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CHARTING THE FUTURE: THE SUPREME COURT RESPONDS TO A CHANGING SOCIETY, 1890-1920. By John E. Semonche. Contributions in Legal Studies, No. 5. Westport, Conn.: Greenwood Press 1978. Pp. 470. $25.00.

Charting The Past

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Between 1890 and 1920, the Supreme Court entered a reactionary phase. No sooner had the nation attained economic maturity,[1] than the Court proclaimed the ethos of capitalism to be the fundamental law of the United States. The brave new world of the justices was a bourgeois paradise, without income taxes or government regulation. In *Pollock v. Farmers' Loan & Trust Co.*,[2] they held that a national income tax violated the constitutional requirement that all direct taxes must be apportioned among the states on the basis of population. In *Lochner v. New York*,[3] they held that a state law prohibiting the employment of bakers for more than ten hours a day or more than sixty hours a week violated the due process clause of the fourteenth amendment. In *Hammer v. Dagenhart*,[4] they held that a national child labor law violated the tenth amendment. With these fateful decisions, the Court embarked on the collision course that ended in the constitutional stalemate of the 1930s, Roosevelt's court-packing plan and the "switch in time which saved nine" in 1937.

That, at least, is the standard version of American constitutional history. After Professor Semonche's book, that version will have to be revised. Looked at in detail, the Court's decisions during those three decades accommodated the social needs of the new America more often than not. The elderly men from comfortable backgrounds who

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1. The stage of economic maturity has been defined as "the period when a society has effectively applied the range of (then) modern technology to the bulk of its resources." This stage was reached in the United States around 1900. W. ROSTOW, THE STAGES OF ECONOMIC GROWTH 59 (2d ed. 1971).

2. 157 U.S. 429 (1895).

3. 198 U.S. 45 (1905).

4. 247 U.S. 251 (1918).

occupied the High Bench in those years endeavored to do their duty fairly and fully. As revealed by Professor Semonche, their approach was not doctrinaire but pragmatic, that is, "attuned to law's use as an instrument for the effectuation of certain ends."[5] Over the years, they set precedents that, although temporarily overshadowed by a few infamous decisions, provided a legal position upon which the Court could fall back after its retreat in 1937. In a sense, then, the Court presided over by Melville Fuller and Edward White was doing nothing less than "charting the future."

To make his case, Professor Semonche takes his reader back to the palmy days of the late nineteenth century. In 1889, the Supreme Court was one hundred years old, and on February 4, 1890, its centenary was celebrated with pomp and circumstance. In a fascinating ceremony at the Metropolitan Opera House, the opulent bar of New York paid tribute to the Court. After this engaging overture, Professor Semonche guides the reader through each successive term of court. For lawyers and law teachers alike, this chronological method is an unexpected novelty. Because of the thematic organization of lawbooks, legal scholars are unpracticed in thinking about the ensemble of any given term. For his purposes, however, Professor Semonche's method has much to recommend it. Not only does it reconstruct the context in which any given opinion was written, but it also heightens the reader's awareness of the result in each case and the shifting judicial alliances throughout each term.

From the shadow of *Pollock, Lochner*, and *Hammer*, Professor Semonche rescues cases broadly construing the federal taxing power and upholding state and federal regulation of the economy. From the early days of the Republic, it has been axiomatic that the power to tax is the power to destroy, but it was left to the turn-of-the-century Court to validate the use of the taxing power to regulate the marketing of various commodities.[6] Anticipating the future even more obviously, the Court recognized that the commerce clause conferred regulatory power over a wide range of activities (not, unfortunately, including child labor). The national government could prohibit the carrying of

5. J. SEMONCHE, CHARTING THE FUTURE: THE SUPREME COURT RESPONDS TO A CHANGING SOCIETY, 1890-1920, at 426 (1978). Semonche's "pragmatism" is intellectually akin to the "instrumental conception of law" that Morton J. Horwitz has described as emerging between 1780 and 1820, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 16-30 (1977).

6. United States v. Doremus, 249 U.S. 86 (1919) (drugs); McCray v. United States, 195 U.S. 27 (1904) (margarine); *In re* Kollock, 165 U.S. 526 (1897) (margarine).

lottery tickets from one state to another,[7] ban the interstate transportation of adulterated food or drugs,[8] outlaw carrying women across state lines for immoral purposes,[9] prohibit the importation of prize fight pictures,[10] close interstate commerce to false and fraudulently branded articles,[11] and mandate the hours and wages of railroad employees engaged in interstate commerce.[12]

The Court also upheld numerous state regulations. New York's ten-hour law was the exception, not the rule. Utah could forbid the employment of miners for more than eight hours a day.[13] New York and Ohio could pass pure food and drug acts.[14] Massachusetts could make vaccination compulsory.[15] Chicago could fix the weight of bread.[16] In its zeal to uphold state laws, the Court even approved a Boston ordinance requiring a license for public speaking on the Boston Common.[17] In practice, the due process clause as a restraint on state action was a product of the 1920s, not of the earlier era. Professor Semonche has calculated that, from the ratification of the fourteenth amendment in 1868 until 1921, the Court found only thirteen state and local acts invalid under the due process clause, a smaller number than that invalidated in the five succeeding years.[18]

The judicial generation from 1890 to 1920 was composed of twenty-six individuals—more than a quarter of the entire roster of Supreme Court justices. Professor Semonche's assessments confirm some long-standing judgments and conflict with some others. John Marshall Harlan clearly emerges as a prophet, albeit one without a majority in his own time. His view that the fourteenth amendment incor-

7. The Lottery Case, 188 U.S. 321 (1903).

8. Hipolite Egg Co. v. United States, 220 U.S. 45 (1911).

9. Hoke v. United States, 227 U.S. 308 (1913).

10. Weber v. Freed, 239 U.S. 325 (1915).

11. Seven Cases v. United States, 239 U.S. 510 (1916).

12. Wilson v. New, 243 U.S. 332 (1917).

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

14. Crossman v. Lurman, 192 U.S. 189 (1904) (New York); Arbuckle v. Blackburn, 191 U.S. 405 (1903) (Ohio).

15. Jacobson v. Massachusetts, 197 U.S. 11 (1905).

16. Schmidinger v. City of Chicago, 226 U.S. 578 (1913). *But see* Burns Baking Co. v. Bryan, 264 U.S. 504 (1924) (Nebraska statute prescribing minimum weights of loaves repugnant to fourteenth amendment).

17. Davis v. Massachusetts, 167 U.S. 43 (1897). *But see* Hague v. CIO, 307 U.S. 496, 514-16 (1939) (opinion of Roberts, J., in which Black, J., concurred) (freedom of speech in public places may not be abridged or denied in the guise of regulation).

18. J. SEMONCHE, *supra* note 5, at 424-25. For an argument anticipating Semonche's, but necessarily less comprehensive, see Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294 (1913).

porated the Bill of Rights,[19] largely accepted in the 1960s,[20] was consistently denied by his colleagues. More surprising is Professor Semonche's rehabilitation of David J. Brewer[21] and his debunking of Oliver Wendell Holmes.[22] Brewer, it appears, was better than his rhetoric. Due process, for him, hedged in more than the deprivation of property,[23] and his economic decisions were, in Professor Semonche's term, pragmatic. Despite his fear of the power of government, he accepted many state regulations,[24] and despite his high opinion of the rights of property, he repeatedly voted not to exempt corporations from state taxation.[25] Holmes, on the other hand, is said to be less Olympian than his rhetoric: "Any close reader of Holmes's opinions cannot miss the obvious hostility that the Justice had for certain legislative measures, despite his oft-repeated conclusion that the judiciary should not pass on the wisdom of such legislation."[26] In support of this proposition, Professor Semonche cites the restrictive readings the Justice gave to the Sherman Act,[27] the Interstate Commerce Act,[28] and the Pure Food and Drug Act.[29]

Professor Semonche is a successful revisionist. He forces us to amend our pat answers to the old questions. But like all revisionists, he

19. *See, e.g.*, Twining v. New Jersey, 211 U.S. 78, 114 (1908) (dissenting opinion); Patterson v. Colorado, 205 U.S. 454, 463 (1907) (dissenting opinion); Maxwell v. Dow, 176 U.S. 581, 605 (1900) (dissenting opinion); O'Neil v. Vermont, 144 U.S. 323, 366 (1892) (dissenting opinion).

20. *See, e.g.*, Benton v. Maryland, 395 U.S. 784 (1969) (double jeopardy); Duncan v. Louisiana, 391 U.S. 145 (1968) (trial by jury); Washington v. Texas, 388 U.S. 14 (1967) (compulsory process for obtaining witnesses); Klopfer v. North Carolina, 386 U.S. 213 (1967) (speedy and public trial); Pointer v. Texas, 380 U.S. 400 (1965) (confrontation of witnesses); Malloy v. Hogan, 378 U.S. 1 (1964) (self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963)(assistance of counsel); Robinson v. California, 370 U.S. 660 (1962) (cruel and unusual punishment).

21. J. SEMONCHE, *supra* note 5, at 244-45, 433.

22. *Id.* at 433.

23. *See, e.g.*, United States v. Ju Toy, 198 U.S. 253, 264 (1905) (dissenting opinion); United States v. Sing Tuck, 194 U.S. 161, 170, 181 (1904) (dissenting opinion) ("I cannot believe that the courts of this republic are so burdened with controversies about property that they cannot take time to determine the right of personal liberty by one claiming to be a citizen"); Fong Yue Ting v. United States, 149 U.S. 698, 732 (1893) (dissenting opinion).

24. *See, e.g.*, Louisville & Nashville R.R. v. Eubank, 184 U.S. 27, 43 (1902)(dissenting opinion); Rasmussen v. Idaho, 181 U.S. 198 (1901); Lindsay & Phelps Co. v. Mullen, 176 U.S. 126 (1900).

25. *See, e.g.*, Citizens' Bank v. Parker, 192 U.S. 73, 86 (1904) (dissenting opinion); Adams Express Co. v. Ohio State Auditor, 166 U.S. 185 (1897).

26. J. SEMONCHE, *supra* note 5, at 260.

27. Northern Securities Co. v. United States, 193 U.S. 197, 400 (1904) (dissenting opinion). For Holmes's contempt for the Sherman Act, see HOLMES-POLLOCK LETTERS 163 (2d ed. M. Howe 1961) and C. BOWEN, YANKEE FROM OLYMPUS 360 (1943).

28. Harriman v. ICC, 211 U.S. 407 (1908). For Holmes's hostility to the ICC, see HOLMES-POLLOCK LETTERS 163 (2d ed. M. Howe 1961).

29. United States v. Johnson, 221 U.S. 488 (1911).

runs the risk that in worrying about the old questions, he will lose the opportunity to ask some new ones. The crisis in 1937 concerned the power of the national government to stimulate and direct the economy. The Court presided over by William Howard Taft and Charles Evans Hughes had denied the Nation this necessary power. After 1937, the Court reversed itself. Historians have assumed that the Taft-Hughes era was merely a continuation of the Fuller-White era. Professor Semonche exposes that assumption as facile. The turning point on the issue of economic regulation was 1920, not 1890. In fact, the Court of the gay nineties and the progressive decades had mapped out a bit of the post-1937 terrain.

The constitutional crisis of the New Deal is not, however, the only touchstone for American constitutional history. Because he is looking back from 1937, Professor Semonche sees 1890 as a point on which little turned. A revolution in personnel, rather than in ideas, makes it his starting point. Between 1890 and 1894, five new Justices were named to the Bench. They made changes, as Professor Semonche recognizes, but they did not seriously impair the government's power over commerce and industry. Yet the changes they did make were often significant in their own right. In the interpretation of the eleventh amendment,[30] for instance, 1890 is a recognizable turning point. During the post-Reconstruction era, the amendment had proved a strong bulwark behind which the restored white governments of the old Confederacy could shelter, while repudiating the bonds issued by their Reconstruction predecessors. No state shall be sued by a citizen of another state in federal court meant just that[31]—and that no Southern state could be sued on its indebtedness by a Northern state,[32] or by its own citizens.[33] But the eleventh amendment entered a new phase with the advent of the railroad rate cases.[34] Beginning in 1894 with *Reagan v. Farmers' Loan & Trust Co.*[35] and ending in 1908 with *Ex parte*

30. U.S. CONST. amend. XI provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

31. *In re* Ayers, 123 U.S. 443 (1887); Hagood v. Southern, 117 U.S. 52 (1886); Cunningham v. Macon & Brunswick R.R., 109 U.S. 446 (1883); Louisiana *ex rel.* Elliott v. Jumel, 107 U.S. 711 (1883). *Contra*, Rolston v. Missouri Fund Comm'rs, 120 U.S. 390 (1887); The Virginia Coupon Cases, 114 U.S. 269 (1885).

32. New Hampshire v. Louisiana, 108 U.S. 76 (1883). *But see* South Dakota v. North Carolina, 192 U.S. 286 (1904) (distinguishing *New Hampshire* and asserting jurisdiction).

33. North Carolina v. Temple, 134 U.S. 22 (1890); Hans v. Louisiana, 134 U.S. 1 (1890).

34. C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 132 (1972).

35. 154 U.S. 362 (1894).

Young,[36] the Justices charted a course around the amendment by making state officers surrogates for their states. The jurisprudence of the eleventh amendment entered its latest phase in the 1890s. Its future was to be the continuing revelation of ways to escape its effect.[37] Concentration on the economic issues in the 1930s, however, obscures this useful bit of mapmaking.

Each issue that confronts the Court has, of course, its own special future. It is easy to portray the Justices from 1920 to 1937 as darkly reactionary. With respect to the preeminent constitutional issue of the day, they undoubtedly were. But in other areas they, too, charted the future. In 1961, in *Mapp v. Ohio*,[38] the Warren Court fired the first shot in what has been called the "due process revolution."[39] In less than a decade, the due process clause of the fourteenth amendment was interpreted to require strict compliance by state and local police with the key provisions of the Bill of Rights. Yet that historic development was prefigured by decisions in the twenties and thirties. From the *Slaughter-House Cases*[40] in 1873 until 1923, the promise of the fourteenth amendment was consistently denied. The states had a free hand in criminal law and procedure. Then, in *Moore v. Dempsey*[41] in 1923, the Court ruled that the fourteenth amendment gave criminal defendants in state courts the right to a real trial, not a bogus, mob-dominated one. Within the next decade and half, the Court held that the due process clause confers the right to an unbiased judge[42] and, in capital cases, to the assistance of counsel.[43] It overturned convictions based on perjured testimony[44] or coerced confessions.[45] Finally, in the midst of the economic crisis, the Court laid down the "fundamental fairness" test for determining which provisions of the Bill of Rights were absorbed in the due process clause.[46] In criminal justice, then, the periods of American constitutional history run from 1873 to 1923, from 1923 to 1961, and

36. 209 U.S. 123 (1908) (state action for purposes of fourteenth amendment but not for purposes of eleventh amendment).

37. *See* Comment, *Avoiding the Eleventh Amendment: A Survey of Escape Devices*, 1977 ARIZ. ST. L. J. 625. *But see* Edelman v. Jordan, 415 U.S. 651 (1974) (eleventh amendment bars recovery of retroactive welfare benefits wrongfully denied by state officials).

38. 367 U.S. 643 (1961).

39. F. GRAHAM, THE SELF-INFLICTED WOUND 6 (1970).

40. 83 U.S. (16 Wall.) 36 (1873).

41. 261 U.S. 86 (1923).

42. Tumey v. Ohio, 273 U.S. 510 (1927).

43. Powell v. Alabama, 287 U.S. 45 (1932).

44. Mooney v. Holohan, 294 U.S. 103 (1935).

45. Brown v. Mississippi, 297 U.S. 278 (1936).

46. Palko v. Connecticut, 302 U.S. 319, 328 (1937) ("Does it violate those 'fundamental prin-

from 1961 to the present (with premonitory signs of the last era in its immediate predecessor).

In the history of American civil rights and civil liberties, neither 1890 nor 1920 (nor, for that matter, 1937) marks a turning point. During the post-Reconstruction era, in the 1870s and 1880s, the Supreme Court virtually nullified the fourteenth amendment and the civil rights acts passed to enforce it.[47] Until *Brown v. Board of Education*[48] in 1954, this inglorious tradition was upheld. As Professor Semonche recognizes, the Court from 1890 to 1920 refused the lead offered by the first Justice Harlan.[49] Instead, it complacently presided over a mushroom growth in discriminatory legislation.[50] It sanctioned Jim Crow in transportation[51] and education.[52] It upheld poll taxes and literacy requirements for voting, despite their obvious use to disenfranchise the black race.[53] Since the plain language of federal law required it, the Court did overturn the residential segregation laws that had been enacted all over the South after Baltimore led the way in 1910.[54] But it was understood that what governments could not do by law, individuals could do by restrictive covenant.[55] In the history of American civil rights, the eras run from the end of Reconstruction to 1954 and from then to the present (with only a few premonitory signs of change).

On the rights of laboring men to organize, the Court at the turn of

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ciples of liberty and justice which lie at the base of all our civil and political institutions'?") (Cardozo, J.) (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)).

47. *See, e.g.*, The Civil Rights Cases, 109 U.S. 3 (1883); United States v. Harris, 106 U.S. 629 (1882); Virginia v. Rives, 100 U.S. 313 (1879); United States v. Cruikshank, 92 U.S. 542 (1876); The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

48. 347 U.S. 483 (1954).

49. J. SEMONCHE, *supra* note 5, at 430.

50. C. WOODWARD, THE STRANGE CAREER OF JIM CROW 97-102 (2d rev. ed. 1966).

51. Plessy v. Ferguson, 163 U.S. 537 (1896). *Compare* Louisville, N.O. & Tex. Ry. v. Mississippi, 133 U.S. 587 (1890) (state statute requiring racial segregation on railroads in the state held not an unconstitutional burden on interstate commerce) *with* Hall v. De Cuir, 95 U.S. 485 (1878) (state statute prohibiting racial segregation on railroads held an unconstitutional burden on interstate commerce). *See also* Chiles v. Chesapeake & Ohio Ry., 218 U.S. 71 (1910) (interstate carrier may make rules requiring racial segregation).

52. Berea College v. Kentucky, 211 U.S. 45 (1908); Cumming v. Richmond County Bd. of Educ., 175 U.S. 528 (1899).

53. Williams v. Mississippi, 170 U.S. 213 (1898). A decision invalidating the "grandfather clause" as a means to disenfranchise blacks, Guinn v. United States, 238 U.S. 347 (1915), was contumaciously evaded. *See* Lane v. Wilson, 307 U.S. 268 (1939).

54. Buchanan v. Warley, 245 U.S. 60 (1917) (applying the equal housing section of the original Civil Rights Act of 1866, ch. 31, §1, 14 Stat. 27 (1866) (current version at 42 U.S.C. § 1982 (1976))); *see* R. KLUGER, SIMPLE JUSTICE 108 (1975).

55. *See* Corrigan v. Buckley, 271 U.S. 323 (1926) (upholding racially restrictive covenants). *But see* Shelley v. Kraemer, 334 U.S. 1 (1948) (racially restrictive covenants unenforceable by courts).

the century was, as Professor Semonche acknowledges, no better than its predecessor or successor.[56] Indeed, a change in the judicial attitude on this question came only in 1937.[57] Since time out of mind, the common law opposed the collective efforts of workers to improve their conditions of employment,[58] and the oracles of the law from 1890 to 1920 made no exceptions. In 1895, the Justices discovered in the postal and commerce clauses of the Constitution the power of federal courts to enjoin strikes against the Nation's railroads.[59] But in 1908, they found the commerce clause too narrow to permit Congress to prohibit the same carriers from requiring, as a condition of employment, a promise not to unionize (the notorious yellow-dog contract).[60] In 1915, they found state police power inadequate to justify a similar intrastate ban.[61] In 1917, on the other hand, they authorized an injunction to protect yellow-dog contracts required by an employer.[62] With respect to labor organization, the periods of American constitutional history run from earliest times to 1937 and from then to the present (with no premonitory signs of change).

In light of Professor Semonche's research, the standard version of American constitutional history must be revised. On government regulation of the economy, Professor Semonche demonstrates that the appropriate periods are 1890 to 1920, 1920 to 1937, and 1937 to the present. Professor Semonche further demonstrates that on this issue the earlier and later periods have more in common with one another than either has with the intervening years. But even in the revised standard version much remains unchanged. On major issues of modern law and society—labor, desegregation, criminal justice—the Court from 1890 to 1920 was a cartographic failure. For the thorough documentation of this truth, we must also thank Professor Semonche.

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56. J. SEMONCHE, *supra* note 5, at 430-31.

57. *See* Hague v. CIO, 307 U.S. 496 (1939) (authorizing an injunction to prevent interference with rights under the National Labor Relations Act); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding the constitutionality of the National Labor Relations Act). On the significance of *Hague*, see Gibbons, *Hague v. CIO: A Restrospective*, 52 N.Y.U.L. Rev. 731 (1977).

58. *See, e.g.*, Vegelahn v. Guntner, 167 Mass. 92, 44 N.E. 1077 (1896); The Philadelphia Cordwainers' Case (Philadelphia Mayor's Ct. 1806), *reprinted in* 3 J. COMMONS & E. GILMORE, A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 59 (1958); The King v. Journeymen Taylors of Cambridge, 88 Eng. Rep. 9 (K.B. 1721); Combination Acts, 39 & 40 Geo. 3 c. 106 (1800), 39 Geo. 3 c. 81 (1799); The Statute of Labourers, 25 Edw. 3 st.1 (1351); Ordinance of Labourers, 23 Edw. 3 (1349).

59. *In re* Debs, 158 U.S. 564 (1895).

60. Adair v. United States, 208 U.S. 161 (1908).

61. Coppage v. Kansas, 236 U.S. 1 (1915).

62. Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917).