LOUIS D. BRANDEIS'S MIT LECTURES ON LAW (1892-1894)

EDITED BY ROBERT F. COCHRAN JR.

Carolina Academic Press, Durham, NC, 2012. 357 pages, $60.00.

Reviewed by R. Mark Frey

Louis D. Brandeis was a legal giant who helped shape the law through his work both as an attorney and as a Supreme Court justice. One marvels at his intellect, his social conscience, and his accomplishments. At the same time, one wonders how and why he developed his particular perspective on the law and its place in U.S. society.

Brandeis was born in 1856 in Louisville, Ky., the son of Bohemian immigrant Jews. He graduated from Harvard Law School at 20 and established a law partnership in Boston with his law school classmate, Samuel D. Warren. The two gained prominence when they published a seminal article entitled "The Right to Privacy" in the Dec. 15, 1890, *Harvard Law Review*. In the article, they observed that "[p]olitical, social, and economic changes entail the recognition of new rights," one of which was a right to privacy.

Years later, Brandeis employed similar reasoning in his oft-cited dissent in *Olmstead v. United States*, 277 U.S. 438, 478 (1928), in which the Supreme Court held that a warrantless wiretap did not violate the Fourth or Fifth Amendments. He noted that the framers of our Constitution "sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men [*sic*]. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And, the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth." Brandeis's dissent continues to be relevant, as people today struggle over our government's anti-terrorism policies in relation to our civil liberties.

The decades of the 1890s and 1900s proved to be significant for Brandeis's professional development. His partner, Samuel Warren, left their firm for another business opportunity, and Brandeis formed a new firm with two other attorneys. As time passed, he became less interested in legal work focusing solely on clients' business needs and more interested in cases having a wider-ranging impact on society. Industrial monopolization, the growing power of large banks and trusts, workplace and labor protections, as well as pro bono work and access to legal services, increasingly drew his attention. He became involved in numerous reform efforts, spearheading opposition to monopolization of the Boston rag trade, fighting to preserve the Boston subway system, opposing restrictions on the sale of liquor in Massachusetts, and battling public corruption, all the while influencing public opinion through magazine articles and speeches.

This was the Progressive era, with its escalating concern over the unregulated power of large corporations, corruption in politics and government, and social justice. Brandeis was in the thick of many Progressive causes and became known as "the People's Lawyer." His legal work led to the development of what has become known as the Brandeis Brief, a brief relying not only on legal citations but also on information gleaned from research containing social science, medical, and economic data.

Starting in 1892, Brandeis delivered lectures on business law to undergraduates at the Massachusetts Institute of Technology (MIT). Why would he teach while he had a thriving law practice and engaged in so many other activities? Apparently, MIT President Francis Amasa Walker was impressed by Brandeis's broad, holistic perspective of the lawyer's function ("helping clients not only to understand the law, but also to see their legal problems in light of their business situation") and invited him to teach there. According to Brandeis, MIT offered his course in business law as "an essential part of a liberal education" and because "such knowledge is of great practical value to men [*sic*] engaged in active life." Although the class was entitled "Business Law," it was not restricted to that subject alone. As was typical of Brandeis's wide-ranging perspective, he covered such other areas as legal history, legal philosophy, civil procedure, evidence, and criminal law. As recounted by one of his students, Gerald Swope, Brandeis was "quite stimulating" with lectures that "gave me a broader base [than engineering] and helped me afterwards." Swope went on to become president of General Electric from 1922 to 1939 and from 1942 to 1944, and his biographer, David Loth, noted that, at the time, business "seemed perilously like the law of the jungle if one looked at the exploits of Goulds and Vanderbilts, although these were much admired in the nineties. But Brandeis offered a different ethic, one of public service. ... He considerably broadened young Swope's understanding of the nature of business and of society itself, without converting the youngster to his own passionate belief in the dangers of corporate size."

Louis D. Brandeis's MIT Lectures on Law (1892-1894) is the first publication of those lectures, and it includes both the original and revised versions of the lectures. Editor Robert Cochran Jr. notes the difficulty of editing the book for two different audiences: readers seeking insight into one of our country's great legal minds, and historians interested in the exact text of the original lectures. Cochran believes that the former audience would be willing to sacrifice exactness for the sake of readability. He serves its interest by lightly editing both the original and revised versions of the lectures for readability, and by merging portions of the original versions into the revised versions, "to make the reading experience something like sitting in on Brandeis's lectures." Then, for

the sake of historians, Cochran also includes other portions of the original versions of the lectures in an appendix. He explains all his editorial decisions in italicized text notes and bracketed footnotes, thereby satisfying the need of historians for accuracy. The book's appendices also include course exams and Brandeis's 1895-1896 casebook outlines.

The lectures provide much depth and insight into Brandeis's view of the law, and Cochran's excellent introductory essay provides a crucial understanding of their significance. For me, the importance of the lectures and Cochran's insights lies in showing the evolution of Brandeis's views and thoughts about the law so as to further our understanding of him as a Supreme Court justice in the years to follow. In fact, Brandeis attributed his time at MIT to helping him develop and expound upon his view of the law and its relation to society.

Initially, Brandeis saw his lectures as providing students with "a routine defense of the adequacy of the common law to deal with industrial and commercial problems." But, in a July 27, 1914, interview with *The Independent*, he noted in retrospect that the 1892 Homestead strike in Pennsylvania had caused him to reconsider his view about the adequacy of the common law.

> I think it was the affair at Homestead which first set me to thinking seriously about the labor problem. It took the shock of that battle, where organized capital hired a private army to shoot at organized labor for resisting an arbitrary cut in wages, to turn my mind definitely toward a searching study of the relations of labor to industry. ... [O]ne morning the newspaper carried the story of the [July 6, 1892] pitched battle between the Pinkertons on the barge and barricaded steel workers on the bank. I saw at once that the common law, built up under simpler conditions of living, gave an inadequate basis for the adjustment of the complex relations of the modern factory system. I threw away my notes and approached my theme from new angles. Those talks at Tech marked an epoch in my own career.

Paul Freund, Brandeis's clerk during the Supreme Court's 1932-1933 term, recalled that Brandeis was deeply affected by the Homestead strike. According to Freund in an essay about his clerkship with Brandeis, the Homestead strike revealed "the tragic mask in the human drama" and "led [Brandeis] to think hard and endlessly on the issues of freedom and responsibility, material provision and moral development, competition and the sense of community." Cochran finds this surprising because a perusal of Brandeis's MIT lectures, notwithstanding changes he made over the years while teaching there, displays little of the social activist lawyer. As a matter of fact, Cochran notes that, for progressive readers, the lectures may seem somewhat conservative.

If this is the case, then what should one make of Brandeis's contention that he underwent a conversion at the time? Cochran has, I think, correctly hit upon the likely intellectual challenge that Brandeis faced at the time he wrote and rewrote his lectures, and that is the dynamic interplay between the common law and legislation in addressing social issues. Brandeis made some changes to his lectures as he reflected upon the place of legislation in relation to the common law's limitations. Although he believed that judicial restraint was appropriate in the face of social legislation, he still had not resolved his thinking about this interplay. At that time, he still argued against government regulation of working hours because he believed that employers and employees' freedom of contract was at stake. It took several more years before he had resolved the interplay in his own mind. By 1908, for example, his thinking had progressed to the point where he successfully argued before the Court that legislation could limit women's working hours (*Muller v. Oregon*, 208 U.S. 412 (1908)). In fact, as Cochran notes, by the time Brandeis became a Supreme Court justice, he was a "staunch defender of the constitutionality of most legislation in the face of a Court that held much social legislation unconstitutional."

Notwithstanding his development and evolution as a progressive, Brandeis remained a conservative in the sense of believing that local solutions to economic and social problems were more effective than a top-down, one-size-fits-all approach. As a Jeffersonian, he believed that government could do only so much, and that states were better prepared to handle some problems. He argued, in effect, that states should serve as laboratories for democracy. Ultimately, Brandeis's "goal was a system that enhanced individual freedom. At times he saw the threat to individual freedom coming from government, at times from business. ... [H]e came to see danger in bigness—big business, big government, and big unions—arguing that smaller units of almost everything would allow individuals to exercise greater control over their lives." The opportunity to teach at MIT afforded Brandeis time to reflect upon the law and its place in society. As Cochran has cogently noted, "such reflection went a long way in the development of the wise lawyer and Justice that Brandeis was to become."

The value of *Louis D. Brandeis's MIT Lectures on Law (1892-1894)* comes from its providing the reader a glimpse into the mind of one of our greatest Supreme Court justices and pointing to his continued relevance today in a world still mired in many of the same issues present in Brandeis's day. Brandeis's lectures and Cochran's introductory essay show the development of his thoughts and reflections on the law, but they do not tell the whole story in all its brilliance and complexity. As a companion to the *MIT Lectures*, I strongly recommend Melvin Urofsky's 2009 book, *Louis D. Brandeis: A Life* (reviewed in the March/April 2011 issue of *The Federal Lawyer*). Together, these books provide a rich description of the life of Justice Brandeis—one contemplated and lived to its fullest. ⊙

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STRANGE REBELS: 1979 AND THE BIRTH OF THE 21ST CENTURY

BY CHRISTIAN CARYL

Basic Books, New York, NY, 2013, 407 pages, $28.99.

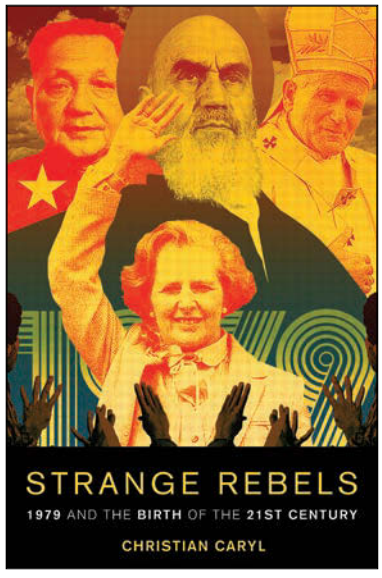
Reviewed by David Heymsfeld

In *Strange Rebels: 1979 and the Birth of the 21st Century*, Christian Caryl gives us new insights and perspectives into the sweeping changes that have occurred in world political and economic thought since the 1970s. In a nutshell, "communist and socialist thought has faded, markets domi-

nate economic thinking, and politicized religion looms large."

Caryl enhances our understanding of these changes by tracing their origins to actions taken in 1979 by four larger-than-life leaders: Chinese leader Deng Xioping, British Prime Minister Margaret Thatcher, Iran's Ayatollah Khomeini, and Pope John Paul II. Caryl concludes that, as a result of the leaders' challenges to prevailing orthodoxies, in 1979, "the twin forces of markets and religion, discounted for so long, came back with a vengeance."

Two of Caryl's leaders, Thatcher and Deng, played major roles in discrediting the communist and socialist approaches of collectivization and centralized state planning as tools for economic development. In the 1970s, the Soviet Union's economic system was held in high regard throughout the world. The Soviet government owned most industry, and central planners, rather than markets, generally determined what would be produced, how raw materials would be allocated to factories, and the prices at which these materials, as well as manufactured goods, would be sold. Many believed that the Soviet system had succeeded in transforming a nation of illiterate peasants into a mighty industrial power with full employment, which in the long run would overtake Western capitalist economies. In 1960, no less an authority than Henry Kissinger wrote: "If the issue was simply the relative capacity to promote economic development, the outcome is foreordained [in favor of communism]." But the implosion of the Soviet economy in the late 1980s raised serious questions about the benefits of planning and collectivization.



Compelling evidence of the superiority of markets was provided in China, by reforms that Deng initiated in 1979. From the 1950s through the 1970s, China's economy had operated strictly according to communist principles of government ownership and control. At best, the result was limited growth from a low base, with millions on the verge of starvation. At worst, central planning led to disastrous results, such as the Great Leap Forward in the late 1950s. The Great Leap forcibly transferred large numbers of agricultural workers to industry, reducing agricultural production and leading to famines that killed 20 to 40 million people. In the mid-1960s, the Cultural Revolution created economic and political chaos by sending the most educated parts of the population to rural communes to do manual labor. This system could not be changed so long as Mao Zedong, who was committed to communist ideology, remained in control. Changes became more feasible after Mao's death in 1976, and, in 1979, a new leadership headed by Deng Xioping began to undertake reforms.

Although Deng was always a supporter of one-party authoritarian rule, he was pragmatic on economic issues, saying, "I don't care if it's a black cat or white cat. It's a good cat if it catches mice." His preference for economic efficiency over communist political correctness was demonstrated in his 1971 dinner conversation with actress Shirley MacLaine. MacLaine told Deng how wonderful it was that the Cultural Revolution had sent professors to work in rural communes so they would get to know the people. Deng responded scornfully, "Professors should be teaching university classes, not planting crops."

In 1979, Deng's government took some small steps that began the transition from a centrally controlled and planned economy to a market-oriented one. One such step was agricultural reform. Until then, most farming had been done on communal plots, with individual workers having no power to decide what they would produce, and not allowed to sell their individual output. Workers felt little motivation to do more than the minimum, and productivity was low. Caryl cites a study that concluded that after collectivization it took 14 days to hoe the same piece of land that once took six.

With reform, some communes began to allow people to farm independently. The new system, called "household responsibility," provided market incentives. Although people did not own the land they worked, they had considerable authority to determine what they produced and to sell the output. The transitional steps were initiated at the local level. Deng and his central government allowed them to take effect, and by commending the success of local experiments, encouraged others to follow. By 1983, more than 90 percent of farming was done under "household responsibility," and China was well beyond problems of starvation. The increase in productivity was explained by the saying, "Energetic as dragons on the private plot, sluggish as worms on the public fields."

The increased efficiency of agriculture freed workers in rural areas, and the government allowed the creation of so-called "town and village enterprises" to produce and sell consumer goods. Although publicly owned, these enterprises were permitted to operate largely free of government control.

In 1979, Deng's government began the creation of Special Economic Zones in which foreign investors would be allowed to establish businesses. The first zone was created in Guangdong Provence bordering Hong Kong. Out of deference to the followers of Mao, who were still a powerful force, the zones were segregated from the society at large. Businesses in the zones contributed to the economy and created opportunities for Chinese people to learn from foreign investors and managers how to compete in the global economy. In subsequent years, the Chinese economy evolved into one in which most goods are produced by privately owned firms and sold at prices determined by the market.

The results of the transition to a market-based economy have been astounding. For more than three decades, China's economy has grown by 8 to 9 percent per year and is now on the verge of becoming the world's largest. Hundreds of millions people have been lifted out of poverty.

Caryl believes that the triumph of market principles was also greatly furthered by Margaret Thatcher's reforms, as well as the political and economic philosophy she advanced in support of these reforms. When Thatcher became British prime minister in 1979, she was faced with the breakdown of the economic system that had been put in place in the years following World War II. In 1945, with broad public support, the Labor Party had established programs to

move Britain from a market-based economy to a far-reaching welfare state. By the mid-1970s, about 20 percent of the economy was nationalized, including coal, railroads, natural gas, and telecommunications, and nearly one-third of Britons who had jobs worked in the public sector. A cradle-to-grave welfare system was established, including a national health system. The emphasis in government budget policy was to promote full employment by government spending, regardless of the inflation that might result. Unions were all-powerful in obtaining wage increases. Although these policies were put in place by the Labor Party, they were supported by the Conservative Party in what came to be known as a "postwar consensus."

In the 1970s, the British economy, operating under the policies of the postwar consensus, was not doing well. Output was falling relative to that of France and Germany. Inflation was rampant, reaching 25 percent in 1974. In 1976, to avoid a meltdown, Britain received a $3.9 billion loan from the International Monetary Fund—the first time that a developed country had asked for an IMF loan. In 1978, the country was paralyzed and demoralized by the so-called Winter of Discontent. There was massive labor unrest, including strikes by garbage men, gravediggers, bakers, and truck drivers.

In 1979, Margaret Thatcher led the Conservatives to victory, pledging to return to an economy based on private entrepreneurship and competition. She relied not only on arguments of economic efficiency, but also on moral arguments (which Caryl attributes to her strict Methodist upbringing) that a competitive free-market economy promotes individual responsibility and the primacy of personal choice. Thatcher objected to political consensus as an end in itself. She believed it more essential for her party to have "a philosophy and policy which because they are good appeal to sufficient people to secure a majority." Thatcher's views were not universal in the Conservative Party, and on many occasions, she was in the minority in her own cabinet.

Thatcher's 1979 campaign relied more on general concepts of reducing the role of government and the power of unions than on specific proposals. Her policies during her eight years in office included privatization of some nationalized industries, substantial cuts in spending, combating inflation by limiting the expansion of the money supply, and curbing union power by successfully standing up to the miners union in the long and bitter strike of 1984-1985. Nevertheless, she was not a libertarian and did not try to totally destroy the national health system or other parts of the welfare state. After Thatcher left office, something of a new consensus developed, and the Labor Party under Tony Blair did not try to reverse her decisions to end government ownership of major industries.

In his discussion of the origins of the growth of politicized religion, Caryl focuses on two events in 1979: the revolution in Iran that replaced the Westernized regime of Shah Reza Pahlavi with an Islamic state controlled by Islamic clergy, and the Soviet Union's decision to intervene to protect a communist government in Afghanistan. Successful resistance to the Soviets led to a government in Afghanistan that ruled by Islamic law and supported groups engaged in terrorism against the West.

The overthrow of the Shah by a movement inspired by religion came as a great shock to the West. It had been generally believed that the Shah's government was a great success economically, and that he had suppressed the only credible threat—the one posed by communist opposition. There was little concern that the Shah's regime was threatened by Ayatollah Khomeini, an other-worldly cleric and religious scholar who had spent years in exile in Iraq and France, living "a life of ostentatious simplicity, more akin to a medieval mystic than a 1970s activist."

Under the Shah, Iran's economy had achieved a growth rate of more than 10 percent a year from the mid-1960s to the mid-1970s. Caryl describes Iran in the mid-1970s as "an industrial powerhouse" that was developing an expanding middle class and a strong university system. But Iran's rapid industrialization was accompanied by economic dislocations, including hardships for peasants and traditional artisans and merchants. A large number of university graduates were unemployed.

Of critical importance for the future course of opposition, the discontent with the Shah was focused as much on cultural and religious matters as on economic issues. Many Iranians were disturbed by the adoption of Western ways, such as "[r]eforms [that] encouraged women to study, to work, and to scorn the veil." There was distaste for American clothes and films, garish billboards, and cinema posters that displayed the limbs of Western movie actresses. People were offended when the Shah held an over-the-top celebration of the 2,500-year anniversary of the Persian monarchy; it was deemed the jet-set event of the century and included a six-hour feast catered by Maxim's of Paris. In addition, there was resentment of the Shah's closeness to the United States and his desire for good relations with Israel.

The widespread resentment against Westernization created considerable support for a revolution to restore Islamic principles and to return to traditional ways. Khomeini was able to gain control of the revolution against the Shah by promising a return to Islamic culture. He believed that clergy who would follow principles established in the Quran should run government. He opposed allowing women to vote. He shrewdly capitalized on anti-American sentiment by taking control of the student occupation of the American embassy and becoming the public face of resistance to America in the year-long fight to free the hostages. Khomeini's philosophy of government was that religion and politics are not separate, and that governments should be controlled by persons learned in Islamic law. He never described with any specificity the policies he would follow. He believed that, once the proper persons were in charge, God and the Quran would provide the answers. After the Shah's overthrow, Khomeini succeeded in overcoming more moderate and secular elements and establishing a government structure over which he and members of the clergy had complete control.

In the years since 1979, governments controlled by Khomeini and his clerical successors have followed a mixture of policies, not all of which were religiously dictated, including allowing women to vote, and continuing literacy and other modernization programs that the Shah had begun. Caryl believes that Khomeini's historical significance will not lie in the policies he implemented, but in his success in "returning Islam to the forefront of the global political stage. ... The most potent legacy of the Islamic Revolution in Iran was simply to show that it could be done."

The other major event in 1979 promoting the development of Islamism occurred in Afghanistan, where the Soviet Union intervened militarily to protect the communist government. This began a 10-year

war in which a substantial part of the resistance against the Soviets came from Islamic groups that were inspired by the teachings of Khomeini and his success in overthrowing a government supported by a Western superpower. These Islamic groups' success in driving the Soviets from Afghanistan inspired others, and, by the late 20th century, Afghanistan was controlled by the fundamentalist Taliban and became a center for the growth of Al Qaeda and other groups supporting worldwide terrorism.

The final 1979 event that Caryl covers is the visit of Pope John Paul II to Poland. In 1978, Cardinal Karol Wojtyla, the archbishop of Kraków, was elected pope, taking the name John Paul II. He was the first non-Italian pope in more than 400 years. He had an extraordinary background. An athlete and a poet, he spoke a dozen languages and had doctorates in theology and philosophy. He had taken great personal risks in aiding resistance to the Nazis and the communist occupiers of Poland.

Since World War II, Poland had been under communist rule as a satellite of the Soviet Union, which had little tolerance for the Catholic Church and other organized religion. Under its Marxist–Leninist ideology, religion was a relic of the past, designed to exploit the working class. Religion would be replaced by "scientific" theories of economic determinism.

The communist governments in the Soviet world made strong efforts to discourage religion through propaganda and through persecution of the clergy. In Poland, these efforts were unsuccessful, and Caryl reports that a 1975 survey showed that 77 percent of Poles participated regularly in religious activities. The future pope was a leader in the church's resistance to government suppression.

In 1979, John Paul II was invited to Poland for ceremonies commemorating the 900th anniversary of the martyrdom of Poland's greatest saint, Saint Stanislaw, who had been put to death for resisting the king. The Communist government reluctantly allowed John Paul II to accept, but it tried to downplay the pope's appearances in a number of ways, including directing TV cameramen not to show the crowds and to focus only on old people in attendance. Nevertheless, millions attended the pope's masses in Poland.

In his addresses, the pope did not openly call for supporters to oppose the government. But his messages pointed Poles in that direction, by supporting values that were contrary to those of the communist government. John Paul II emphasized the primacy of religion and human rights, and the importance of giving people the freedom to practice their religion. He also urged that efforts to gain rights and freedoms be nonviolent.

Caryl credits John Paul's public addresses, beginning in 1979, as a substantial factor in motivating Solidarity and the other resistance movements that achieved their goal when the Soviets withdrew from Eastern Europe in 1989. But Caryl recognizes that religiously motivated opposition was not the only cause of their success, and that the Soviet Union's economic collapse may have been a more important factor.

Caryl finds another relationship between John Paul's 1979 visit to Poland and the ouster of the communist government in 1989. In the 1979 visit, it was not the Polish government but individual volunteers who bore most of the responsibility for organizing logistics and security for crowds of up to a million. For the first time since the communist takeover, the Poles came together and acted as a people, separate from their communist government. Caryl asserts convincingly that the success of these efforts gave the Polish population the confidence it needed to organize and to manage subsequent campaigns against their totalitarian government.

Caryl's biographies of the four leaders at the center of his book pay tribute to their strong characters and considerable political skills. All four took great risks in opposing the prevailing wisdom. Khomeini, Deng, and John Paul II risked their personal safety by opposing policies of regimes that were ready to imprison and kill opponents. All four showed great leadership and political skills by carrying out important reforms, while avoiding extremes that could have resulted in a fall from power, or worse.

Strange Rebels is a rich mix of general history and biographies of leaders who set the stage for the world of the 21st century. ⊙

David Heymsfeld retired from the federal service in 2011 after a long career that included service as staff director of the House Committee on Transportation and Infrastructure. He is now a policy advisor to nonprofit organizations.

THE BASEBALL TRUST: A HISTORY OF BASEBALL'S ANTITRUST EXEMPTION

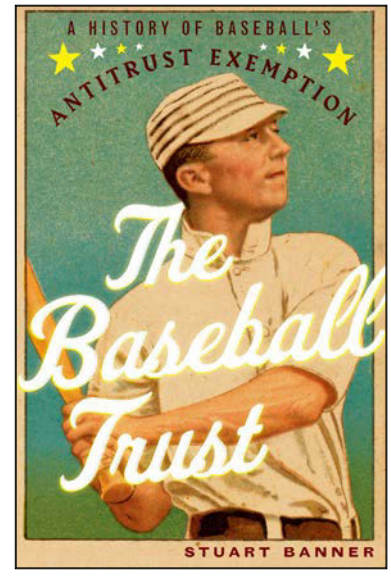
BY STUART BANNER

Oxford University Press, New York, NY, 2013. 283 pages, $29.95.

Reviewed by Jon M. Sands

Clutch hitting is a key part of winning baseball—the walk-off home run or the go-ahead hit in the late innings. The notion that some hitters are especially good in the clutch is a fallacy, say the statisticians who analyze the game. On average, a hitter will be no more, and no less, successful in the clutch than at other times. Maybe the number crunchers are right. Yet, trailing in the bottom of the 9th, who would not want Casey in the batter's box (even if he struck out once)?

Organized baseball in the courts, especially facing antitrust litigation, seems to be that clutch hitter, winning cases when the odds are long against it. Why is that? Stuart Banner fills in the scorecard in *The Baseball Trust: A History of Baseball's Antitrust Exemption*. Baseball is the only sport exempt from the Sherman Antitrust Act, its exemption explained or justified by its unique place in American culture. Baseball supposedly must stand apart from the rules and regulations of other commercial, or even sports, enterprises. But this is a myth, explains Banner. In fact, he shows, baseball's unique cultural status as America's pastime has little to do with how it secured its anomalous place in antitrust law. It is exempted not because



it is exceptional, but because of the fortuity that its key cases were decided at just the right times. When baseball has come to bat, it has been lucky in whom the umpires (justices) were, and, up at the plate, it has had the best legal talent it could buy. Things changed, however, when Marvin Miller, the union strategist, became head of the players' union.

Banner concentrates on three cases: *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922); *Toolson v. New York Yankees*, 346 U.S. 356 (1953); and *Flood v. Kuhn*, 407 U.S. 258 (1972). He compares baseball with other professional sports, notably football and basketball, and he ends the book with how collective bargaining has supplanted antitrust as the regulatory framework. The three cases that reached the Supreme Court all involved the reserve clause. This clause contractually bound a player for life with a team by enabling the team to keep him under contract each succeeding year. The Sherman Antitrust Act in 1890 forbid collective action, or acting in concert, if it affected interstate commerce. Having reserve clauses was collective concerted action. Admittedly, sports do present some unique antitrust issues. A league needs rules, schedules, and some control over its teams—you don't want players to be able to switch sides in the middle of a game. If the teams are not competitive, then the public will lose interest and the league will fold. The owners, however, wanted more. They wanted absolute control over their employees—the players—and so imposed the insidious reserve clause, which bound each player to the team for life. The problem was not so much the actual words of the contract, which were interpreted as allowing the contract to continue for an additional year and to be perpetually renewed by the owner. After all, a renewal to which a player did not agree would not constitute a contract. The problem was that all the owners abided by it. No owner would sign a player under another's reserve clause. They acted in concert.

The first challenges were to the reserve clause as creating adhesion contracts. Despite legal misgivings by scholars in the crowd, baseball won because it out-lawyered the plaintiffs. Challenges then turned to antitrust. At the turn of the 20th century, as baseball became more popular and more profitable, players sought higher pay, and new leagues sought to get in on the game. Baseball managed to dodge more than a few cases by settlements, but it faced its biggest test with a rival, the Federal League. When a Federal League team filed an antitrust suit challenging the reserve clause, baseball's legal team feared that it could be playing in a hostile legal field. Yet, in 1922, in *Federal Baseball Club*, the Supreme Court held that baseball was not governed by the Sherman Antitrust Act because it was not a form of interstate commerce. Justice Oliver Wendell Holmes Jr., who wrote the unanimous opinion, knew nothing of sports and could not have cared less. The decision, though, had little to do with balls, strikes, or outs; it was not a paean to peanuts, Cracker Jacks, and Abner Doubleday. Baseball won because of the state of Commerce Clause jurisprudence at the time. Banner points out that ticket sales provided the bulk of the revenue for baseball, and the focus was on the local team selling seats to the home crowd. It was a myopic ruling (was the ump blind?). As the only successful professional sport at the time, baseball benefitted from leading off and getting to the Court first. If the case had come up in the late 1930s, the Court would clearly have found baseball to be interstate commerce. Timing was everything.

Baseball's antitrust exemption was no doubt helped by the relative rarity of sports cases. As the seasons rolled by, leagues and players would rather play than litigate. With the expanded interpretation of the Commerce Clause, lower courts expressed skepticism as to baseball's antitrust exemption, but they felt obliged to say that the Supreme Court had created one. The next major challenge, by a player this time, came in *Toolson*, in which the plaintiff argued that the reserve clause was anticompetitive. Baseball owners argued that the Court had indeed crafted an antitrust exemption in *Federal Baseball Club*, and that they had relied upon the precedent in fashioning their sport and leagues. For the Court to rule that there was no exemption would create chaos and expose owners to crippling retroactive treble damages. The Court, in deciding for baseball, acknowledged that *Federal Baseball Club* was bad antitrust jurisprudence, but adhered to its precedent. The Court then, to borrow a phrase from a different sport, punted. It said that Congress was aware of the Court's prior ruling and could have acted, but had not. Congress had to act, reasoned the Court, because only Congress could give solely prospective effect to the application of antitrust law and thereby spare baseball from liability.

In 1972, the Court in *Flood* asserted the same reasoning in upholding the reserve clause: Congress knew how the Court had ruled and had not acted. In addition, the Court expanded the exemption to state antitrust statutes and found that the players' union had implicitly agreed to the exemption in its collective bargaining agreements. In analyzing the decision, Banner posits that the decision was backwards looking in more ways than just the fulsome tribute to baseball history in Justice Harry Blackmun's now-ridiculed prologue. The justices were reluctant to impose retroactive liability for antitrust violations when the owners had relied upon what they considered lawful actions when implemented. The "E" for error in the Court's antitrust jurisprudence could be corrected only by Congress.

For its part, Congress was not keen to change the rules for baseball. It had stepped in for other sports, notably football, enacting limited exceptions to antitrust law, such as with respect to television and radio broadcasts of games. Members of Congress have acknowledged that they could remove baseball's exemption, and have threatened to do so at various times, most recently during the steroid hearings. It has proven to be just a threat, like a brushback pitch.

The Baseball Trust should be the definitive account of baseball's storied antitrust exemption. But it is a work of legal history and does not look much to the present and future of the business of baseball, which has moved beyond its protection from antitrust law. Most important now are the collective bargaining agreements with the players' union and the arrangements with broadcasters. Also highly relevant is the ascendency of other sports, notably football, and other forms of entertainment.

Banner convincingly shows how baseball benefitted from its lawyers' acumen and from the conservatism of the Court. The antitrust exemption was not a foregone conclusion. Lower courts and legal scholars bet against the Supreme Court's continuing the exemption. Yet, timing and the right argument, skillfully presented, can be everything. Despite the golden era of baseball, and all the "field of dreams" memories, professional baseball is foremost a business, with winners and losers on the balance sheet.

Banner is especially good at charting the rise of other professional sports, especially football, without the reserve clause. But he is less engaging as a storyteller. A better book on the impact of the antitrust exemption on players, and on the rivalries and feuds between the owners and the players' union, is Brad Snyder's history of the Curt Flood case, *A Well-Paid Slave* (which I reviewed in the August 2007 issue of *The Federal Lawyer*). Snyder's account of the complete collapse of Arthur Goldberg in his oral argument should be read by anyone who doubts that oral arguments can make a difference, and by anyone curious about Goldberg's sad professional fall. Nonetheless, Banner is interesting in his reports of future legal stars showcasing their talents. At the time of the *Toolson* case, a young staffer on a House Judiciary subcommittee, by the name of John Paul Stevens, warned that treble damages for reserve clause liability would cause the game to suffer. A law clerk for Justice Jackson advised him "that baseball, like other sports, is *sui generis*, and not suitably regulated either by a bunch of lawyers in the Justice Department or by a bunch of shyster lawyers stirring up triple damage suits." William Rehnquist perhaps then turned back to his memo on *Brown v. Board of Education*. Of the short portraits in *The Baseball Trust*, the most engaging is of a non-lawyer who had the most legally significant role in ending the reserve clause: Marvin Miller, the executive director of the players' union, who negotiated the terms of free agency. One is left with a sense of injustice in his having been spurned by the Baseball Hall of Fame, as he (who died in 2012 at age 95) was among the most deserving. ⊙

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ON THE SUPREME COURT: WITHOUT ILLUSION OR IDOLATRY

BY LOUIS FISHER

Paradigm Publishers, Boulder, CO, 2014. 242 pages, $127.50 (cloth), $24.61 (paper).

Reviewed by Charles S. Doskow

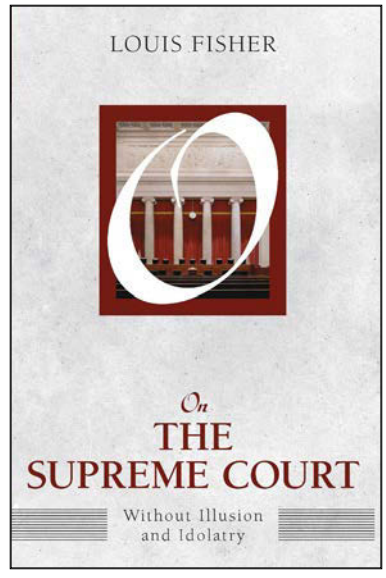
The Constitution is very much in the news these days. The Supreme Court's recent rulings, particularly in the areas of health insurance, campaign finance, and voting rights, have made the Court a major player in the political arena.

Despite the political nature of many of its rulings, the Court remains the most respected of the three branches of government. Even when it was striking down popular New Deal legislation, the specter of an attack on its independence, in the form of President Franklin Roosevelt's court-packing plan, brought forth sufficient public support to make the plan politically unfeasible.

Louis Fisher, now retired, spent four decades at the Library of Congress researching constitutional issues for Congress, specializing in the area of separation of powers. After publishing more than 20 books and 470 articles, Fisher has now compressed his views of the Supreme Court in this short volume, which is intended to explain the Court, warts and all, to the lay public. He makes no claim to finding doctrine in the Court's decisions. His analysis is historical and analytical, and his viewpoint is that of a critical scholar somewhat disappointed in his subject.

Fisher believes that the public needs to be disabused of its idiolatry of the Court. He wishes it to recognize that the Court does not always have the final say, and has decided many major cases incorrectly.

In *Marbury v. Madison*, Chief Justice John Marshall wrote, "It is emphatically the province and duty of the judicial department to say what the law is." Fisher points out that "Courts decide the law" would say the same thing in fewer words, and would reveal that "the sentence is obvious, even trite. That is why courts are created. Nothing in the sentence says anything about judicial supremacy."



In fact, Fisher argues that the Court, influential as it is, does not always have the final word on the meaning of the Constitution. In answer to Justice Robert Jackson's famous dictum, "We are not final because we are infallible, but we are infallible only because we are final," Fisher characterizes the Court as "neither infallible nor final."

It is not final in multiple respects. For one, Congress has the power to overrule the Court's decisions that turn on statutory interpretation. That is, of course, a function of the separation of powers. Congress also has the power under the Constitution, rarely used, to deprive the Court (in fact, the entire federal judiciary) of entire areas of jurisdiction, although most such congressional efforts have gone nowhere.

Fisher discusses other instances of the Court's non-finality. One is the Court's inability to require the elected branches to follow its judgments; Andrew Jackson is famously reputed to have said, "John Marshall has made his decision; now let him enforce it!" Another example of its non-finality is that a decision by the Court that a government practice is constitutional does not prevent Congress, the President, or the states from abolishing the practice. States may do so by interpreting their own constitutions to prohibit the practice, or by enacting legislation to prohibit it.

A third example is that the Court often announces only broad guidelines, such as "undue burden" or "compelling governmental interest," and leaves their application to elected officials and jurors. For example, the Supreme Court says that a publication is obscene if it appeals to the prurient interest, but jurors have the last word in deciding whether particular publications are obscene, so they give meaning to the concept.

Fourth, "through threshold doctrines (standing, ripeness, mootness, etc.), the Court often sidesteps a constitutional issue and leaves it to the regular political process."

Fisher concedes, however, that the Court "should be judged on the basis of its performance and respect for self-government, not on some abstract theory of judicial finality." So, what about its performance? Fisher

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characterizes the Court's major errors as "self-inflicted wounds." He is at his most interesting in the two chapters in which he describes cases containing errors—one chapter on decisions prior to World War II, and another on later ones. The first chapter lists 17 such cases, the second nine, for a total of 26. That doesn't seem excessive for a period of 224 years. But all 26 are big ones, in one way or another.

Many have been corrected: *Dred Scott*, corrected by the Civil War amendments; *Plessy v. Ferguson*, corrected by *Brown v. Board of Education; Bradwell v. Illinois*, denying women the right to become lawyers, corrected by the passage of time. But the list includes some that remain icons, including *McCulloch v. Maryland*, which Fisher accuses of asserting illusory finality.

As for post-World War II judicial disasters, Fisher starts with *United States v. Reynolds*, a 1953 case in which the Court first recognized the state secrets privilege in its full scope. In a negligence suit brought under the Federal Tort Claims Act, the Court allowed the government not to release an accident report on a B-29 crash because the government claimed that it was a state secret. In 2000, the report was declassified. It contained no state secrets, but it did reveal government negligence. Fisher calls it a "fraud against the Court."

Fisher also criticizes *Roe v. Wade*, because of its "untenable framework." He quotes comments of Ruth Bader Ginsburg (to whom he dedicates the book), made while she was serving on the D.C. Circuit before her elevation to the Supreme Court, that *Roe* became a "storm center" and "sparked public opposition and academic criticism," in part "because the Court went too far in the change it ordered changed and presented an incomplete justification for its action." Fisher clearly believes this to be a lesson to be learned.

Other judicial failings, according to Fisher, occurred in *INS v. Chadha*, invalidating legislative vetoes; *Bush v. Gore* (of course); and the campaign finance cases of *Buckley v. Valeo* and *Citizens United*. But Fisher gives precious little credit to the Court for its most forward-looking landmark decisions, such as *Brown v. Board of Education*, which he criticizes for its lack of enforcement; *Lawrence v. Texas*, which held criminalizing homosexual conduct unconstitutional; and the cases upholding the Civil Rights Act of 1964 and the Voting Rights Act of 1965. He never mentions *Plyler v. Doe*, in which the Court held that illegal immigrants are "persons" under the Equal Protection Clause, and therefore the state may not deprive their children of a public education. It was perhaps the most significant victory for equality and minority rights in the Court's history.

Unfortunately, we do not have the benefit of Fisher's comments on one of today's most pressing social issues: marriage equality and gay rights in general. The Court's decisions last year suggest that it learned from its earlier rulings not to get too far ahead of public opinion, but to move forward with public opinion, a step at a time.

Fisher's discussion of history in *On the Supreme Court* is good, as are his explanations of Supreme Court opinions. His writing is crystal clear, and the book is an excellent primer. It is good to have a short text that looks at the Supreme Court "without illusion or idolatry." ⊙

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ADDITIONAL BOOK REVIEWS

In addition to the book reviews in the paper copy of this issue of *The Federal Lawyer*, bonus reviews are included in the online version of the magazine. The following reviews are available at www.fedbar.org/magazine. ⊙

BURNING THE REICHSTAG: AN INVESTIGATION INTO THE THIRD REICH'S ENDURING MYSTERY

BY BENJAMIN CARTER HETT

Reviewed by Christopher C. Faille

FLASH BOYS: A WALL STREET REVOLT

BY MICHAEL LEWIS

Reviewed by Christopher C. Faille

SPYING ON DEMOCRACY: GOVERNMENT SURVEILLANCE, CORPORATE POWER, AND PUBLIC RESISTANCE

BY HEIDI BOGHOSIAN

Reviewed by David Gespass

WINDFALL: THE BOOMING BUSINESS OF GLOBAL WARMING

BY McKENZIE FUNK

Reviewed by Christopher C. Faille