# BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA. By Edward A. Purcell, Jr.[1] Yale University Press. 2000. Pp. 417. $40.00.

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The federal judiciary's role in American constitutional governance is a useful reference point at the new millennium. Early in the nation's life Alexis de Tocqueville commented that the interdependency between unelected federal judges and an aggressively active democracy reflected the distinctiveness of American institutions.[3] During the twentieth century, the impact of the Supreme Court and the federal judiciary on American society and government seemed to grow apace. Following the Second World War, the historic promotion of civil rights and liberties under the leadership of Chief Justice Earl Warren and the Supreme Court highlighted the irony that attaining greater democratic inclusiveness depended on a nonelected judiciary. Since the 1970s growing numbers of commentators questioned the propriety of this constitutional interdependency, while others de-

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3. De Tocqueville's assessment may be summarized as follows: In antebellum America the states rather than the federal government exercised "real power." Nevertheless, Americans accepted that "it was almost impossible that the execution of a new law should not injure some private interest." The Constitution's "makers . . . relied on that private interest to attack the legislative measure of which the Union might have complained[,]" and "[i]t is to that interest that they offer protection." Thus, while federal justice and state sovereignty were at odds, the federal judiciary "attacks only indirectly . . . strik[ing] at the consequences of the law, not at its principle; it does not abolish but enervates it." The federal courts "intervene[d] in public affairs only by chance, but that chance recur[red] daily." Thus "Federal judges almost always alone decide those questions that touch the government of the country most closely." Alexis de Tocqueville, *Democracy in America* 99, 143, 148, 149, 276 n.7. (J.P. Mayer, ed., George Lawrence trans., Doubleday, 1969).

fended it as an appropriate expression of institutional checks and balances.[4]

Through the changing image of the prominent Progressive figure, Louis D. Brandeis and his landmark opinion in *Erie Railroad v. Tompkins* (1938), Edward A. Purcell's new book locates this institutional transformation within the sweep of twentieth-century American social and political conflict. Lawyers recall *Erie* as a "great case" and "jurisprudential landmark" which nonetheless remains controversial because it establishes a constitutionally contentious procedural boundary between state and federal court jurisdiction. Most historians, by contrast, find the decision of interest because it is associated with legalistic maneuvering which has been especially favorable to corporate litigants, including the practice known as forum shopping by which corporate defendants escaped less friendly state courts by removing cases to federal courts.[5]

An historian who wrote a prize-winning study of democratic theory in late nineteenth- and early twentieth-century America, Purcell has been for some years a practicing lawyer and law professor. Thus, in the language of history and law Purcell is fluently bilingual. He has drawn together the two disciplines in a growing body of scholarship, including a thoughtful and extensive social and legal history of federal diversity jurisdiction in industrial America, 1870-1958.[6] His new book gives historians a deeper understanding of the federal judiciary—and the legal profession, which are its chief agents—as central institutional channels for ordering social conflict within American constitutional governance and the corporate market economy. It provides members of the legal profession insight into the procedural and constitutional issues associated with the origins, decision, and subsequent evolution of one of the most important precedents in American law.

Section I of this review considers the origins of what Purcell calls the Progressive constitution. The second section examines

4. See Charles L. Black, Jr., *The People and The Court: Judicial Review in a Democracy* (Macmillan, 1960); Robert F. Nagel, *Controlling the Structural Injunction*, 7 Harv. J.L. & Pub. Pol. 335 (1984).

5. See *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938). Purcell engages the huge literature about the *Erie* case, so that law teachers, practicing lawyers, and judges will find the book illuminating; fundamentally, though, it is a study of history, and as such, deserves to be widely read by historians.

6. See Edward A. Purcell, Jr., *Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870-1958* (Oxford U. Press, 1992).

Brandeis's *Erie* opinion as part of the general transition from a Progressive to a liberal regulatory state. The third section suggests how the splintered Court deciding *Erie* was indicative of tensions and unintended consequences influencing the course of judicial activism throughout the rest of the twentieth century. The fourth section raises two questions followed by a conclusion.

## I

The Progressive constitution emerged from a reaction against the constitutional order that preceded it. The period following the Civil War and Reconstruction to World War I, one of the most economically and socially significant in U.S. history, receives very little attention from constitutional law scholars. Even so, American social and political struggle centered on the response to industrialization, particularly increasing social-class conflict associated with the growth of wage labor, greater dependence on big business—what business historian Alfred Chandler called managerial capitalism—and the gradual development of state and federal governmental institutions to match the scale of exploitive corporate power.[7] The established view of the turn-of-the-century constitutional order undergoing this same transformation focuses on the Supreme Court's deployment of constitutional doctrines derived primarily from the due process and commerce clauses to emasculate labor and government in favor of corporate capitalism. Protest movements, especially the Populists and the Progressives, fought back. But not until the Great Depression did Franklin Roosevelt's New Deal liberalism finally institute a constitutional regime in which government became as big as business.

Purcell refines this accepted version of pro-capitalist constitutionalism, arguing that a fundamental issue underlying private versus public ordering concerned the "primacy" of legislative or judicial authority. Opponents of big business envisioned a constitutional order in which popular politics channeled through democratically elected state and federal legislatures predominated; contrariwise, business interests represented by elite law-

7. See Thomas K. McCraw, *Government, Big Business and the Wealth of Nations*, 522-45; Jeffrey R. Fear, *Constructing Big Business: The Cultural Concept of the Firm*, 546-74, in Alfred D. Chandler, Jr., Franco Amatori, Takashi Kikino, eds., *Big Business and the Wealth of Nations* (Cambridge U. Press, 1997). A notable exception to constitutional law scholars' lack of interest in the period is David M. Rabban, *Free Speech in Its Forgotten Years* (Cambridge U. Press, 1998).

yers asserted that unelected federal judges with appointments based on good behavior should exercise dominant control. Purcell's reformulation suggests that due process and commerce clause jurisprudence—which always involved exceptional cases in which the legislature was more often than not upheld—had less immediate impact on the daily lives of individual Americans than the exercise of the federal court's ordinary jurisdictional power.[8]

Purcell's focus on federal court jurisdiction begins with a doctrine the Supreme Court established in *Swift v. Tyson* (1842).[9] That case raised the narrow issue of the interpretation of section 34 of the Judiciary Act of 1789, which stated that except for matters involving federal law and the Constitution itself, federal courts were bound by state law in all cases where it applied. The case arose from a series of speculative investments transacted through the medium of commercial credit contracts, which unraveled during the depression of 1839-43. The question before the Court was what source of law to apply in relation to section 34: did the law of New York or Maine, the residences of the debtor and creditor, respectively, control, or did federal judges possess a discretionary power to look beyond the state's

8. The Progressives, of course, distrusted federal courts, but recognized that the American constitutional tradition sanctioned a legitimate exercise of judicial review, particularly as umpire of federal-state relations. Despite their criticism of the freedom of contract doctrine associated with economic due process, for example, they recognized that the Supreme Court often upheld diverse state regulations of private contracts. The objective fact that the *Lochner* era had a low rate of invalidation has been noted by historians and lawyers for some time. See Tony Allan Freyer, *Forums of Order: The Federal Courts and Business in American History* 99-141 (JAI Press, 1979); Melvin I. Urofsky, *Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era*, in *Yearbook 1983: Supreme Court Historical Society*; Charles Warren, *A Bulwark to the State Police Power: The United States Supreme Court*, 13 Colum. L. Rev. 667 (1913). Thus the *Harvard Law Review*'s summary of development to 1914 stated: "The law . . . seems everywhere to be that the legislature may, to some extent, at least, restrict liberty to contract in the supposed interest of the persons restrained." Indeed, complete freedom of contract was inconsistent with the necessity in a highly organized community for legislation to safeguard the public health, morals, safety, and general welfare. *Extent of the Legislative Power to Limit Freedom of Contract*, 27 Harv. L. Rev. 372, 374 (1914).

9. *Swift v. Tyson*, 41 U.S. (16 Peters) 1 (1842). Purcell actually begins his discussion not with the "original" *Swift* doctrine, but with the point to which it had evolved by the closing decades of the nineteenth century (see *Progressive Constitution*, 51-56). In the text I summarize the "original" *Swift* doctrine; below I suggest the utility of emphasizing this distinction. See Tony Freyer, *Harmony & Dissonance: The Swift & Erie Cases in American Federalism* 1-100 (New York U. Press, 1981); Tony A. Freyer, *Business Law and Economic History* in Stanley L. Engerman and Robert E. Gallman, eds., 2 *The Cambridge Economic History of the United States: The Long Nineteenth Century* 456, 461, 465, 470, 472 (Cambridge U. Press, 2000).

local law to a body of internationally recognized commercial jurisprudence based on the practices of mercantile custom?

Although lower federal court and Supreme Court cases had raised these issues indirectly, *Swift* was the first to present squarely the construction of section 34. In a unanimous decision written by Justice Joseph Story, the Court interpreted the section to mean that the obligation to follow local law where it "applied" implied that there existed other sources of law—particularly international commercial custom—that federal judges could draw upon for rules of decision to determine the rights and obligations of commercial litigants who, because they resided in different states or foreign nations, were qualified to enter federal court on the basis of the diversity of citizenship jurisdiction the Constitution and the Judiciary Act sanctioned. At the time, the decision was a non-controversial extension of diversity jurisdiction that Whigs such as Story, Democrats such as Chief Justice Roger B. Taney, and even the rigidly states rights Virginia Democrat Peter V. Daniel agreed was a legitimate use of federal judicial discretion. Thus the decision did not interfere with state power, since it pertained only to parties who qualified for federal diversity jurisdiction. Rather, the jurisdictional theory underlying *Swift* was consistent with the principle of dual sovereignty the Taney Court was developing in response to mounting popular discontent over American slavery and freedom.

During the late nineteenth and early twentieth centuries the federal judiciary greatly extended the discretionary authority identified with the *Swift* doctrine. This expansion occurred, however, primarily after the Civil War and its accompanying industrialization transformed the United States into a global economic player. What had been an abstract question of choice of law suddenly assumed real significance in a radically revamped economy. Thus, from the Civil War on, federal judges progressively enlarged the doctrine to enable corporations doing interstate business to employ federal diversity of citizenship jurisdiction to circumvent unfriendly state courts and juries.[10] In addition, the Supreme Court built up around the *Swift* doctrine constitutional protections of property and contract rights transcending the limits of congressional legislation. In 1875 Congress for the first time granted federal courts the full authority to

10. Freyer, *Harmony & Dissonance* at 45-122 (cited in note 9); Purcell, *Litigation and Inequality* at 28-176 (cited in note 6).

assert claims under federal law—federal question jurisdiction—as well as the Constitution itself.

Disagreement among lower federal courts and a shifting majority on the Supreme Court nonetheless persisted concerning the relationship between the *Swift* doctrine, the expanded federal question jurisdiction, and their application to insurance, personal injury, and municipal bond debt litigation. In about 300 bond cases the Court applied the transformed *Swift* doctrine in favor of foreign creditors.[11] The insurance and personal injury litigation presented a more complicated picture: corporate defendants initially used the threat of removing suits from state to federal court to force smaller settlements upon plaintiffs. By the 1890s, however, plaintiffs' lawyers won decisions from the Supreme Court that were more favorable, instituting a dual market for legal services in which defense attorneys in the pay of corporations confronted plaintiffs' lawyers relying on contingent fees.[12] Although the picture remained ambiguous, the plaintiffs' lawyers, overall, won more often than they lost; but because the corporations possessed superior means to assert federal jurisdiction, critics condemned the *Swift* doctrine as a tool of unfair corporate manipulation. The escalating assault on what the *Swift* doctrine became after the Civil War stood in marked contrast to the Court's original, uncontroversial pre-war decision. Clearly, the social and political context had radically changed over time and with it the doctrine's meaning to contemporaries.

Within this transformed wider context Purcell traces the struggles over federal jurisdiction and Progressive constitutionalism. Two issues were particularly contentious: the labor injunction and the inequitable litigation advantages that corporations had won over the years associated with the federal judiciary's administration of the *Swift* doctrine. The leading defender of outcomes favoring nationally operating corporate business was Justice David J. Brewer, who served on the Supreme Court from 1890 to 1910. Purcell presents Brewer as a complex figure whose religious faith supported decisions benefiting women, African-Americans, and Chinese immigrants; even so, this same religious conviction made Brewer an effective and zealous advocate of constitutional ideals granting extensive protections to corporate

11. See Charles Fairman, *Reconstruction and Reunion 1864-88: Part I*, 918-1116 (6 History of the Supreme Court of the United States, Paul A. Freund, Macmillan, 1971); see also Michael G. Collins, *Before* Lochner - *Diversity, Jurisdiction and the Development of General Constitutional Law*, 74 Tulane L. Rev. 1263 (2000).

12. Purcell, *Litigation and Inequality* at 148-216 (cited in note 6).

property rights. Purcell's careful argument demonstrates that Brewer was the Court's chief architect of establishing judicial over legislative primacy, not only in his better known expansion of the labor injunction in *Debs* and other cases, but just as importantly in broadening the reach of the *Swift* doctrine's federal common law to the benefit of corporate interests.[13]

Committed to overturning Brewer's constitutional edifice was the Progressive champion, Louis D. Brandeis. He went from decades of winning reforms as the "People's Lawyer," to a distinguished career as an Associate Justice of the Supreme Court between 1916 and 1939. As public advocate, Justice Brandeis epitomized the Progressive vision of American constitutionalism which trusted experts use of facts to justify giving primary lawmaking authority to the legislature's democratic processes, particularly in order to redress economic abuses and social injustice. Brandeis possessed a distinctive personal faith in local control and the virtues of small-scale social, market, and governmental units against the "curse" of bigness. Yet he was also a brilliant and effective promoter of mainstream Progressive reform, including ending the abuses identified with the *Swift* doctrine and federal diversity jurisdiction.[14]

Purcell's focus on judicial versus legislative predominance revises the prevailing view of social conflict and judicial authority during this period. Much contemporary American historiography presents the federal judiciary and the Supreme Court as the promoter of big business in a one-sided clash with dispossessed groups, epitomized by the union's fight against the labor injunction. Critical legal histories of the nation's labor struggles

13. See *In re Debs*, 158 U.S. 564 (1895). Purcell's analysis of Justice David J. Brewer's role in expanding *Swift* is incomplete, especially concerning the protracted confrontation with Justice Stephan Field over the latter's effort to limit the *Swift* doctrine in accident cases by following the liberal English rule where an agent's negligence resulted in an injury to a fellow servant. Field succeeded in holding a 5-4 majority in *Chicago, Milwaukee and St. Paul Ry. Co. v. Ross*, 112 U.S. 377 (1884), extending employer liability to include injuries to fellow servants caused by the negligence of train conductors. Purcell notes that Brewer prevailed over Field in *B & O R.R. v. Baugh*, 149 U.S. 368 (1893), but neglect of the long-term split underestimates how contested was growth of the federal common law among members of the Supreme Court over the post-Civil War decades. This helps to explain why in *Erie* the federal trial court and the federal circuit court of appeals would apply *Baugh* to uphold the damages awarded the injured party (see below). Freyer, *Harmony and Dissonance* at 65-74, 125-29 (cited in note 9).

14. Although Purcell cites the extensive literature about Brandeis, the distinctiveness of his values deserves greater emphasis. See Thomas K. McCraw's historical recovery of a producerism rooted in *petit bourgeois* values; *Prophets of Regulation: Charles Francis Adams, Louis D. Brandeis, James M. Landis, Alfred E. Kahn* (Belknap Press, 1984).

have done much to revise the standard vision, including, most recently, Ruth O'Brien's study of the tension between the American Federation of Labor and the Progressives as they sought to maneuver around judges to attain a "subtle reform of labor law that fell somewhere between repudiation of the labor injunction and immunity for organized labor" that substituted "one form of legal restraint—the injunction—for another—the enforceability of collective bargaining agreements."[15]

Similarly, Purcell does not present the federal judiciary as a static agent simply serving the interests of business. It was a richly textured institution interacting on different levels with society and politics to order private and public action. Even so, persistent confrontations over diversity jurisdiction and the *Swift* doctrine engendered a division among Progressives, with some arguing that winners and losers were not unequivocally clear, since often plaintiff's lawyers turned the system to the advantage of their clients. In addition, the constitutional limitations the judiciary imposed upon state and federal administrative agencies constituted an uneven, often contradictory mix of lax and restrictive policies, as well as opportunities for countervailing interest-group pressure and federal litigation. As a result, federal jurisdiction and constitutional decision making were part of a multiplicity of judicial, bureaucratic, and legislative channels by which interest groups articulated demands. The contingency of outcomes sustained, in turn, a Progressive faith that striking a new balance between judicial and legislative authority was not only possible but also essential to the welfare of American society and government.

## II

The clash between opposing visions of judicial and legislative primacy in American democracy shaped the *Erie* decision. During the mid-1930s Americans experienced the dramatic reversal of the Supreme Court's protracted resistance to Roosevelt's New Deal; indeed, by the time the United States entered World War II, the Court had demolished the pro-corporate due process and commerce clause doctrines and instituted a constitutional revolution sanctioning the liberal regulatory state. Purcell expands upon this well-known story, analyzing Brandeis's opin-

15. Ruth O'Brien, *Workers' Paradox: The Republican Origins of New Deal Labor Policy, 1886-1935* at 42 (U. of North Carolina Press, 1998).

ion for the Court in *Erie*.[16] The incisive, multidimensional exegesis of the opinion comprises about one third of the book. He locates the suit arising from the railroad's negligence to the unemployed laborer Harry Tompkins, within the broad context of Depression-era congressional confrontations over diversity jurisdiction and the labor injunction in which the Progressives lost on the former issue but won the latter.

Against this background of conflict, Purcell reveals the Court's inner process of decision-making, which resulted in overturning the ninety-six year old *Swift* doctrine. Brandeis's opinion for a splintered Court transformed American federalism. After nearly a century it ended the discretionary authority federal judges had exercised to circumvent or ignore the state courts: from 1938 on federal judges were bound by state law, unless a federal statute or constitutional provision was at issue. Moreover, the decision's opaque language conveyed a new constitutional obligation circumscribing federal judicial authority within the coextensive powers of Congress. Fundamentally, *Erie* replaced Brewer's constitutional principle of judicial primacy with a regime in which judicial and legislative powers were brought into closer alignment.

Purcell makes Brandeis and the *Erie* opinion central to the ambiguous triumph of New Deal liberalism. The immediate beneficiaries were poorer and middle-class litigants represented by plaintiff trial lawyers, a side of the bar which, since the late-nineteenth century, had steadily grown to rival in strength the corporate defense attorneys. Reform-minded Populists and Progressives fought to address the unfair advantages federal diversity of citizenship jurisdiction gave corporate defendants operating across state lines. Purcell ties this struggle into the Progressives' better-known campaign against the laissez-faire due process jurisprudence identified with the Supreme Court's notorious decision of *Lochner v. New York* (1905). By linking the two reform objectives he demonstrates that Progressive constitutionalism represented a powerful alternative to Justice Brewer's pro-corporate decisions.

A preoccupation with *Lochner* obscures, moreover, the long-term effectiveness of the Progressive effort. In *Muller v.*

16. Barry Cushman's revisionist interpretation of the origins of the New Deal Court, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (Oxford U. Press, 1998), does not discuss *Erie*; Purcell, however, does draw upon Cushman's work to contextualize the decision within as well as without the Court.

*Oregon* (1908), for example, Brewer wrote an opinion for a unanimous Court upholding Brandeis's argument that the Fourteenth Amendment's guarantee of liberty did not prevent the state from enacting legislation aimed at improving the working conditions of women. More generally, elite professional legal groups broadly associated with Progressivism pushed for and often won increased rationalization of judicial and regulatory institutions—including federal court jurisdiction—until their efforts finally prevailed in the New Deal. Like Ellis Hawley and Alan Brinkley, Purcell is fully aware of the limitations involved in the transition from Progressive to liberal reform, especially those regarding racial justice and wealth redistribution.[17] *Erie* nonetheless ended one source of corporate privilege resulting from the operation of federal court jurisdiction, just as the Court went from opposing to supporting New Deal liberalism as a whole. Thus, in conjunction with the collapse of the constitutional doctrines which marked the demise of Brewer's old order, *Erie*—as symbol and practice—embodied the triumph of Brandeis and the Progressive Constitution.

Throughout the remainder of the twentieth century the practical and symbolic impact of *Erie* and its author changed. Purcell's contextualization of legal doctrine illuminates the shift from a Progressive to a liberal idea of the regulatory state, which ultimately sanctioned corporate capitalism in the name of wartime victory and Cold War confrontation. *Erie's* reallocation of personal injury, insurance, and other civil litigation to state court—while at the same time altering the scope of interstate actions that could be litigated under federal diversity jurisdiction—coincided with America's fervent postwar embrace of a consumption-driven society.[18] Although the decision's constitutional significance was contested, *Erie* nonetheless also facilitated the federal judiciary's burgeoning federal question jurisdiction, which the Warren Court expanded in order to promote civil rights and liberties and to undercut McCarthyism.

Both areas of federal jurisdiction engendered political demands to curb judicial activism. In 1958 conservative Southern Democrats and Republicans supported a measure limiting fed-

17. See *Lochner v. New York*, 198 U.S. 45 (1905); *Muller v. Oregon*, 208 U.S. 412 (1908). On the relationship between Progressivism and New Deal Liberalism, see Alan Brinkley, *The End of Reform: New Deal Liberalism in Recession and War* (Knopf, 1995); Ellis W. Hawley, *The New Deal and the Problem of Monopoly* (Princeton U. Press, 1974).

18. See Brinkley, *End of Reform* at 66-85 (cited in note 17).

eral jurisdiction over cases involving individual rights; it failed to pass the Senate by just eight votes. In the same year, by contrast, legislation intended to reduce diversity suits did become law, but it was too weak to have a fundamentally transforming effect. Congressional inability to resolve persistent controversy arising from the *Erie* doctrine encouraged the Supreme Court to act. As a conservative Court majority gradually eroded most of the Warren Court precedents from the 1970s on, federal jurisdictional authority favoring individual rights was cut back.

Meanwhile, the evolving *Erie* doctrine occupied an important place in American legal culture. It was central to some of the most important courses taught in the nation's law schools, including civil procedure and federal courts, which provided lawyers basic entry into the distinct federal and state judicial processes. Thus, generations of lawyers associated the *Erie* doctrine with the fundamental institutional avenues of dispute resolution upon which client representation depended. *Erie* was also basic to the stark boundary between the markets served by trial and corporate defense lawyers. Purcell is especially good at relating doctrinal change and political conflict to legal culture and the ideological construction of professional image. As the wider themes unfold he tells the fascinating story of how elite law teachers and judges—particularly Harvard law professor Henry M. Hart, Jr. and Supreme Court Justice Felix Frankfurter—reimagined the figure and jurisprudence of Brandeis to legitimate the application of the *Erie* precedent to the changing social and political realities of postwar America.

Born respectively in 1856, 1882, and 1904, Brandeis, Frankfurter, and Hart represented the successive generations identified with the rise and triumph of the Progressive constitution and its subsequent permutation into liberal constitutionalism.[19] While the two younger men achieved their own professional prominence, both cultivated direct identification with Brandeis's personal ethos and professional mantle. Nevertheless, Frankfurter and Hart, for different personal and principled reasons, initially disagreed with *Erie*, especially its constitutional dimension. Frankfurter in particular considered the decision's abstract

19. Purcell notes that as Frankfurter and Hart grew older they were increasingly identified as conservatives, despite an earlier commitment to liberal and radical causes. Over the first half of the twentieth century, other prominent Progressives, including Learned Hand and Roscoe Pound, underwent the same transformation. Brandeis, however, adhered consistently to a fully developed Progressive creed throughout his adult life. This variation deserves further study.

constitutional imperative a threat to his own Progressive theories, which sought to minimize federal judicial activism, cloaking it under ideological cover of professional expertise and elitism. Over the decades following Brandeis's death in 1941, however, Frankfurter and Hart transformed the image of the legendary Justice to fit their own increasingly ambivalent interpretations of the *Erie* doctrine and liberal theories of federal jurisdiction.

Purcell also makes an important contribution to labor and social history. On the level of technical procedure, which ordinarily would be primarily of interest to lawyers, he clarifies for historians why Brandeis opposed the Declaratory Judgments Act of 1934 and the new Federal Rules of Civil Procedure. He knew they could be turned to the advantage of corporate litigants and threatened basic values of local control. Many Progressives supported these measures because they furthered the cause of institutional systemization and rationalization; Brandeis, however, followed his own personal values and opposed them, attempting to address the dangers he perceived through the opaque language of the *Erie* opinion.[20] (pp. 130-36)

A more familiar confrontation involved the labor injunction. As noted above, a growing number of critical studies by O'Brien, Daniel Ernst, William Forbath, Victoria Hattam, Christopher Tomlins, and others have argued that from the late nineteenth century to the New Deal, organized labor's standing within the nation's political economy was clearly contested. To a certain extent, however, the movement also succeeded in shaping the outcome. Like other scholars, Purcell is sensitive to the ultimately limiting character of labor's triumph in ending the labor injunction in the Norris-LaGuardia Act of 1932 and the subsequent institution of regulatory dispute resolution in the New Deal's Wagner Act of 1935. Nevertheless, the resistance that labor and its allies faced from business interests and their lawyers should not be underestimated. Purcell shows that, as Brandeis crafted the constitutional language of the *Erie* opinion, he included a doctrinal hedge for the Norris-LaGuardia Act, which

20. Purcell shows that prominent Progressive lawyers, such as Benjamin Cardozo and Charles E. Clark, desirous of achieving greater rationalization in the American legal system, favored these measures, whereas Brandeis did not. Purcell explains that Progressives belonging to an older generation, like Brandeis, feared the political and social consequences resulting from organizational centralization, whereas their younger counterparts valued efficiency more highly. Although Purcell makes a convincing case for Brandeis's decentralist values as being representative of the older Progressive generation, I think a similarly strong case can be made for an argument that the Justice's motivations were more distinctively personal. See note 14 and discussion below.

was then also under review by the Supreme Court. Similarly, Brandeis fashioned the *Erie* decision to eliminate the advantages corporate defendants gained from exploiting federal diversity jurisdiction and the federal common law built up around the *Swift* doctrine. Although unintended or contradictory consequences often resulted, fundamentally, legal processes and doctrines possessed a protean legitimacy adaptable to changing social conditions and interests.

## III

The ironic play of volition and contingency is especially evident in Purcell's analysis of *Erie*. Six members of the Court voted to overturn the *Swift* doctrine; but despite reservations expressed by Chief Justice Charles Evans Hughes, Harlan F. Stone and Stanley Reed, Brandeis insisted that his opinion should establish constitutional limitations on federal court jurisdiction. Over much of the century following its creation in 1842, federal judges continuously exercised the discretion inherent in *Swift* to broaden the scope of the federal common law, until it included industrial torts, like the injury which befell the unemployed laborer, Harry Tompkins, in the *Erie* case. Corporations, of course, routinely exploited the *Swift* doctrine in such suits; nevertheless, plaintiffs' lawyers often succeeded in turning it to the benefit of their clients in personal injury and wrongful death cases because the tort doctrines of the states were often in conflict and federal judges would employ their discretionary authority to apply a rule favoring the plaintiff.

The broad constitutional connections Brandeis perceived between the *Swift* doctrine, Congress, the federal judiciary, and state authority made him less concerned about the status of personal injury plaintiffs if *Swift* were overruled. Thus the immediate loser in *Erie* was Tompkins. He had won a $30,000 jury verdict because the federal trial judge had followed the *Swift* doctrine and applied the more liberal negligence rule of the American law restatement. On the basis of the new doctrine Brandeis established in overturning *Swift*, however, the trial judge was now bound to apply the Pennsylvania law where the accident occurred, which designated individuals in Tompkins's position as trespassers. Thus, Tompkins was denied damage claims against the railroad.

Justice Hugo L. Black unsuccessfully attempted to preserve Tompkins's verdict, but otherwise he vigorously supported

Brandeis' opinion. Purcell concedes that Black's ambivalent stance favoring both the plaintiff's recovery and Brandeis's opinion denying that result was due to the Alabamian's unswerving commitment to maintaining the vigor of jury trials. Indeed, in the years to come, Black was the Court's great champion of trial lawyers. Purcell nonetheless notes only in passing that both the federal trial and appellate court applied the discretionary judgment inherent in the *Swift* doctrine to decide in Tompkins's favor. Furthermore, each of the judges involved in these holdings may be said to have been broadly associated with Progressive values.[21]

The mixed motivations shaping the *Erie* opinion reflected the divergent values and interests inherent in Progressive constitutionalism's ascendancy over Brewer's faith in judicial primacy. Brandeis approached the opinion with an absolute conviction that Brewer's constitutional ideals could be addressed adequately only through an equally comprehensive but contrary constitutional theory. Hughes and Stone were nonetheless apprehensive about the scope of the theory Brandeis suggested in initial drafts of the opinion; whereupon he responded with increasingly vague language until it was acceptable to his two colleagues. The issue was difficult, however, because it touched the diverse Progressive backgrounds of the majority deciding *Erie*. The eight members of the Court participating in the opinion were Hughes, Brandeis, Black, Reed, Stone, Owen J. Roberts, James J. McReynolds, and Pierce Butler. In ill health which ended in death some months after the Court handed down *Erie* in 1938, the Progressive jurist Benjamin Cardozo took no part in the decision, though he had supported the initial appeal from the circuit court to the Supreme Court.[22] The Court's remaining adherents to Brewer's vision and New Deal opponents, McReynolds and Butler, dissented.

Of the four Court members who joined Brandeis's *Erie* opinion, Hughes, Stone, and Roberts, were prominent Progressive Republicans. Black also signed on to the opinion. During the mid-1920s he briefly had been a member of the Ku Klux Klan, but he had also actively supported leading Progressive causes in his native Alabama and in the U.S. Senate before be-

21. The federal trial court judge was Samuel Mandelbaum; Learned Hand, Augustus Hand, and Thomas Swan rendered the unanimous circuit court of appeals decision. For their association with Progressivism see Freyer, *Harmony & Dissonance*, at 125-29, 142-43 (cited in note 9).

22. Id. at 129-30.

coming one of Roosevelt's most loyal New Deal liberals. Reed voted with the majority to end the *Swift* doctrine, but his concurring opinion objected to Brandeis's constitutional language, arguing that a limited construction of section 34 would be sufficient to achieve the desired result without raising new uncertainty about the scope of federal jurisdiction amid the great transformation initiated by the Court's affirmation of the New Deal.[23] (pp. 104, 107-09) Republican President Herbert Hoover, who was also a forgotten Progressive, had appointed Reed, a moderate Kentucky Democrat, as counsel for the Federal Farm Bureau and the Reconstruction Finance Corporation, to fight the Depression. After the 1932 election Reed became Roosevelt's Solicitor General; fresh from defending the New Deal before the shifting Court, *Erie* was the first case he participated in as a Justice.[24]

Purcell makes it clear that the divisions among the Progressive majority concerned Brandeis's reliance upon a constitutional theory to overturn *Swift*. Still, I think he could have done more to distinguish Brandeis's values from those shared by the southern Democrats Black and Reed. In the field of First Amendment freedom of speech David M. Rabban is suggestive regarding the distinction between the libertarian radical tradition—to which Black could be said to be sympathetic—and the Brandeisian conviction that free speech was the precondition for democratic citizenship. Similarly, I would suggest that in *Erie*, Black's small-town southern background led him to trust in the ability of plaintiffs' lawyers to tap the communal spontaneity of jury trials and local court culture. Brandeis, however, viewed trial and appellate court process more as the means to promote individual responsibility and democratic citizenship.[25]

While the motivations behind Reed's concurring opinion in *Erie* are obscure, it is reasonable to speculate that at least two factors influenced him. First, Reed shared with Black a small-town southern background, so he, like Black, may have been more willing to give Tompkins a fighting chance in a new jury trial. Second, and more important, Reed perhaps perceived in the constitutional language of Brandeis's opinion unnecessary

23. Id. at 135-36, 161-62.

24. See Freyer, *Harmony & Dissonance* at 135 (cited in note 9). On Hoover's Progressivism see Ellis W. Hawley, *Herbert Hoover and the Sherman Act, 1921-1933*, 74 Iowa L. Rev. 1067 (1989).

25. See Rabban, *Free Speech* (cited in note 7); Tony Freyer, *Hugo L. Black and the Dilemma of American Liberalism* (Addison-Wesley, 1990).

procedural complexities that could arise in connection with the new constitutional presumption the Court was giving the New Deal regulatory bureaucracy after 1937. After all, as Solicitor General he had witnessed first hand the Court's shift from opposing to supporting the New Deal. Thus, rather ironically, Reed, not Brandeis, was the one making the Progressive argument for judicial self-restraint.[26]

The tensions among the Progressive justices deciding *Erie* suggested its ambiguous impact on postwar American society. For practicing lawyers from 1938 on, the practical result of *Erie's* overturning of the *Swift* doctrine was that federal judges now had to apply state common law in federal diversity cases. Accordingly, a retired Little Rock attorney reminisced in 1979 that the day the Court announced *Erie* was the "worst of his life," because he lost the advantage he had had representing interstate insurance corporations in federal court. No longer could he escape local Arkansas juries by removing his client's case before federal judges who applied corporation-friendly rules under the *Swift* doctrine.[27] Purcell's earlier massive study of diversity jurisdiction from 1870 to 1958 confirms that the Arkansas lawyer's experience was typical of corporate defense counsel prior to the *Erie* decision. Purcell's new book notes that by the 1980s, however, the state law that federal judges were required to apply was becoming increasingly more conservative as many states enacted pro-business tort reform.

Ambivalent outcomes resulted especially from *Erie's* constitutional holding. Legal practitioners, law teachers, and jurists noted repeatedly that Butler and McReynolds based their dissent primarily on the venerable rule that a court should not address an issue, especially a constitutional one, unless it has been properly litigated by the parties. In *Erie,* counsel for neither side had questioned the constitutional underpinnings of the *Swift* doctrine. Thus, the dissenters argued, the decision's use of a constitutional rationale to overturn the long standing *Swift* doctrine violated established tenets of judicial self-restraint that Brandeis and other Progressives had defended for many years. *Erie* was consistent with Progressive constitutional values, which favored restraining federal judicial power within the coextensive

26. Reed followed the logic of Brandeis's classic statement of judicial self-restraint in *Ashwander v. TVA,* 297 U.S. 288 (1936) (Brandeis, J., concurring).

27. Tony A. Freyer Interview A .F. House, Little Rock, Arkansas, June 16, 1980.

bounds of Congress; but it was a restraint achieved through pronounced judicial activism.

*Erie's* constitutional ambiguity nonetheless sanctioned an expansive federal jurisdiction facilitating post-war American society's transformation. During the second half of the twentieth century Americans increasingly identified the federal judiciary and the Supreme Court as the nation's primary defender of civil rights and liberties, establishing a historic degree of racial and gender equality under the Constitution. Purcell expertly examines the role of Harvard law professor Henry Hart and other elite legal professionals in promoting interpretations of *Erie's* constitutional language, which widened federal court jurisdiction to match the expanding reach of the postwar liberal state. Working through the channels of extended federal judicial and administrative power, the civil rights movement, women's rights advocates, and numerous public interest groups achieved significant social reforms during the postwar decades. Over the same period, by contrast, issues involving diversity jurisdiction, which had been so important earlier in the century, had become sufficiently routine that they were peripheral to ongoing disputes about the federal judiciary's authority.

Purcell's chapter on Hart splendidly interweaves these themes to suggest how *Erie's* Progressive constitutionalism was transformed into the liberal constitutionalism identified with the Warren Court. Hart had been one of Brandeis's law clerks, but like his mentor, Frankfurter, he initially had profound misgivings concerning the constitutional dimension the Justice had introduced into the *Erie* decision. By the 1950s, however, Hart had reformulated the *Erie* doctrine in order to construct a brilliant jurisprudential foundation for "neutral principles" supporting federal judicial supremacy within American federalism.[28] (p. 229-57) Meanwhile, he blunted the intellectual force of Frankfurter's efforts to curtail the expansion of the *Erie* doctrine's constitutional language. Ironically, although Hart favored the greater social justice the Warren Court achieved through judicial supremacy, he was an adamant foe of the doctrinal theories the Court employed to reach its results. Hart believed that the Court was violating the delicate balance of neutral principles he had fashioned to both check and promote the liberal state.

28. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 2 (1959), for Hart's jurisprudential contribution to the idea of "neutral principles."

From the 1970s on, within American politics and professional legal culture, opposition mounted to judicial activism. In the book's concluding chapter Purcell provides historical perspective on the relevance of *Erie* as a reference point for the dynamics of social and legal change in turn-of-the-century America. In the market for legal services—including what law schools teach in order to prepare students to enter the legal profession—*Erie* perpetuated a constitutionally sanctioned jurisdiction for state law which significantly influenced lawyers' practice and the relation between federal and state courts. It thus maintained and facilitated the adaptation of the American Constitution's decentralist values during a new era of national bureaucratic and corporate centralization and globalization. In this connection the Progressives' opposition to federal diversity jurisdiction, which motivated Brandeis and other reformers in response to the evils of industrialization, has little continuing institutional or ideological force. Despite considerable contemporary criticism that diversity suits are organizationally inefficient, the rule of *Erie* nonetheless has established a balance of interests between plaintiff and corporate defense lawyers. Especially in interstate personal injury and insurance claims, lawyers on both sides have employed diversity jurisdiction as a routine source of dispute resolution in the new age.

Meanwhile, Chief Justice William H. Rehnquist's conservative Court majority, its repeated rhetorical condemnation of judicial activism to the contrary notwithstanding, construed the *Erie* precedent in *Boyle v. United Technologies Corp.*(1988) to establish a "federal common law defense to state tort claims that allowed government contractors to avoid suits brought by individuals injured by defective products."[29] (p. 301) Much like the Supreme Court's more familiar decisions concerning abortion rights, the *Boyle* decision suggests that the *Erie* of the new age of conservatism merely employs old style judicial activism to the benefit of new litigants.

## IV

Purcell's prodigious research supports a persuasively argued thesis, which raises some interesting questions. Like Alfred Chandler, who displaced the "good guys-bad guys" view of business history with the thesis of managerial capitalism, Purcell de-

29. *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988).

contextualizes constitutional institutions and law, making them a primary process of conflict resolution in American society. He clearly presents Brandeis and his famous opinion as reflections of the Progressive vision and the institutionalization of political, economic and cultural struggle. At book's end Purcell concedes that the Brandeisian Progressive vision has lost its practical force in a new age of conservatism. He suggests, however, that Brandeisian values, refracted through professional legal culture and constitutional discourse, retain power to inspire America at the millennium. While Purcell is undoubtedly correct about Brandeis's leading influence within Progressivism, a legitimate question arises concerning the representativeness of Brandeisian values as distinct from his role as an effective advocate.

Brandeis's faith in small units and local control stemmed from an absolute certainty that giant corporations threatened the personal independence and accountability upon which participatory democratic citizenship depended. He adamantly opposed the consumption-driven economic order, advertising, and consumerism generally, because they pandered to human weakness, which invited political corruption and social immorality. These convictions were so strong that Brandeis actively, though ultimately unsuccessfully, supported the legal right of small businessmen to engage in price fixing as a way to attain the same benefits of economies of scale that big corporations gained through mergers and managerial centralization.[30] He also profoundly distrusted the investment methods Wall Street lawyers pioneered to establish corporate giants. "I feel very sure that . . . [people like us] ought not to buy and sell stocks," he wrote to his brother. "Prices of stock[s] are made. They don't grow; and their fluctuations are not due to natural causes."[31] Most Progressives probably did not embrace these values; yet Brandeis adapted them to ongoing reform efforts, joining others within the diverse Progressive movement to achieve goals he and they shared.

Brandeis's ability to adjust his most deeply held convictions to wider Progressive goals shaped the ambiguous constitutional holding in the *Erie* opinion. Ever since 1938, the decision's link between this constitutional language and the widely accepted need to overturn the *Swift* doctrine has remained controversial. Purcell's comprehensive evidence demonstrates that Brandeis

30. See McCraw, *Prophets of Regulation*, 101-08 (cited in note 14).
31. Allon Gal, *Brandeis of Boston* 25-26 (Harvard U. Press, 1980).

was primarily responsible for the constitutional thrust of the *Erie* opinion, but more could have been done to show that within Progressivism Brandeis possessed distinctive constitutional and legal values. Thus during the 1912 Presidential election, Democrat Woodrow Wilson, though campaigning with Brandeisian rhetoric against Theodore Roosevelt and Howard Taft, never accepted Brandeis's absolute condemnation of constitutional due process theories which fostered the power of giant corporations. Moreover, during the 1920s Justice Brandeis supported trade associations because they enabled many comparatively small firms to survive; the two Progressive Republicans Stone and Hoover also promoted the trade association movement, but, according to Hawley, in order to "reconcile cooperative stabilization and developmental mechanisms with antitrust objectives."[32] Initially, the Supreme Court—over Brandeis's dissent—opposed trade association practices, but the 1925 *Maple Flooring Association* decision upheld Stone's argument that many such practices were legal. The Court's decision not only confirmed a broad Progressive policy objective, but also represented the accommodation of diverse motivational strands within Progressivism.[33]

Purcell shows that a similar process of accommodation occurred among the majority deciding *Erie*. The opinion's basic logic and substance was clearly Brandeis's. Just as the Justice's underlying motivation differed from other leading Progressives in the trade association fight, so his distinctive social values and jurisprudence compelled a constitutional remedy for the abuses identified with the *Swift* doctrine. Hughes and Stone nonetheless succeeded in diluting Brandeis's initially stronger constitutional rationale, while Reed opposed it more forcefully. Given such strong internal tensions shaping the crafting of the *Erie* opinion, the resulting ambiguous constitutional language was understandable.

The ascendancy of the Progressive constitutional regime, its influence upon the liberal Warren Court era that followed, and the subsequent conservative backlash both reflected and sustained the course of social conflict in twentieth-century America. Purcell's presentation of Progressive legal culture as the coun-

32. Hawley, 74 Iowa L. Rev. at 1102 (cited in note 24).

33. For views Hoover, Stone, and Brandeis shared on trade associations see Tony Freyer, *Regulating Big Business: Antitrust in Great Britain and America, 1880-1990* 218-19 (Cambridge U. Press, 1992). *Maple Flooring Mfrs. Ass'n. v. United States*, 268 U.S. 563 (1925).

terpoint to Brewer's pro-corporate constitutionalism demonstrates that state and federal judiciaries and the U. S. Supreme Court were dynamic channels of social struggle in which corporate-capitalist and reform interests clashed for control. This replacement of a static image of judicial dispute resolution with a dynamic one makes a major contribution to contemporary American historiography. It also gives legal practitioners a deeper awareness of the extent to which even the most technical procedural doctrines upon which their professional autonomy depend are imbedded in changing social, political, and cultural contexts. Purcell's exposition of the Brandeisian Progressive constitution confirms that the interdependence between judicial and democratic power in America rarely produces an equitable allocation of opportunity; but, usually, it has been wide enough to diffuse broadbased, ongoing social disorder.

A question, nonetheless, remains regarding the origins of the constitutional theory Brandeis wrote into *Erie*. The *Swift* doctrine's initial meaning had been transformed by the time Justice Brewer adopted it to the goal of establishing judicial primacy. It is fair to say that Purcell neglects the degree to which for two decades following the Civil War this steady expansion of the *Swift* doctrine was vigorously contested in Congress, among practicing lawyers and law teachers at such places as Harvard Law School and the University of Pennsylvania Law School, and within the federal judiciary, including an unstable majority on the Supreme Court. The confrontation involved, moreover, not the doctrine as originally formulated by a unanimous Court in 1842 in accordance with the principles of dual sovereignty, but what a new Court majority had done to steadily reshape it. Beginning in *Gelpcke v. Dubuque* (1863), the Court erected a constitutional defense of numerous foreign creditors in the bond cases. By the 1890s it also incorporated into the federal common law a broadened negligence principle in railroad accident litigation.[34] Even so, before the Civil War an uncontroversial *Swift* doctrine embraced a narrowly conceived commercial jurisprudence; its postwar counterpart, however, facilitated the rise of the pro-corporate due process constitutionalism associated with Brewer and *Lochner*.[35]

34. See note 9 and 11. *Gelpcke v. City of Dubuque*, 68 U.S. (1 Wall.) 175 (1863).

35. Michael G. Collins, *Before* Lochner - *Diversity Jurisdiction and the Development of General Constitutional Law*, 74 Tulane L. Rev. 1263 (2000).

The distinction between the original and remade *Swift* had a direct bearing on the controversial constitutional rationale Brandeis incorporated into *Erie*. In the Justice's private files of the *Erie* opinion are his handwritten notes referring to works published during the postwar decades by the University of Pennsylvania Law School's Judge John Innis Clark Hare and Harvard Law School's James Bradley Thayer. These sources do not appear in the published decision's copious citations, but they clearly influenced Brandeis's thinking as he drafted the opinion. Hare, Thayer and others opposed the new "constitutionalized" *Swift* emerging after *Gelpcke*, not the Taney Court's initial doctrine. Brandeis drew upon these older critical works, undoubtedly because they reinforced his own personal values regarding the need to realign federal judicial and legislative power as a matter of constitutional interpretation.[36] Would Brandeis's *Erie* opinion have been less tendentious if it had addressed the original *Swift* doctrine Taney, Story, and their states' rights colleagues had found so congenial?

## CONCLUSION

Generations of lawyers and judges have grappled with the procedural and constitutional imperatives of adapting the Constitution's system of federalism to America's place in a changing global order. The technical dimensions of the relationship between *Swift* and *Erie* have less relevance to historians than the practical bearing the cases have had on maintaining the judiciary's and the legal profession's powerful influence in American society. Purcell's sweeping and original interpretation of Brandeis and the Progressive constitution not only makes a significant contribution to the fields of law and history separately, but combines insights from each to provide a deeper understanding of twentieth-century America. His conceptualization of federal jurisdiction as a central institution of dispute resolution in the nation's social process establishes a new way of thinking about the dominance of corporate capitalism and the rise and erosion of the liberal regulatory state. The question of the original *Swift* doctrine's lost meaning suggests, as Tocqueville intimated, that the federal judiciary's primary role in preserving social order reached back to the nation's earliest days. Purcell's focus on the development of this role since the end of nineteenth

36. Freyer, *Harmony & Dissonance* at 142-53 (cited in note 9).

century affirms the value of locating the constitutional channels which contain social struggle within the long time stream of American history. Approached in this light, Purcell reveals the soul of American constitutional governance.