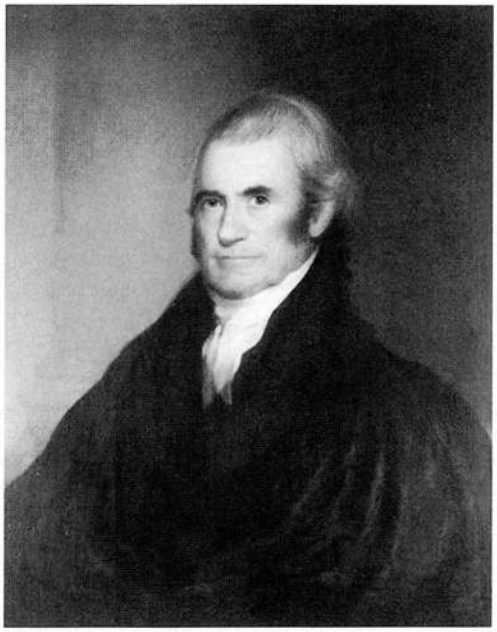
The Framers deployed the principle of consent in various ways in the plan of government they devised in Philadelphia in 1787. The Constitution entrusted the conduct of elections for national offices to the popularly elected legislatures of the pre-existing states, subject to modifications that Congress might make. People eligible to vote for "the most numerous Branch of the State Legislature" elected members of the House of Representatives. State legislatures selected members of the Senate. Electors, "appoint[ed], in such Manner as the Legislature [of each state] . . . may direct," chose the President and Vice President. Except for constitutional amendments that instituted popular election for senators and significantly broadened the franchise, these provisions still control the election of national officers. By peacefully determining those who shall govern and by bestowing legitimacy on the decisions they make, those provisions have provided answers to crucial questions faced by every political system.

Yet how did the Framers link the Supreme Court to the principle of consent? They deliberately detached that body from any meaningful "dependence on the people." The President, "by and with the Advice and Consent of the Senate," was to "appoint . . . Judges of the supreme Court" who, along with judges of the "inferior Courts," were to "hold their offices

during good Behavior" and to enjoy "a Compensation, which shall not be diminished during their Continuance in Office." Thus, in May 1788, when Alexander Hamilton imagined the Supreme Court and a national judicial power in *The Federalist*, no. 78, he defended this "independence of the judges" as "an essential safeguard" against the people, "against the effects of occasional ill-humors in the society." Of primary concern to Hamilton were "infractions of the constitution," which the anticipated power of judicial review would not only check once they had occurred but perhaps even discourage at their outset. As Princeton's Professor Edward S. Corwin would observe almost 160 years later, "judicial review represents an attempt by American Democracy to cover its bet."[2] Hamilton, however, strove valiantly in the seventy-eighth *Federalist* to lodge consent in the Court. Judicial review, he argued, did not "suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both."

It was this convergence of an appointed Bench with the popular will that Chief Justice John Marshall articulated in *Marbury v. Madison*,[3] the first defense of judicial review in a decision by the Supreme Court of the United States. "That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. . . . Those, then, who controvert the principle, that the Constitution is to be considered, in court, as a paramount law, . . . reduce[] to nothing, what we have deemed the greatest improvement on political institutions, a written constitution. . . . "[4] For Marshall, consent had two dimensions: popularly derived authority to rule combined with popularly derived limits on that rule. This is the link Justice Robert H. Jackson succinctly captured almost a century and a half later in the steel seizure case. Article II's command that the President "shall take Care that the Laws be faithfully executed . . . gives a governmental authority that reaches so far as there is law," advised Jackson. Likewise, the Fifth Amendment's command that "No person shall be . . . deprived of life, liberty or property, without due process of law . . . gives a private right that authority shall go no farther. These signify about all there is of the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules."[5]

Marshall is the subject of a new biography by CIA historian David Robarge, **A Chief Justice's Progress**.[6] The book is engaging, well written, and exhaustively researched and documented.[7] Yet any student of the fourth Chief Justice knows that this major figure in American constitutional history poses two unique challenges for any author. First, the Great Chief Justice—as Marshall has long been known, as if no one else could ever be his equal—casts a large shadow on the Constitution and on the development of American political institutions. Surely few early national political leaders are more difficult to portray adequately in a single volume. To write about Marshall after 1800 is to write about the Supreme Court, and—with only a few exceptions, such as William Johnson and Joseph Story—to write about the Supreme Court in the first third of the nineteenth century is to write about John Marshall. Second, Marshall's place in the American pantheon means that he has rarely been allowed to stray far from the center of scholarly attention. Alongside several biographies[8] lie a host of more narrowly focused volumes and reams of articles, plus countless other studies in which Marshall's handiwork figures prominently. At the 1955 bicentennial of his birth, one bibliography counted nearly 750 titles.[9] The past 46 years have surely pushed that number to well over a thousand. So it must be exceedingly difficult today even for an accomplished



CIA historian David Robarge has published a new biography of Chief Justice John Marshall (pictured) entitled *A Chief Justice's Progress.* It is the first book about Marshall devoted primarily to his pre-Court years.

scholar to find something new to say about John Marshall. In short, how does one justify yet another book about this man?

A Chief Justice's Progress is the first book about Marshall devoted primarily to his pre-Court years. In Robarge's view, "[w]hat is still lacking in the Marshall historiography is an interpretive 'half-life': a biography that emphasizes the formative influences on John Marshall during the years *before* he became Chief Justice."[10] Inspired by a study of Abraham Lincoln in the 1850s,[11] Robarge finds that previous biographers of Marshall have often dealt with the pre-Court years superficially, prefatorily, or both. However, these years merit detailed examination in their own right for at least two reasons. First, Marshall enjoyed an active public life for a quarter of a century before his appointment as Chief Justice launched a 34-year judicial career. The period thus has intrinsic interest as a window onto Marshall as a Revolutionary War soldier, lawyer, delegate to the Virginia constitutional ratification convention, member of Congress, diplomat, Federalist party activist, secretary of state, historian, and confidant to President John Adams. Wholly apart from his judicial service, Marshall was an influential, if not a leading, figure during the formative years of American national history. Second, the events and situations of Marshall's nearly 46 pre-Court years comprise "a cumulative, character-forming experience" that "shaped Marshall's personality and attitudes."[12] The assumption is that Marshall as Supreme Court leader and expounder of constitutional principles—subjects addressed in a lengthy final chapter—can be neither fully appreciated nor fully understood without knowledge of the man before he became the fourth Chief Justice.

Robarge acknowledges that his method is not risk free. "The most dangerous conceptual pitfall of the half-life is the fallacy of retrospection: using the subject's later historical reputation as a lens for viewing his early years as an unfolding chronicle that inexorably leads to whatever historical circumstance made him important." He attempts to avoid this trap "by treating Marshall's life before 1801 on its own terms as he lived it, while at the same time looking at it in new ways. In doing so, however, I have not tried to force Marshall into preconceived interpretive schemes or use him as a passive medium for examining broad forces and trends."[13]

This results in added insight, lively analysis and narrative, and a wealth of detail. For example, an outline of three phases of Marshall's life illustrates the environment that influenced him. First, despite Marshall's habit of being a haphazard record keeper "who did not believe the paper paraphernalia of his life was worth preserving,"[14] Robarge has largely succeeded in excavating materials that yield a probably unmatched view of Marshall's law practice. In this he was aided considerably by the ongoing publication of **The Papers of John Marshall**.[15] Largely self-taught, Marshall quickly became one of the most eminent

attorneys in a state whose bar was the envy of the rest of the nation. Marshall had seemed at the outset almost destined for the law. Neither he nor his parents, in their plans for his future, appear ever to have given serious attention to farming, medicine, the ministry, or mercantile activities.

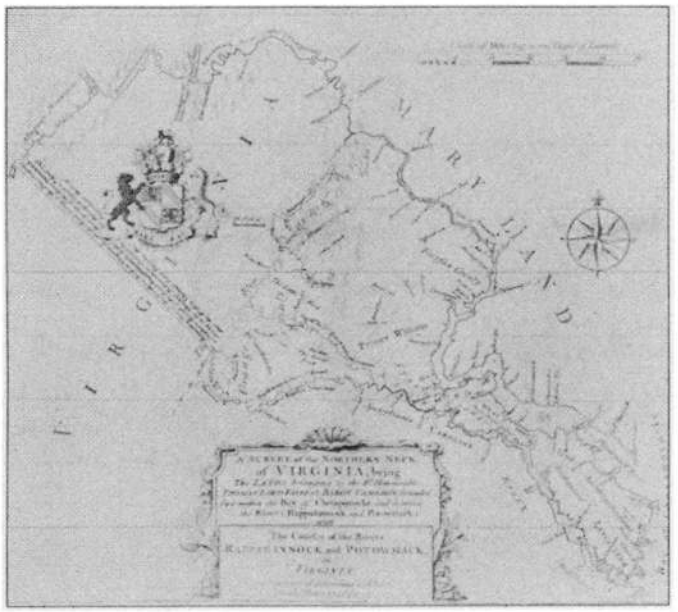
Second, in addition to a lucrative law practice, the volume reveals Marshall's efforts to further strengthen his financial position through land speculation and the development of western lands. Investment in land deals was to the late eighteenth century what investment in oil and gas exploration and Internet companies has been to the late twentieth and very early twenty-first centuries. One could make or lose much money in a very short period of time. Eventually Marshall owned over 41,000 acres in his own name, and he participated as well in the purchase of part of the gigantic 5.2 million-acre Fairfax property in the Northern Neck region of Virginia. The latter venture drew upon Marshall's skills as an attorney, and Robarge shows how Marshall was able to gain "legal protection for the syndicate's title through adroit legal and political maneuvers" and how this in turn helped him "surmount[] the main obstacle blocking his entrance into national affairs."[16] Even his diplomatic mission to Europe in 1797 as part of what became known as the XYZ Affair provided an opportunity to seek out financial backing for the Fairfax purchase.

Third, two chapters ("Southern Federalist" I and II) provide an extensive look at Marshall as a Federalist party man. Given the extreme views of many New England Federalists, the portrait of that party in the late Washington and early Adams years was not flattering. By contrast, Middle Atlantic and Southern Federalists seemed more flexible and accommodating, stressing "participatory politics . . . without the disabling anti-Jacobin paranoia of their Yankee counterparts." It was with the southern faction that Marshall was allied. For the author, Marshall's brief congressional career "can be seen as his effort to rescue the Federalist Party from self-destruction and oblivion by persuading it to adopt more popular policies without sacrificing its core beliefs."[17]

Although he ultimately failed in this objective, Marshall did succeed in scuttling one bizarre and desperate measure proposed in Congress: the Disputed Elections Bill, "a witless and probably unconstitutional attempt by extreme Federalists to alter the presidential election returns."[18] With an eye toward Pennsylvania's probable support for Jefferson in 1800, the bill provided for a "grand committee" consisting of six senators and six representatives (picked by the Federalist Congress) and the Chief Justice. This committee would have had an unappealable veto over the validity of any contested votes cast by presidential electors. Although his opposition posed risks to his own political future within his party, Marshall grasped an elementary principle of the emerging party system: a party adapts or it becomes irrelevant and eventually dies, as the Federalists and, later, the Whigs would learn.

Marshall's core Federalist beliefs combined with Jeffersonian successes at the polls appear to have been key reasons for his acceptance of President Adams' invitation to succeed Oliver Ellsworth as Chief Justice. Believing that the Court should be a counterweight to the Republicans, Marshall also believed that leadership of the Court required someone "with the right combination of conviction, intellect, political astuteness, and personality. Marshall, whose friendliness and self-effacement concealed a resolute will and deep self-confidence, believed he was that man."[19]

By the twentieth century, Marshall's legacy of recasting consent to allow judicial restraints on more or less transitory majorities had evolved into rigorous judicial protection of individual rights. In the 1940s, emphasis on property rights in the period between 1890 and 1937 gave way to a preference for nonproprietarian civil liberties and civil rights—the rights revolution—that has dominated



In addition to a lucrative law practice, Marshall strengthened his financial position through land speculation. He came to own 41,000 acres in his own name and participated in the purchase of the 5.2 million-acre Fairfax property in Virginia's Northern Neck region (shown on this map). His diplomatic mission to Europe in 1791—which became known as the XYZ Affair—provided an opportunity to seek financial backing for the land purchase.

American culture and constitutional law ever since. This was one hallmark of the constitutional revolution, precipitated by President Franklin Roosevelt's audacious assault on the Court following the presidential election of 1936.

Constitutional doctrine has always taken shape in the context of cases—decisions involving real-life controversies among people. Wisconsin journalism professor Shawn Francis Peters' **Judging Jehovah's Witnesses**[20] chronicles the doctrines, activities, and growth of this small, well-out-of-the-mainstream apocalyptic sect that generated courtroom controversies in abundance and significance well out of proportion to its numbers. Witnesses ran afoul of state laws and local ordinances particularly because of actions based on their beliefs: confrontational door-to-door, sound truck, and street corner evangelizing. Even the American Civil Liberties Union conceded that they proselytized "by annoying methods."[21] Moreover, they opposed the flag salute and military service at a time when war against the Nazis had reached the level of a moral crusade and when the outcome of the war and, with it, the future of Western civilization were still in doubt. Some Witnesses were even accused of being fifth-column agents for the Germans. In the early 1940s, some 3,000 Witnesses were arrested annually.

That was the good news. The bad news was the pogroms in nearly all regions of the nation, sometimes witnessed and silently condoned by police: job losses, mobbings, beatings, arson, forced ingestion of castor oil and other hazing, school expulsions, and being run out of town. These predations became more intense after the Supreme Court, through "Felix's Fall-of-France Opinion,"[22] ruled 8 to 1 against the Witnesses in the Gobitis flag-salute case.[23] "They're [t]raitors —the Supreme Court [s]ays [s]o."[24] The American Civil Liberties Union reported that 1,488 Witnesses in 335 communities were victims of vigilante assaults between May and October 1940.[25] Only occasionally were the perpetrators of such attacks successfully prosecuted.

However, Witnesses were constantly on defense in court. Building on David Manwaring's account of the flag-salute cases and Merlin Newton's study of Witnesses in Alabama,[26] Peters shows how Witnesses helped to jump-start the rights revolution. A few Witness cases that reached the Supreme Court

Shawn Francis Peters' new *Judging Jehovah's Witnesses* traces how the small apocalyptic sect generated courtroom controversies in abundance and significance well out of proportion to its numbers because of its members' aggressive methods of proselytizing and their refusal to salute the flag or perform military service during World War II. Above, 5,000 Jehovah's Witnesses are baptized in a New York City pool in 1952.

yielded some of the landmark decisions of the period. Witnesses seemed to be a perfect match for the category of "discrete and insular minorities" deserving of special judicial protection against majorities run amuck, which Justice Harlan Stone had outlined in his famous Footnote Four in 1938.[27] *Lovell v. City of Griffin*[28] pointed to the possibilities of unbridled censorship when it struck down a municipal ordinance that required distributors of printed materials to first obtain permission from the city manager, who had total discretion to grant or deny the request. It was in *Cantwell v. Connecticut*[29] that the Court first applied the Free Exercise Clause of the First Amendment to the states by way of the Fourteenth Amendment. Justice Stone first articulated his "preferred position" doctrine for the First Amendment in *Jones v. Opelika*.[30] References to "fighting words" still surface in free speech cases, and that exception to protected speech was announced in *Chaplinsky v. New Hampshire*.[31] The right not to salute the flag received its judicial imprimatur with a free speech—not a free exercise—footing in *West Virginia Board of Education v. Barnette*.[32] Extension of the First Amendment to the streets of a company town occurred in *Marsh v. Alabama*.[33] Even *Minersville School District v. Gobitis*, which *Barnette* overruled, stands today as one of the most profound debates in modern Supreme Court history over the role of the Court in the political system. Lovell, Cantwell, Jones, Chaplinsky, Barnett[34], Marsh, and Gobitas[35] were all Witnesses. Yet, as is often ironically true among persecuted zealots, Witnesses were typically as intolerant of dissenters within their ranks and of other faiths as many non-Witnesses were of them.[36]

Between 1938 and 1946, lawyers for the Witnesses and groups working on their behalf argued 39 Witness cases that yielded 23 opinions in the Supreme Court, most of them for the Witnesses.[37] This is no small achievement. In terms of their impact on the First Amendment, Witnesses were to the 1940s

what civil rights demonstrators were to the early 1960s and what antiwar protestors were to the late 1960s and early 1970s. Their cases gave the Court an opportunity to define and apply the First Amendment in new situations under novel conditions. "I think the Jehovah's Witnesses," commented Justice Stone, "ought to have an endowment in view of the aid which they give in solving the legal problems of civil liberties."[38]

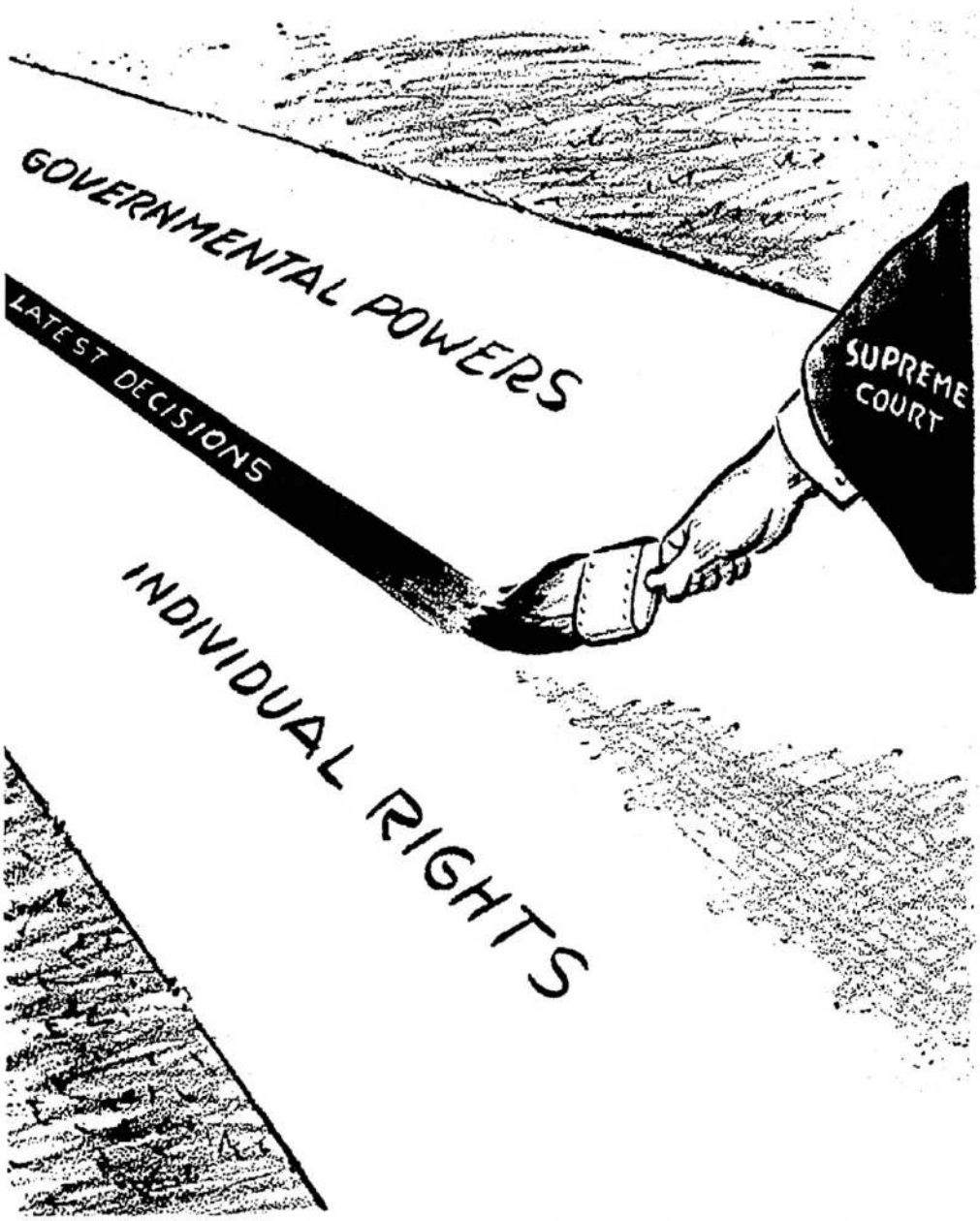
Had groups like the Witnesses not pressed their cases in the Supreme Court, and had the Court not been at least reasonably receptive to their claims, the contemporary Court's rights-centered jurisprudence might well be unimaginable. The Warren Court could probably not today claim its impressive stature in American constitutional history. By 1953, when Earl Warren of California became the fourteenth Chief Justice, the Court had already accustomed itself to cases involving individual rights. However, as late as the 1935 Term, only two of the Court's 160 decisions concerned nonproperty issues in civil liberties and civil rights. By the 1960 Term, that number had increased to 54 of the 120 cases decided by full opinion.[39] The data point to a phenomenal transformation in the substance of the Court's work. A new judicial inclination to decide cases favorably to civil rights claimants begot even more cases, just as a decreased inclination to rule in favor of property rights brought about the demise of proprietarian claims. The Court learned that it could affect the content of its docket in both direct and indirect ways.

Chief Justice between 1953 and 1969, Warren led his Bench down one of the most active and remarkable paths in American judicial history. In altering constitutional doctrine, the Court quickly transformed American society in a variety of ways. Hardly any aspect of life went untouched by landmark decisions on race discrimination, legislative districting, criminal justice, and the Bill of Rights. The Warren Court initiated a revolution during the quiescent Eisenhower years that is measured by Ike's latter-day lament over Warren's appointment: "The biggest damn fool mistake I ever made."[40]

The Warren Court is the subject of an important book by Texas law and political science professor Lucas A. Powe, Jr. **The Warren Court and American Politics**[41] acknowledges that by the time Warren—a California politician and former Republican vice-presidential nominee without judicial experience—retired, "the name 'Warren Court' had become a household word and there was no doubt in anyone's mind that the Supreme Court was a co-equal branch of government."[42] Few living at that time can forget the impression that the Supreme Court made on American politics. The Court was the topic of discussion in classrooms, from pulpits, and in supermarkets and barber and beauty shops. For the first time, billboards appeared along highways demanding the impeachment of a Chief Justice in order to "save the Republic." Had talk radio been a common broadcast format in those days, the Warren Court would have dominated the airwaves, too. Those Framers of the Constitution who thought they had insulated the Court from politics were poor prophets.[43]

Powe's book has two objectives. The first is discipline-oriented: "to help revive a valuable tradition of discussing the Supreme Court in the context of American politics."[44] Within the past three decades, nonquantitative political science has largely abandoned the Court, leaving it to lawyers, law professors, and a few historians. "Today a non-quantitative article on the Supreme Court and politics in a political science journal would stick out like an article on physics in a law journal."[45] For Powe, the "political science of judicial decision-making is better when supplemented by the insights of law and lawyers. Constitutional lawyering is better when supplemented by the insights of political science. There was a time when we understood this synergy.... But it is no longer clear that we know this synergy."[46]

The second objective seeks to replace stereotypes of the Warren Court with information derived from a synthesis of the many



This 1957 cartoon heralded the Warren Court's increasing tendency to protect individual rights from Red Scare abuses. The Warren Court so transformed constitutional doctrine that President Eisenhower once lamented that the Chief Justice's appointment was "[t]he biggest damn fool mistake I ever made."

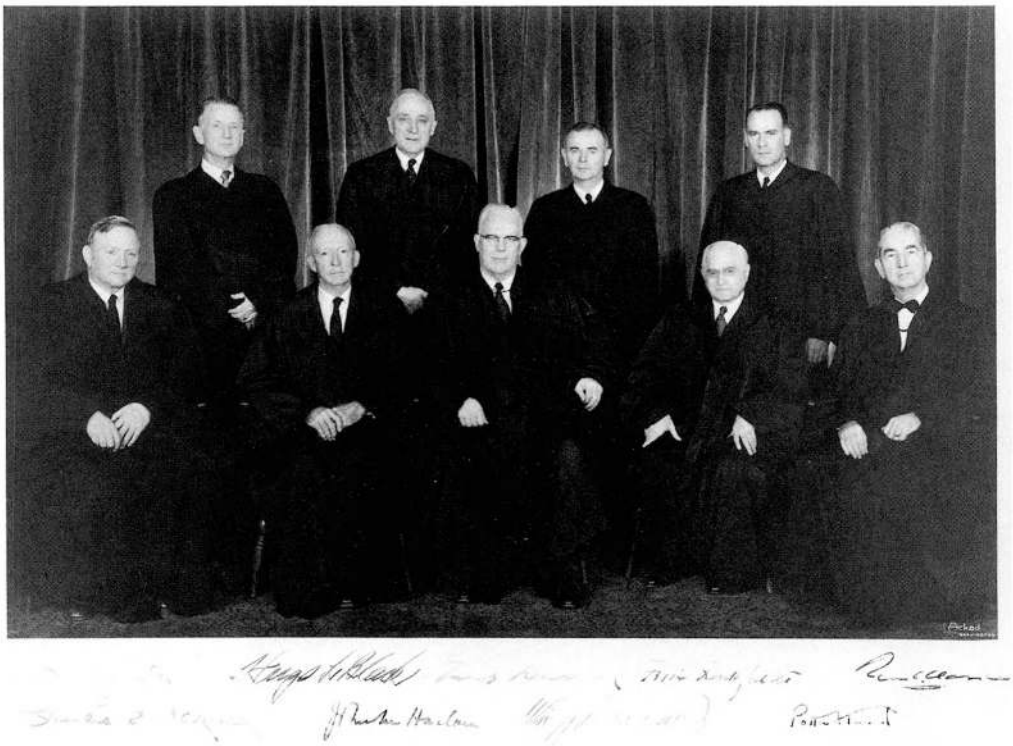
books and articles on the Court, its decisions, and its Justices during Warren's day. In this sense, the book succeeds: Powe weaves decision-making, analysis of opinions, issues, themes, political events and forces, and perspective into a consistent work. He acknowledges the "huge interpretive disputes about the legitimacy and efficacy of what the Warren Court did,"[47] but he recognizes points of agreement too. "[T]he Warren Court consisted of a group of powerful, talented men who were more sympathetic to claims of individual liberty while being simultaneously more egalitarian than their predecessors, more willing to intervene in contentious controversies, more prone to ignore the past, and more convinced that national solutions were superior to local solutions."[48] He does not attempt to evaluate the changes in terms of whether they were good or bad, but rather to see how they came about in the context of deciding cases, how far they reached, and how they met their limits, sooner or later.

Powe does this through eighteen chapters (plus an introduction), divided into four parts. The first three survey what he calls the "Three Warren Courts."[49] The first of these covers 1953–1956; the emphasis is on *Brown v. Board of Education*[50] and cases that began to dismantle the domestic security program that had emerged during the Cold War. The second phase lasted for about five years. Powe presents it as a stalemate between competing visions of the Court's role, as the aftermath to the first part. It is in the third part, after Justice Felix Frankfurter's retirement, that the Warren Court appears full-blown. Nine chapters cover those years, from 1962 to 1968, when the Court displayed an "aggressive willingness to implement liberal values, like those being articulated across the street in Congress and at the end of Pennsylvania Avenue at the White House."[51] The fourth and final part of the book surveys the final year of the Warren Court and offers perspective and a conclusion.

As important as the Warren Court has been to constitutional law, one also must recognize that its decisions were part of a larger rights orientation in American culture. Just as it is difficult to imagine the sit-in demonstrations of the late 1950s and early 1960s without *Brown v. Board of Education*, it is difficult to imagine some of the Warren Court's later rulings without all that preceded them in the early and mid-1960s. The Court acted alongside, in concert with, and in response to other rights-centered forces in American society.

On reflection, much of this might never have come about. Any number of isolated events would have redirected American history. "It might have been Black, almost as old as Frankfurter, who suffered a stroke. . . . Or Douglas might have gotten his wish . . . to become secretary of state. Or, for that matter, the horse that rolled over Douglas in 1950, breaking twenty-three of his ribs, might have killed him, thereby giving Truman another slot for one of his friends. With any of these possibilities, history's 'Warren Court' would not have come into existence in the 1962 Term."[52] Even President Kennedy's two opportunities—of what he thought would be many—to name Justices to the Bench could easily have stymied what became the thrust of Warren Court jurisprudence in the 1960s. Kennedy's first choice of Byron R. White to replace Justice Whittaker mirrored the "New Frontier": a "preference for the national government" in claims against states but, "like the Kennedy Justice Department, showing little concern for claims of individual liberty."[53] Upon Frankfurter's retirement, the President's choice could easily have been Harvard law professor Paul Freund, not Arthur Goldberg. "Had that happened, the 'fifth vote' [for a consistent liberal result in civil liberties cases] would have waited at least until Clark retired (in 1967)."[54]

The volume concludes by posing a question: "Was it truly the *Warren* Court?"[55] Powe believes it was. As significant a role as Justice William Brennan played—and the author acknowledges that Brennan became "the most important Justice of the second half of the twentieth century"—had Brennan's judicial



In *The Warren Court in American Politics*, Lucas A. Powe devotes nine chapters to the years 1962–1968, during which the Court displayed an "aggressive willingness to implement liberal values." The turning point was the retirement of Justice Felix Frankfurter (second from right, seated) when he suffered a stroke in 1962. If he had been replaced by Harvard law professor Paul Freund instead of the liberal Arthur Goldberg, the fifth consistent vote in civil liberties cases would have waited at least until Tom Clark (seated at right) retired in 1967.

career ended in 1969, no one would today make that assertion. "No one claimed that it was the Brennan Court while Warren sat." Brennan's career had just begun, and "he was largely unknown." During the Warren Court's 16 years, "the public face of the revolutionary Court was its dignified, genial chief Justice.... When all the discussions are over, CBS commentator Eric Sevareid needed but a single word to explain why the Court was identified with Warren rather than anyone else. Warren possessed that rarest of traits— 'gravitas.'"[56]

In one of many respects, the Warren Court contrasts sharply with the Burger Court (1969–1986) that succeeded it. The presidential campaign of 1952 that handed the White House to Dwight Eisenhower yielded no debate on the Supreme Court. Ike's appointment of Earl Warren in 1953 was, by some accounts, a payback for the California governor's support at a crucial moment at the Republican national convention in 1952, perhaps a substitute for the vice-presidential nomination that went to fellow Californian Nixon instead. And almost no one anticipated Warren's soon-to-be reputation as leader of the most progressive Bench in American history. By contrast, in 1968, both candidates opposing the incumbent Democratic party and its presidential nominee Vice President Hubert Humphrey had made the Supreme Court an issue in their campaigns.[57] Richard Nixon, the Republican nominee, and George Wallace, a third-party candidate, differed only on the degree to which they detested some of the landmark rulings of the Warren Court. As the vic-

The Chief Justiceship of Warren Burger, 1969–1986, by law professor Earl M. Maltz, is the sixth installment in the series entitled "Chief Justiceships of the United States Supreme Court" under the general editorship of Herbert A. Johnson. Pictured are Justices John Paul Stevens, Lewis F. Powell, Jr., Harry A. Blackmun, William H. Rehnquist, Thurgood Marshall, William J. Brennan, Jr., Chief Justice Warren E. Burger, and Justices Potter Stewart and Byron R. White.

tor, Nixon was able to name four Justices to the Bench by the winter of 1971–1972: Chief Justice Warren Burger and Justices Harry A. Blackmun, Lewis F. Powell, and William H. Rehnquist. Thus, Nixon launched the Burger Court. With Burger's retirement in 1986, it too, like the Warren Court, became part of history. But what was the Burger Court?

One answer to that question is the subject of **The Chief Justiceship of Warren Burger, 1969–1986** by Rutgers-at-Camden law professor Earl M. Maltz.[58] It is the sixth installment in the series entitled "Chief Justiceships of the United States Supreme Court" under the general editorship of Herbert A. Johnson. Previous volumes treat the pre-Marshall,[59] Marshall,[60] Fuller,[61] White,[62] and Stone/Vinson eras.[63] Far briefer than any of the volumes in the Holmes Devise History, books in the Johnson series seemed designed and written to attract a wider audience and may prove nearly as useful. Maltz's contribution meets the solid standard set by other series authors.

A study of the Burger Court presents any author with challenges. First, the Burger Court may be part of history, but only barely so. We may still be too close to it to be comfortable with a definitive reading of what it was and how it fit into the sweep of Supreme Court history. As late as the spring of 1993, five of the Supreme Court's nine Justices had served with Burger, a number reduced to three by the spring of 2001. If a "Court" is partly defined by its personnel, the Burger era continued in a significant way well past its Chief's retirement. Once all members from the Burger era have departed, access to papers and reflection on their careers will no doubt yield additional insight into the Burger Court. Justice Blackmun's papers, for example, will not be available for another several years.

Second, the Burger period is less easily encapsulated in ideological terms than War-

ren's. The Court under Chief Justices Stone (1941–1946) and Vinson (1946–1953) was in a transition from the Hughes Court (1930–1941) in the wake of the constitutional revolution of 1937. That transition was completed under Warren, as Powe's volume demonstrates. The Warren Court left a legacy of politically and socially transforming decisions, rendered by a core of sufficiently like-minded jurists. However, there was no single controlling signature bloc after 1969; as Maltz explains, "no particular viewpoint could command a consistent majority."[64] The reason for this seems clear. Not only did Warren-era Justices comprise a majority on the Burger Court until Justice Stevens's arrival in 1975, but three of them—Justices Brennan, White, and Marshall—were still sitting when Burger left. One would therefore expect a mixed bag of decisions with no consistent ideological message. "[T]he Court was composed of nine independent contractors with widely differing political and jurisprudential agendas." What emerged "reflected the shifting coalitions among these independent contractors rather than a single, easily described" focus.[65]

In contrast to scholars who label the Burger Court as either conservative or centrist, Maltz argues that the picture is more complex. For cases involving statutory construction, the Bench "moved the state of the law perceptibly to the right,"[66] as in cases on criminal procedure, antitrust matters, and labor relations. In contrast, many of the constitutional decisions appear "quite liberal."[67] Tellingly, while a few landmark rulings of the Warren Court were trimmed at the margins and some were not extended, not a single one was overturned

Maltz acknowledges that it will continue to be difficult to get a definitive reading on the Burger Court and how it fits into the sweep of Supreme Court history until all members from the Burger era have departed and their papers are made available. The papers of Harry A. Blackmun, who died in 1999, will not be available for several years.

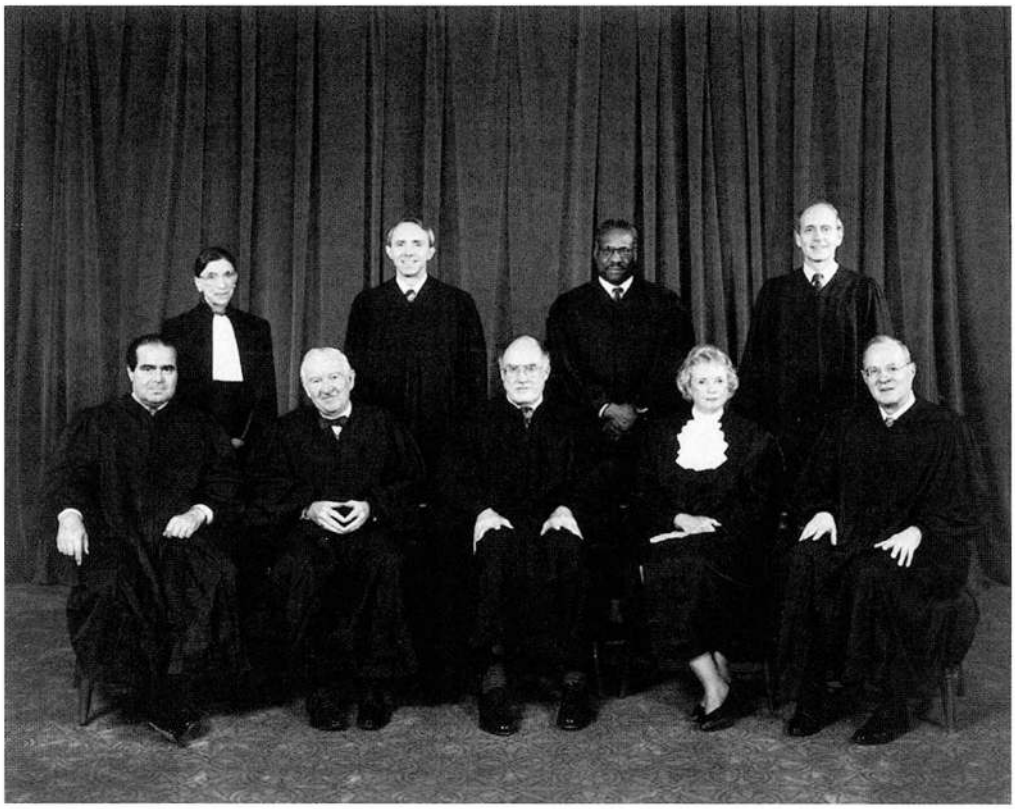
outright. In addition, some Burger Court rulings advanced the law in a liberal direction well beyond what the Warren Court had done. One thinks of *Griggs v. Duke Power Co.* (1971) in Title VII job discrimination cases, *Roe v. Wade* (1973) on abortion, and *Grand Rapids School District v. Ball* (1985) on the Establishment Clause.[68] Burger spoke for the 8-0 Court in the first, and Blackmun spoke for Court in the second, in which the seven-Justice majority included both Burger and Powell. In the third, Brennan could not have retained his narrow majority of five on the disputed Shared Time Program without the votes of Blackmun and Powell. "No dispassionate observer would conclude that the Burger Court moved the overall shape of constitutional law significantly to the right."[69] Moreover, while there were conservative decisions, there was no consistently articulated conservative theory that could offer a plausible alternative to the ideology of the Warren Court.

These themes become apparent in the twelve of Maltz's fourteen chapters that review substantive areas of the law, ranging from free speech and economic regulation to nonracial classifications and privacy. The book is thus structured topically, not chronologically, although within chapters analysis proceeds mainly Term by Term. Each of the twelve concludes with a table depicting voting alignments in each major case. The reader is able to see at a glance the position taken by each participating Justice. An appendix reprints tables from annual Supreme Court review issues of the *Harvard Law Review* showing the percentages, by Term, that each Justice voted with every other Justice.

The book also contains an assessment of Burger as Chief Justice. With his flowing white hair and deep baritone voice, most agreed that he looked and sounded the part. Had he been an actor, he would have been perfectly cast. With the possible exception of William Howard Taft, Warren Burger was the most active Chief Justice *outside* the Supreme Court. He treated the office like a pulpit from which to preach energetically for changes in legal education, professional standards for Bench and bar, criminal sanctions, prisons, and the administration of justice. He was also among the most efficient Chiefs in heading the Court and was tireless in his efforts on behalf of the Court itself, in matters ranging from the condition of the building, the introduction of copying machines, and the reconfiguration of the courtroom Bench to a leading role in the creation of the Supreme Court Historical Society. Yet he never achieved a judicial reform dear to his heart: establishment of a national court of appeals, staffed by judges who would rotate from the existing courts of appeals, that would decide routine conflicts among the circuits and push the most important cases to the Supreme Court.[70]

Moreover, Maltz acknowledges, chiefs are usually "evaluated almost exclusively on their impact on American jurisprudence." On this count, Burger receives a low mark. "[H]e was not . . . a central figure in the development of the law during his tenure. . . . Burger's views on a particular issue were rarely decisive; instead, he was a necessary but not sufficient member of any conservative majority." Furthermore, "he lacked the mental capacity and rhetorical skill to adequately elaborate and defend an alternative approach to Warren Court activism; indeed, his efforts to assert intellectual leadership . . . often degenerated into fiascoes. . . . In short, from a purely jurisprudential perspective, the Burger era bears its name only because he held the formal title of Chief Justice."[71]

The task of articulating a conservative jurisprudence in the Burger years, Maltz believes, fell to Justice Rehnquist, and it was Rehnquist to whom President Reagan turned in 1986 to replace Burger. In **The Rehnquist Court and the Constitution**, a tightly written, impressive, and thoroughly documented piece of scholarship by East Carolina political science professor Tinsley Yarbrough,[72] the portrait of Chief Justice Rehnquist that emerges



Political scientist Tinsley Yarbrough has written *The Rehnquist Court and the Constitution.* Along with analysis of decisions, the book presents behind-the-curtain information; unlike that reported in certain journalistic accounts, Yarbrough has documented his. Above are current members of the Court.

involves admiration of his skills as a leader, if not agreement with his constitutional values. The book is an example of the kind of analysis of the Supreme Court in the context of American politics that Powe hopes will become commonplace again. It depicts a Court that, as of midwinter 2001, was still unfolding. (Yarbrough's book appeared in 2000, the year of a presidential election that, ironically, may determine how the story of the Rehnquist Court concludes.)

Reagan's selection of Rehnquist, the author argues, was "hardly accidental,"[73] although one suspects that few Supreme Court nominations are ever "accidental." Yarbrough's point is that the appointment was part of a pattern in the Reagan administration, continued by the first President Bush, to challenge more aggressively than Nixon ever did "the federal human rights orthodoxy of the post–World War II era" by judicially advancing a conservative agenda.[74]

Did those efforts succeed? "The Reagan-Bush judicial choices have had an undoubted influence on the direction of constitutional law, but not, to date, the sort of fundamental impact for which the Reagan White House had hoped." Because of "centrist forces" evident on the Bench, "[i]t is hardly surprising . . . that much scholarly research on the Rehnquist Court to date has emphasized doctrinal continuity rather than change—the extent to which constitutional decision-making . . . has largely kept faith in many fields of litigation with Burger Court, if not Warren Court, precedent."[75] Nonetheless, Yarbrough cites "important developments on the Court with enormous potential for exerting a substantial impact on future decisional trends." Aside from the usual "hot-button" examples from the October 1999

Term, a high percentage of which were decided by votes of 5 to 4, one thinks of cases under the Commerce Clause and the Eleventh Amendment where the majority questioned Congress's power over the states.[76] In addition, "takings" rulings under the Fifth Amendment "cast doubt on the current status of the constitutional 'double standard,' under which the post-1936 Supreme Court has presumed the validity of economic regulations, leaving the definition and protection of property rights largely to the political arena . . . , while closely scrutinizing governmental interferences with non-economic personal rights."[77] The composition of the Bench during the coming decade may well determine whether such trends flourish or atrophy.

Yarbrough makes his case for both the continuity and the signs of change in seven chapters dealing with government power, the double standard, unenumerated rights, the religion clauses, freedom of expression and association, criminal justice, and equal protection. Aside from the analysis, which will be of interest to students of constitutional law, readers will catch glimpses of the author's values, traces of humor, and willingness to second-guess the Court. With respect to the adherence of some members of the Court to a "color-blind Constitution," the author recalls the Civil Rights Cases[78] that assumed that special legal protection for the former slaves and their offspring was no longer needed. Justice Harlan dismissed that assumption as "'scarcely just,' and with good reason," Yarbrough writes. "Justice Scalia and company could do worse than to subject certain of their own premises to similar scrutiny."[79] In a reference to *Roe v. Wade*, the author notes that "Justice Blackmun was a frequent object of death threats, presumably from antiabortion extremists zealously, but selectively, committed to the sanctity of life."[80] Discussion of *Clinton v. Jones*[81] questions a key assumption of that presidential immunity decision: that "there is no basis for concluding that fear of civil liability for private misconduct will inhibit a president's performance of official duties"—albeit with the advantage of postimpeachment hindsight. On the assumption that "those providing financial support and legal representation for [Jones] were staunch opponents of President Clinton's position on abortion and other controversial issues," presidential fears of civil liability in such cases "would appear at least as likely to inhibit a president in the fearless and effective performance of his duties as a suit directed at official misconduct."[82] (The latter kind of suit had been ruled out of bounds, by a vote of 5 to 4, in *Nixon v. Fitzgerald*.[83])

Along with analyses of decisions, the book also presents in two chapters an engaging portrait of the Justices, the selection and confirmation proceedings, and how they decide cases. There is much behind-the-curtain information; unlike that reported in certain journalistic accounts, Yarbrough has documented his. For example, there are the efforts by Justice Blackmun in 1988 to make amends after press accounts of a talk to the Eighth Circuit judicial conference yielded unflattering comments about his colleagues.[84] The reader witnesses Chief Justice Rehnquist's efforts to speed along the opinion-writing process, especially during the "spring pileup," suggesting that "in the future he would give 'some preference' in the assignment of additional majority opinions to those Justices 'who are 'current' with respect to past work.'"[85] This pair of chapters depicts the Court as a very fast track, where some scrambling is needed just to keep up. They could stand by themselves as an introduction to the work of the Supreme Court, and the chapters on substantive decisions could stand alone as well.

Yarbrough's book on the Rehnquist Court and the other four volumes surveyed here serve as reminders of the continuing role of the Supreme Court in American government. "Democratic institutions are never done," observed Princeton professor Woodrow Wilson over a century ago. "[T]hey are like living tissue—always a-making. It is a strenuous thing,

this of living the life of a free people."[86] Because of the Supreme Court, America's democratic institutions reflect the historic principle of the consent of the governed as both an affirmation of and a limit on majority rule.

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THE BOOKS SURVEYED IN THIS ARTICLE ARE LISTED ALPHABETICALLY BY AUTHOR BELOW

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ENDNOTES

[1]The author's thanks go to James F. Van Orden, who read a draft of this essay and made helpful comments.

[2]Edward S. Corwin, Book Review, 56 *Harvard Law Review* 484, 487 (1942).

[3]5 U.S. (1 Cranch) 137 (1803).

[4]*Id.*, 175–176, 178.

[5]*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (concurring opinion).

[6]David Robarge, **A Chief Justice's Progress: John Marshall from Revolutionary Virginia to the Supreme Court** (2000) (hereafter cited as Robarge).

[7]Generous endnotes follow each chapter. A comprehensive bibliography on Marshall concludes the volume. *Id.*, 323–356.

[8]For example, *see* Albert J. Beveridge, **The Life of John Marshall**, 4 vols. (1916–1919); Leonard Baker, **John Marshall: A Life in Law** (1974); Francis N. Stites, **John Marshall: Defender of the Constitution** (1981); and Jean Edward Smith, **John Marshall: Definer of a Nation** (1996).

[9]James A. Servies, **A Bibliography of John Marshall** (1956).

[10]Robarge, xviii (emphasis in the original).

[11]Don E. Fehrenbacher, **Prelude to Greatness: Lincoln in the 1850s** (1962).

[12]Robarge, xix.

[13]*Id.*, xx.

[14]*Id.*, xix.

[15]Herbert A. Johnson, *et al.*, eds., **The Papers of John Marshall** (1974–present). The ten volumes published to date provide materials through 1823, or roughly two-thirds of Marshall's Chief Justiceship.

[16]Robarge, 172.

[17]*Id.*, 209.

[18]*Id.*, 215.

[19]*Id.*, 233.

[20]Shawn Francis Peters, **Judging Jehovah's Witnesses: Religious Persecution and the Dawn of the Rights Revolution** (2000) (hereafter cited as Peters).

[21]*Id.*, 33.

[22]This is the title of chapter 2 of Peters' book. *Id.*, 46.

[23]*Id.*, 89. *Minersville School District v. Gobitis*, 310 U.S. 586 (1940).

[24]This is the title of chapter 3. Peters, 72.

[25]*Id.*, 85.

[26]David R. Manwaring, **Render unto Caesar: The Flag Salute Controversy** (1962); Merlin Owen Newton, **Armed with the Constitution: Jehovah's Witnesses in Alabama and the U.S. Supreme Court, 1939–1946** (1995).

[27]*United States v. Carolene Products Co.*, 304 U.S. 144, 152, n. 4 (1938).

[28]303 U.S. 444 (1938).

[29]310 U.S. 296 (1940).

[30]316 U.S. 584, 600 (1942) (dissenting opinion).

[31]315 U.S. 568 (1942).

[32]319 U.S. 624 (1943).

[33]326 U.S. 501 (1946).

[34]The Barnett name was spelled incorrectly in the *United States Reports* as "Barnette."
[35]The Gobitas name was spelled incorrectly in the *United States Reports* as "Gobitis."
[36]Peters, 14, 17.
[37]*Id*, 13.
[38]*Id.*, v.
[39]Alpheus Thomas Mason and Donald Grier Stephenson, Jr., **American Constitutional Law: Introductory Essays and Selected Cases** (12th ed., 1999), 358.
[40]Quoted in *id.*, 7.
[41]Lucas A. Powe, Jr., **The Warren Court and American Politics** (2000) (hereafter cited as Powe).
[42]*Id.*, xi.
[43]Donald Grier Stephenson, Jr., **Campaigns and the Court: The U.S. Supreme Court in Presidential Elections** (1999), ch. 7.
[44]Powe, xi.
[45]*Id.*, xii.
[46]*Id.*, xiv.
[47]*Id.*, xv.
[48]*Id.*
[49]*Id.*, 497.
[50]347 U.S. 483 (1954) and 349 U.S. 294 (1955).
[51]Powe, 498.
[52]*Id.*, 209.
[53]*Id.*, 210.
[54]*Id.*, 211.
[55]*Id.*, 499 (emphasis added).
[56]*Id.*, 500.
[57]Stephenson, **Campaigns and the Court**, ch. 7.
[58]Earl M. Maltz, **The Chief Justiceship of Warren Burger, 1969–1986** (2000) (hereafter cited as Maltz.)
[59]William R. Casto, **The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth** (1995).
[60]Herbert A. Johnson, **The Chief Justiceship of John Marshall, 1801–1835** (1997).
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[62]Walter F. Pratt, Jr., **The Supreme Court under Edward Douglass White, 1910–1921** (1999).
[63]Melvin I. Urofsky, **Division and Discord: The Supreme Court under Stone and Vinson, 1941–1953** (1997).
[64]Maltz, 12.
[65]*Id.*, 3.
[66]*Id.*, 264.
[67]*Id.*, 264.
[68]401 U.S. 424 (1971); 410 U.S. 113 (1973); 473 U.S. 373 (1985).
[69]Maltz, 265.
[70]*See*, for example, **Report of the Study Group on the Caseload of the Supreme Court** (1972); Commission on Revision of the Federal Court Appellate System, **Structure and Internal Procedures: Recommendations for Change** (1975); Warren E. Burger, "The Time is Now for an Intercircuit Panel," 71 *ABA Journal* 86 (April 1985).
[71]Maltz, 11–12.
[72]Tinsley E. Yarbrough, **The Rehnquist Court and the Constitution** (2000) (hereafter cited as Yarbrough). The editors at Oxford University Press must have tried valiantly, if in vain, to keep the book under 300 pages (it comes in at 306 pages). The index, appearing in Yarbrough on pages 299–306, is printed in a triple-column format in exceedingly small type. It may be accessible only by those with above average close-up vision.
[73]*Id.*, ix.
[74]*Id.*
[75]*Id.*, x–xi.
[76]*E.g., Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000); *United States v. Morrison*, 529 U.S. 598 (2000).
[77]Yarbrough, xi.
[78]109 U.S. 3 (1883).
[79]Yarbrough, 266.
[80]*Id.*, 56.
[81]520 U.S. 681 (1997). *See* Yarbrough, 79–82.
[82]Yarbrough, 82.
[83]457 U.S. 731 (1982).
[84]Yarbrough, 40–41.
[85]*Id.*, 52–53.
[86]Woodrow Wilson, **An Old Master and Other Political Essays** (1893), 116.

Race, Education, and the Courts: A Review of James T. Patterson's *Brown v. Board of Education*: A Civil Rights Milestone and Its Troubled Legacy

GREGORY NELSON HITE

The momentous 1954 Supreme Court ruling on school desegregation is the subject of James T. Patterson's new book. In ***Brown v. Board of Education*: A Civil Rights Milestone and Its Troubled Legacy** (Oxford University Press, 2001), Patterson, who is the Ford Foundation Professor of History at Brown and winner of the Bancroft prize for his book **Great Expectations: The United States, 1945–1974**, seeks to address the multiple forces that led to the ruling and to assess the various intended and unintended effects it had on American society. The book is the first in the new "Pivotal Moments in American History" series by Oxford University Press. Series editors David Hackett Fischer and James McPherson have written that the series is intended to examine large historical problems through the lens of particular historical incidents. The editors hope to "encourage a new way of writing history—one that combines the newest understandings of the past with an old notion of history as a narrative art."[1]

Patterson draws upon the excellent work of Richard Kluger's **Simple Justice** (1974) and J. Harvie Wilkinson's **From *Brown* to *Bakke*** (1979).[2] He has the advantage of viewing the decision over a longer period of time than did they, and with an eye toward the personal as well as the political. Combining insights from legal and social history, Patterson weaves a complex and focused narrative as he attempts to chart the intersection of two highly charged issues in America: race and education. His goal is to assess the "controversies, legal, social, political, educational, that *Brown* sparked from the late 1940s until the present."[3] He takes care to introduce the reader to the myriad of persons—judges, segregationists, lawyers, pastors, psychologists, teachers, governors, presidents, and children—who helped to make the case and later struggled to make sense of the decision.

The book is divided into three sections. The first assesses the state of American race relations and the specific events that led up to the 1954 decision. The middle chapters tackle

In his new book, *Brown v. Board of Education: A Civil Rights Milestone and Its Legacies*, James T. Patterson points out that the post–World War II era saw a hint of liberalization in race relations, as African Americans became concentrated in Northern cities and Southern blacks became urbanized. Patterson is careful, however, not to underestimate the power of Jim Crow.

the difficulties faced by the courts, the federal, state, and local governments, and educators in implementing the decision, the reaction of the South, and the relationship of the decision to the emerging civil rights movement. The last section concerns the substantial shift by the federal government and the courts from benign neglect to active enforcement of *Brown*, the shift from targeting *de jure* to *de facto* segregation, and the unexpected social changes that resulted from the black freedom movement of the 1960s.

Following World War II, the general trend in race relations in the United States hinted at the possibility of liberalization. A number of factors contributed to this, among them the concentration of African Americans in northern cities, increased urbanization among Southern blacks, increased expectations for reform by returning veterans, and a robust economy. However, while Patterson takes note of this optimism, he is careful not to underestimate the power that Jim Crow held over Southern blacks. While the possibility of reform existed, the obstacles to be overcome were formidable. The stain of Communism tainted any African-American reform movement; even if one managed to avoid that stigma, violent reprisal and economic intimidation by whites were almost certainties. Patterson rightly rejects the notion that the South was inevitably moving toward a more liberal racial agenda: "In retrospect it seems clear that the hopeful liberals of the 1940s and 1950s had overly optimistic expectations."[4] Liberals underestimated the persistence of American racial mores and overestimated the power of the courts to alter the social and political landscape.

It was in this milieu of rising expectations and limited possibilities that the National Association for the Advancement of Colored People pursued its agenda. Patterson carefully traces the development of the NAACP's legal

strategy for defeating Jim Crow. Since the 1930s, the plan had been to concentrate on education cases. Seeking to establish a series of legal precedents, the NAACP hoped for an eventual chance to argue a case before the Supreme Court overturning segregation. Patterson is at his best as he describes the NAACP's decade-long, case-by-case assault on *Plessy v. Ferguson*'s "separate but equal" test. He carefully documents the details of each case while moving the narrative forward, assessing the strengths and weaknesses of each in the push against *Plessy*. At the same time, he does not sacrifice the personal side of each case. Rather than reducing those at the center of each case to mere plaintiffs, Patterson carefully portrays their hopes, fears, and struggles to seek an education for themselves and their children in a segregated world.

Two events are key to Patterson's assessment of these pre-*Brown* days. The first was the decision of Thurgood Marshall, the lead counsel for the NAACP's Legal Defense Fund, to depart from the established legal strategy of challenging the "equality test" established by *Plessy* and to pursue a challenge of the "separate test" instead. For the most part, it had been quite easy to establish that the school facilities for blacks were grievously inferior to those set up for whites. However, these cases resulted only in specific remedial measures. While funding for black schools was slowly increasing as a result of these suits, Marshall sought a case that struck at the very heart of the system of segregated education, not the particularities of each school board's facilities. By arguing that separate schools were inherently unequal, Marshall hoped to destroy the very premise of Jim Crow.

The second key event was the appointment of Earl Warren as Chief Justice by Eisenhower in 1953. Warren took a Court that was deeply fractured along personal lines and on philosophical grounds. His predecessor, Fred Vinson, had overseen the Court as it heard the first arguments of the school desegregation cases in 1952, but the Justices stalled for time, ordering a rehearing six months later. In the meantime, the Court asked both sides to consider the relationship of the Fourteenth Amendment to public education. During the fall of 1953, Vinson died of a heart attack. Eisenhower appointed Warren, then governor of California and a close political ally, to replace him. While Warren was not considered a brilliant legal mind, he was a personable and able administrator and within a month of his appointment had done a great deal to establish a positive working relationship among the Justices.

Marshall and the NAACP lawyers pinned their hopes for a reversal of *Plessy*, not on legal precedents, but upon recent psychological studies that theorized that racial segregation made children feel inferior and provided an unfit learning environment, which therefore denied them equal protection under the law. Writing for a three-judge panel that decided the original *Brown v. Board of Education of Topeka* in 1951, Judge Walter Huxman refused to find a violation of the *Plessy* "equality test," ruling that the facilities in the Topeka school system were equal. However, he did attach a "Findings of Fact" to his decision that endorsed the psychological theories the NAACP was arguing.

The most prominent advocate of these theories was Kenneth Clark. Clark had received his Ph.D. in experimental psychology from Columbia in 1940. He had worked for Gunnar Myrdal on his magnum opus **An American Dilemma** (1944). Along with his wife and colleague Mamie, Clark worked with children with personality disturbances. In the course of their work, the two collaborated on a project designed to measure the effects of segregation on school children. The validity of Clark's "doll experiment" had long been debated, and many on Marshall's staff had doubts as to the usefulness of the research. However, Marshall felt it offered the best chance for an all-out ruling against segregation.

The new dynamic of the Warren Court

Patterson carefully traces the development of the NAACP's legal strategy of concentrating on education cases. At right are Thurgood Marshall and Donald Gaines Murray in 1936, after Marshall's team at the NAACP secured its first victory in the legal fight against segregation in a successful challenge to the University of Maryland's policy of "awarding" scholarships to blacks to seek enrollment out of state.

made a decision in the NAACP's favor a possibility for the first time. The Justices were acutely aware of the import of the decision, and Warren took it upon himself to write a decision to which he thought all could agree. Hoping to stave off Southern resistance to the decision, Warren and others felt that the opinion had to be unanimous in order for it to be effective. Warren stated that the "opinion should be short, readable by the lay public, non-rhetorical, and unemotional and above all, non-accusatory."[5] The Justices agreed to the opinion on May 15, 1954. The eleven-page opinion said little about *Plessy* or constitutional law and relied heavily upon the Clarks' work. Warren wrote:

> To separate them [black children in grade school and high school] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.[6]

In defense of his assertion that segregation negatively affected the educational development of schoolchildren, Warren cited the work of Clark and others in the now infamous "footnote eleven." The Court noted that the decision would apply to all fifty states, not simply those involved in the case.

Ironically, the decision did not mention Justice Marshall Harlan's dissent in *Plessy*—"Our Constitution is color-blind, and neither knows nor tolerates classes among its citizens."[7] Even more notably, the opinion lacked any direction as to how the courts and the states were to implement the decision. Here Patterson deals with the real crux of the issue, the overarching question: what is the *Brown*

decision's place in history? Should it be judged, as some have claimed, as the greatest legal decision in modern American history, or was it a glaring failure as others have argued? Patterson rightly rejects both extremes; he is careful to see the decision in light of the social and political context in which it was fashioned, and later in the changing social context in which it was enforced. In 1954, the nine senior white men who decided the case were isolated enough from political pressures to accept the NAACP's arguments and to sound the death knell of Jim Crow. They emphasized in plain language and in one voice that "in the field of public education the doctrine of separate but equal has no place," but they were also savvy enough to know that they would not be the ones who changed the hearts and minds of Americans.[8] That task would be left to others.

Initial reaction among African Americans was euphoric, that among whites surprisingly subdued. Most states publicly announced that they would abide by the decision. However, within months, forces on both sides began mobilizing to challenge the decision, with the

Dr. Kenneth Clark (right) and his wife Mamie collaborated on a project designed to measure the effects of segregation on schoolchildren. Patterson's book reports that many on Thurgood Marshall's staff had doubts as to the validity of the Clarks' "doll experiment" research, but that Marshall felt that presenting the results offered the best chance for an all-out ruling against segregation.

hope of pressing the courts and the federal government into expanding it or of cajoling the South into containing the damage the decision had wrought. In May of 1955, just over a year after the *Brown* decision, the Court again unanimously declared that segregation was unconstitutional in public education. What came to be called *Brown* II stated that the South should proceed with dismantling segregated school districts "with all deliberate speed."[9] These words represented a conscious attempt by Warren and his colleagues to reaffirm their earlier decision without antagonizing the South. The Court was aware of growing resistance in the South and a lack of willingness on the part of the Eisenhower administration to actively enforce the decision. Justices recalled the experience of Prohibition, and Hugo L. Black argued that the Court should not "issue what it cannot enforce."[10]

Patterson is quick to reject what has been termed the "backlash thesis." Supporters of this thesis claim that the race relations in the South were in the process of liberalization prior to 1954, and that *Brown* infuriated even moderate Southern whites and radicalized Southern white resistance. This resistance, in turn, placed the emerging civil rights movement in stark contrast to violent pro-segregation forces. The subsequent violent civil rights clashes in Birmingham and Selma, supporters argue, forced the federal government to enact far-reaching legislation that forever altered the political landscape in the South. However, Patterson notes, Southern businessmen, government officials, and agitators became organized and emboldened only after black men and women began to press the claims of *Brown*. The *Brown* decisions were largely symbolic: that is, they had no immediate effect upon the lives of white and blacks. Instead, they established the Court's position and spoke to a possibility of integration, a solution Southerners thought they might avoid or at least quietly delay. It was not the decision, but the very real challengers to Jim Crow—the Montgomery Bus Boycott, Autherine Lucy's integration of the University of Alabama, and the Little Rock Nine—that touched on the basest fears of Southern whites: interracial sex and outside agitation. Those issues had always resulted in swift and violent reactions from Southern whites against blacks.

Amidst all the initial celebration surrounding *Brown*, Marshall himself warned his colleagues, "You fools go ahead and have your fun . . . we ain't begun to work yet."[11] The work that Marshall envisioned was much more of the same. What he did not foresee—what no one could have foreseen—was the birth of the modern civil rights movement. In 1956, the Montgomery Bus Boycott catapulted Martin Luther King, Jr., into the national spotlight and highlighted the determination of everyday men and women seeking their full citizenship. David Garrow, John Ditmer, Charles Payne, and others have established the powerful emotional effect that the *Brown* decision had upon veteran civil rights activists as well as on a younger generation of African Americans who grew up in the post-*Brown* era. Between 1954 and 1960, pro- and anti-integration forces squared off throughout the South. For the most part the battles took place in the schools and in the courts, with Montgomery being the exception. In February 1960, four students at North Carolina A&T launched the sit-in movement. Within weeks, African-American college students were challenging every aspect of Jim Crow. That spring, the Student Nonviolent Coordinating Committee was formed. The radicalization of the civil rights movement cannot be attributed to *Brown* alone, but neither can it be separated from it completely. While Marshall and the NAACP remained wary of nonviolent direct action, a new group of dynamic leaders, young and old, slowly emerged to push forward the changes at which *Brown* had only hinted. Five years later, after countless and often televised confrontations, beatings, and deaths, Congress was moved to enact sweeping legislative reforms with the Civil Rights Act of 1964 and the Voting Rights Act of 1965.

After 1965, judges, plaintiffs, lawyers, educators, and civil rights activists began to confront the issue of education head-on for the first time. All of the details hitherto ignored by both the NAACP and the courts came center stage. Much had changed. New educational research had been conducted; the make-up of the Court had been altered, with Thurgood Marshall being, in 1967, the first African American appointed to the Court; and the political climate in Washington and the South had shifted dramatically. In 1966, as part of Johnson's Great Society Program, Congress passed the Primary and Secondary Education Act in an effort to accelerate the pace of integration and provide funding for "compensatory education" for "culturally deprived minorities."[12]

However, just as the government was setting out to enforce the *Brown* decision, many African Americans were seriously questioning the assumptions upon which that decision was based. The rise of "Black Power" after 1966 forcefully challenged the idea that black children "needed" white children in order to succeed academically. This was nothing new. Patterson traces the history of this position to early statements by earlier activists, such as W. E. B. DuBois. "Theoretically the Negro needs neither segregated schools nor mixed schools," DuBois declared. "What he needs is Education."[13] The ramifications of the findings of Clark and others had simply been ignored while the lawyers pursued the greater goal of dismantling Jim Crow. As parents and educators began to work out the details of integrating schools, they refused to accept the idea that all black institutions were inherently inferior to white or integrated ones. Some activists harkened back to the good old days of segregation and the golden heyday of all black institutions, but most dismissed the nostalgia and concentrated instead on providing a quality education for their children.

In addition to the debate over the potential efficacy of integrated education, the courts were confronted with the reality that there was more than one way to end up with racially segregated schools. In the early 1970s, the courts moved beyond the South and began to challenge *de facto* segregation in the North. Denver and Boston became hotbeds of judicial intervention, radical opposition, and racial strife over the issue of forced busing. As Patterson notes:

> Jim Crow was dead in the South, as was *de jure* school segregation. These were huge changes that few could have imagined in 1960. But hopeful integrationists in the 1960s had come to expect more, and by 1974 they were worrying that true racial equality would remain a distant dream. So would true integration. To these once optimistic integrationists, as to many others, it was becoming increasingly clear that racial conflict would continue to be a vast and complicated national problem blighting the North as well as the South. And it remained unclear whether schools, repositories of all sorts of utopian expectations, could greatly promote interracial understanding. Twenty years following *Brown*, much had been accomplished, and much remained to be done.[14]

Marshall, Clark, and other fervent believers in integration were becoming increasingly disillusioned with the slow pace and limited scope of reform.

Other social, political, and economic factors contributed to the changing pace and direction of reform. The incredible economic growth of the 1960s ended; the country slipped into a recession and later grappled with an energy crisis. Watergate, Vietnam, and social unrest—especially in the cities—all undermined people's faith in the ability and willingness of the government to solve the nation's problems. The more conservative

Court, now under Warren Burger, moved much more cautiously in this new milieu and more readily applied judicial restraint. Local communities, black and white, sought to regain control of school boards. Questions of pupil placement, tracking systems, standardized tests, test gaps between black and white, and disparities in school funding levels arose as educators, judges, politicians, and parents hotly debated the issues, with no answers forthcoming.

Patterson firmly establishes *Brown* as one of the pre-eminent legal decisions of the twentieth century. Citing Kluger, he notes, "The decision represented nothing short of the reconsecration of American ideals."[15] While the decision did not reverse the tide of racism in the United States, it did signal a sea change in the Court's position involving race. To somehow see that decision as a failure, Patterson asserts, misses the importance of the decision. From the first, *Brown* was less about the education of black children and more about ending the racial system under which they were educated.

With regard to the effect *Brown* and subsequent decisions had upon the state of American education, Patterson is more reluctant to praise *Brown*. While the Court was far ahead of public opinion and the academy in its original decision, it lagged far behind both in later years as it belatedly sought to implement its decision. Ironically, the cost of the racial reform that *Brown* heralded has been the educational reform the decision had as its stated goal.

While Patterson does weave an interesting and compelling narrative, attempting to explain the motivations and inner workings of the major actors in the drama, he stops short of providing enough information to fully explain them. In addition, he is uneven in his treatment of the subject. He makes no examination of the religious motivations of either Thurgood Marshall or Earl Warren, although he hints at Warren's possible guilt over his role in interning Japanese-Americans during World War II. When discussing arch-segregationist Leander Perez of New Orleans, Patterson completely omits Perez's role as a Catholic segregationist activist who was excommunicated by Archbishop Rummel for his refusal to accept a black priest in the Jesuit Bend parish of Louisiana. Nor does he mention Kenneth Clark's lifetime association with the New York Catholic Interracial Council; Clark's belief in integration came not only from his work, but also from a deep Catholic piety that stressed the brotherhood of man. Both are odd, considering Patterson's use of Catholic support for *Brown*, especially in the Archdiocese of Baltimore, which he cites as an example of committed religious leadership in support of integration.

Patterson is much more comfortable with the legal histories than with delving into the social, political, and religious motivations of the participants in the cases. However, the mere fact that he has attempted such a grand task—that of linking *Brown* to the larger story of race relations in the United States—makes the book a much-needed contribution to our understanding of race, education, and the courts in the twentieth century. Patterson has succeeded in expanding the context in which we view the courts, and has begun the difficult process of integrating the disparate disciplines of legal, social, religious, educational, and ethnic history. As with the decision about which he writes, a great deal has been accomplished, but much work remains to be done.

ENDNOTES

[1]David Hackett Fischer and James McPherson, Letter from the Editors of *Pivotal Moments in American History* (New York: Oxford University Press, 2001), p.1

[2]Richard Kluger, **Simple Justice: The History of *Brown v. Board of Education* and Black America's Struggle for Equality** (New York: Knopf, 1976); J. Harvie Wilkinson, **From *Brown* to *Bakke*: The Supreme Court and**

School Integration, 1954–1978 (New York: Oxford University Press, 1979).

[3]Patterson, xxvii.

[4]Patterson, 3.

[5]Patterson, 65.

[6]*Oliver Brown, et al., v. Board of Education of Topeka.* Cited in Patterson, 66.

[7]Cited in Patterson, 68.

[8]*Brown.* Cited in Patterson, 67.

[9]Patterson, 84.

[10]Patterson, 83.

[11]Quoted in Patterson, 71.

[12]Patterson, 133.

[13]Quoted in Patterson, 8.

[14]Patterson, 169.

[15]Patterson, 210. See Kluger, 710, for his discussion of the moral and political ramifications of the decision.

New Developments

Two updates to "Women Advocates Before the Supreme Court" (2001, vol. 26, no. 1) are in order.

On January 20, 2001, Barbara D. Underwood was appointed Acting Solicitor General, becoming the first woman to head the Office of the Solicitor General (OSG). She served in that capacity until her presidentially appointed successor was sworn in five months later. In March 1998 Underwood had joined the OSG as Principal Deputy Solicitor General. She argued one case before the Court prior to this time and fifteen cases before the Court while at the OSG, for a total of sixteen arguments before the Court.

Another noteworthy development occurred on June 28, 2001, when Pamela Talkin was named Marshal of the Supreme Court. A former deputy executive director of the Office of Compliance, Talkin is the first woman to hold that title.

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Edward A. Purcell, Jr. is Joseph Solomon Distinguished Professor of Law at New York Law School. His book, **Brandeis and the Progressive Constitution**, won the Society's Griswold Prize. Professor Purcell delivered this paper as a lecture at the Supreme Court on May 23, 2001.

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