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**Edward A. Purcell**. *Brandeis and the Progressive Constitution: Erie, the Judicial Power, and the Politics of the Federal Courts in Twentieth-Century America.* New Haven: Yale University Press, 2000. x + 417 pp. $40.00 (cloth), ISBN 978-0-300-07804-6.

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**The Contradictory Legacy of Judicial Progressivism**

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*Brandeis and the Progressive Constitution* can almost be viewed as three books in one. The book opens with three chapters tracing the development of the idea of federal court jurisdiction before 1937, with a focus on the centrality of *Swift v. Tyson*.[1] The book's middle chapters examine the exegesis of *Erie Railroad Co. v. Tompkins*,[2] the Supreme Court's 1938 decision that (in an opinion by Justice Louis D. Brandeis) overturned *Swift*. Purcell, the Joseph B. Solomon Distinguished Professor of Law at New York Law School, then concludes with a discussion of how the *Erie* decision, which was vaguely worded, was interpreted in the post-World War II environment.

Each of these three sections is impressive–and, in a remarkable testimony to the depth of this book, is impressive for a different reason. The opening section provides what might be the most comprehensive historical survey of the concept of federal jurisdiction between 1880 and 1937; these three chapters should be required reading for any course in U.S. Constitutional History. The middle section convincingly pieces together evidence to explain the making of a controversial Supreme Court decision. And the final section offers a telling, and convincing, lesson on the dangers of attempting to determine "original intent" in the judicial process.

Although Purcell's major efforts focus on the explication of the *Erie* decision, in many ways the book's first section of the book is the most important. Given that Purcell argues that Brandeis's opinion in *Erie* can be understood only as a reflection of the Progressive campaign against the federal courts in the fifty years before 1937, this section of the book forms a vital section of the argument.

The book opens with a discussion of the importance of the professionalization of the law–especially the formation of the American Bar Association–and the centrality of William Howard Taft, both as President and as Chief Justice, to that process. Purcell argues persuasively for the importance of protecting the courts in Taft's resistance to Theodore Roosevelt's 1912 bid for the White House, and he paints a convincing picture of how the development of the ABA produced a growing emphasis on corporations using the federal courts as a way to protect their economic interests. In response, Progressives came to champion states' rights–in the form of protecting the prerogatives of state courts–as the best way to check corporate power.

The second chapter presents a fascinating discussion of Justice David Brewer's importance in understanding the turn-of-the-century Court. Purcell shows how Brewer symbolized a Court intent on reorienting the role of federal courts to make them "the primary source for applying and protecting the Constitution of the United States" (p. 44). Brewer and his colleagues blocked state efforts to restrict federal court jurisdiction; limited the number of diversity cases in the federal court docket to allow the federal courts to deal with more important matters; and asserted greater federal court authority over state courts.

Brewer's jurisprudence manifested itself in an aggressive application of *Swift v. Tyson*, an 1842 decision in which the Supreme Court, speaking through Justice Joseph Story, held that federal courts did not have to follow state courts in matters of "commercial" or "general" jurisprudence, but only on issues of "local" law (p. 51). This holding allowed federal courts to ignore state court decisions, especially when those rulings seemed to check the power of the emerging corporate elite. In this sense, the fate of *Swift* came to symbolize the strength of the federal judiciary to enforce a conservative economic order. Overturning *Swift* thus became of central importance to reformers nationwide.

This crusade played into contentious debates over diversity jurisdiction and federal court injunctions against labor. In the process, Purcell argues, the federal court system itself emerged as a politically polarizing issue, because its continued power threatened a wide variety of Progressive reforms and seemed to dangerously restrict the power of the legislature. A variety of Progressive reformers, most notably Senator George R. Norris (R-NB), sought to weaken the power of federal courts, and Purcell shows how powerful were the structural obstacles to meaningful economic reform in pre-New Deal America.

Purcell's next four chapters examine the *Erie* decision itself, focusing on the central role of Justice Brandeis–and of the Justice's judicial philosophy–in the decision. As Purcell notes, the case that led to *Swift*'s overturning was a peculiar one. Harry Tompkins was walking home late one evening on a footpath near a one-track rail line of the Erie Railroad Company. Before he realized what had occurred, he was struck by an open door on a passing freight train, which knocked him unconscious and severed his right arm. Tompkins's attorneys immediately sued for damages. Because the railroad was incorporated in New York, they had the option of bringing suit against the railroad in either New York or Pennsylvania courts. They sued before the U.S. District Court for the Southern District of New York, and won a judgment for $30,000.

The attorney for the railroad company, Theodore Kiendl, faced a most difficult task. For reasons specific to the case at hand, his appeal rested on a desire to turn the case over to Pennsylvania state courts (where the railroad would have been held blameless because Tompkins was trespassing). In theory, then, Kiendl should have urged the U.S. Supreme Court to overturn *Swift*, because the ruling allowed federal courts to operate in contravention of state law. But, naturally, the broader interests of his corporate clients would have abhorred such an outcome, so Kiendl was left arguing delicately that while *Swift* might have been overly broad and perhaps incorrectly applied in this case, the Court should not overturn it.

As Purcell shows, however, the Justices, led by Brandeis in oral argument, called Kiendl's bluff, and though neither Kiendl's brief nor that of the plaintiffs urged overturning *Swift*, that question, in fact, became the central element of the case. Because only the Court's two most conservative Justices, James C. McReynolds and Pierce Butler, wanted to uphold *Swift*, a firm majority existed to overturn the decision. Yet initially only the newly-confirmed Hugo L. Black accepted Brandeis's contention that *Swift* was unconstitutional because no constitutional power existed for Congress to issue a blanket requirement for federal courts to apply rules of law inconsistent with state law. In an examination of the "art of appellate writing," Purcell offers a fascinating discussion of the intricate negotiations that Brandeis undertook to cobble together a majority, and how the process forced the Justice to write an opinion that in some ways was deliberately misleading.

Despite this obfuscation, Purcell maintains that the *Erie* decision was very much Brandeis's–and that the decision was a highly ideological document, motivated by Brandeis's belief in the political and social defects of *Swift*. Brandeis brought to the Court a faith in decentralization as the best way to achieve his Progressive agenda, a tendency he demonstrated to such an extent that he occasionally penned opinions–such as *Willing v. Chicago Auditorium Association*[3]–that seemed motivated solely by ideological concerns. Ironically, the same fascination with smallness that motivated Brandeis's hostility to *Swift* would cause him to view much of the New Deal with suspicion.

But Brandeis was more in line with New Deal thought in his criticism of *Swift* for its facilitation of federal diversity jurisdiction, which, he and other New Dealers believed, had allowed corporations to trample on labor rights.[4] In this sense, according to Brandeis, *Swift*'s major flaw was the elevation of the federal judiciary over the legislature, and the consequent harm to reform this development caused. *Erie* was informed by this ideological mindset. Brandeis wanted to ensure that, except on questions of constitutional rights, federal courts did not make law unless they had received explicit authorization from Congress to do so.

This belief, Purcell argues, is key to understanding the role that the Tenth Amendment played in Brandeis's reasoning. For Brandeis, *Erie* would restrain not so much the federal government but the federal courts; he included two references to the Tenth Amendment only in late drafts of the decision and then only to secure his majority. To Brandeis, the Tenth Amendment limited federal power only in the absence of a constitutional grant of legislative authority. In this sense, Brandeis's real enemy was none other than Justice Brewer, a key figure of the early part of the book: Brandeis viewed the federal courts as harmful for the same reason that Brewer celebrated their power.

What Purcell terms the "opinion's abstract, abbreviated, and to some extent purposely misleading reasoning invited multiple interpretations" after the Justice himself left the Court (p. 195). Purcell focuses on the writings of

Felix Frankfurter and Henry M. Hart, Jr., both of whom Purcell claims had ideological reasons of their own for distorting Brandeis's views. Frankfurter and Brandeis had experienced a personal and philosophical split during the Court-packing fight, as Brandeis remained true to his preference for decentralization while Frankfurter embraced the New Deal. Hart, meanwhile, typified a generation of New Dealers who drifted to the right in the Cold War era.

In both cases, as Purcell observes, political, economic, and ideological changes in postwar America rendered Brandeis's *Erie* framework untenable. Postwar liberals increasingly saw the federal court system as their ally, and the legislature, under the dominance of the conservative coalition, as their enemy. In this environment, Frankfurter and his allies redefined *Erie*, stressing its restrictions on forum-shopping while stripping it of its ideological content. Thus a decision that initially had symbolized Progressive legal thought came to be applied to Cold War liberalism.

Quite beyond the strength of its three separate sections, Purcell's book contributes to historiographical debate in three important ways. First, *Brandeis and the Progressive Constitution* takes a somewhat different approach to the question whether the New Deal represented a constitutional revolution. Purcell suggests that the revolution, if it occurred at all, developed in stages, with decisions like *Erie* dating from 1937 or 1938 representing a throwback to earlier debates in jurisprudence rather than any revolutionary stage.

At a second level, Purcell's work complements recent publications in political history, notably Alan Brinkley's *The End of Reform*,[5] that periodize 1937 to 1945 as critical in the transformation of liberal thought. Purcell's portrayal of the different views of *Erie* held by Brandeis and Frankfurter is particularly impressive in this regard. As Purcell notes, Brandeis held a much broader view of *Erie* than did his one-time protégé, much as anti-monopolists in the early stages of the New Deal offered a broader critique of the capitalist economy than did World War II liberals.

Finally, Purcell offers an important contribution to the scholarly critique of "original intent" pioneered in its most recent manifestation by Jack Rakove.[6] By painstakingly reconstructing the writing of Brandeis's opinion, Purcell casts doubt on whether it is, in fact, possible to determine original intent. Should legal scholars focus on Brandeis's ideology (as Purcell does)? Or should they stress the compromises he had to make–such as the inclusion of the Tenth Amendment, a move that Purcell downplays? And if it were possible to determine original intent, how can we explain the performance of a figure like Frankfurter, who had every reason to be able to discern Brandeis's intent properly and yet who, the evidence suggests, deliberately misapplied his mentor's thinking?

For these reasons, as well as for its elegant writing and impressive research base, *Brandeis and the Progressive Constitution* is a must read for anyone interested in twentieth-century American constitutional history.

Notes

[1]. *Swift v. Tyson*, 41 U.S. (16 Peters) 1 (1842).

[2]. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

[3]. *Willing v. Chicago Auditorium Association*, 277 U.S. 274 (1928).

[4]. For Purcell's earlier work on federal diversity jurisdiction, *see* Edward A. Purcell, Jr., *Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870-1958* (New York: Oxford University Press, 1992), and *see also* R. B. Bernstein, "Book Review: Mapping Legal History's Middle Ground," *New York University Law Review* 68 (1993): 675-705.

[5]. Alan Brinkley, *The End of Reform: New Deal Liberalism in Depression and War* (New York: Alfred A. Knopf, 1995).

[6]. *See especially* Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Alfred A. Knopf, 1996).





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