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# The Creation of a Usable Judicial Past: Max Lerner, Class Conflict, and the Propagation of Judicial Titans

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## COMMENTARY

# THE CREATION OF A USABLE JUDICIAL PAST: MAX LERNER, CLASS CONFLICT, AND THE PROPAGATION OF JUDICIAL TITANS

SARAH BARRINGER GORDON\*

### INTRODUCTION

“Judicial titans” are made, not born. What’s more, they are made in the interest and the reflection of their admirers. The biographer’s art, as Laura Kalman points out in her Commentary, often shades perilously close to autobiography.<sup>1</sup> Biographers, especially judicial biographers, traditionally tell success stories, harnessing themselves to the power wielded by elite men.<sup>2</sup> The relationship is one of extreme delicacy, blending often as not elements of control, rejection, and manipulation with those of distance, admiration, and acceptance.<sup>3</sup>

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<sup>1</sup> See Laura Kalman, *The Wonder of the Warren Court*, 70 *N.Y.U. L. Rev.* 780, 781 n.9 (1995).

<sup>2</sup> For a sampling of the proliferation of recent perceptive analyses and critiques of biography, see Ulick O’Connor, *Biographers and the Art of Biography* (1993) (discussing creativity of many biographers and arguing biography is truly an art form); Blanche W. Cook, *Biographer and Subject: A Critical Connection*, in *Between Women* 397, 409 (Carol Ascher et al. eds., 1984) (describing her own approach to writing biographies as “aim[ing] to understand, to feel profoundly, to absorb the flavors as far as possible and to learn from [her] subjects”); Eric Hoberger & John Charmley, Introduction to *The Troubled Face of Biography* at ix (Eric Hoberger & John Charmley eds., 1988) (describing writers of biographies as having “personal motives” including wanting to tell interesting stories or reinterpret subject’s life); Janet Malcolm, *Annals of Biography: The Silent Woman—I*, *New Yorker*, Aug. 23, 1993, at 84, 86 (“The voyeurism and busybodyism that impel writers and readers of biography alike are obscured by an apparatus of scholarship designed to give the enterprise an appearance of banklike blandness and solidity. . . . The transgressive nature of biography is rarely acknowledged, but it is the only explanation for biography’s status as a popular genre.”).

<sup>3</sup> See Victoria Glendinning, *Lies and Silences*, in *The Troubled Face of Biography*, supra note 2, at 49, 54 (describing biographers’ tendency to “get uniquely close to a per-

Biographers of Holmes and Brandeis created judicial titans in the 1930s, as Professor White details in his article.<sup>4</sup> As a scholar who has devoted his professional career to biography of elite legal figures, especially Supreme Court Justices,<sup>5</sup> White has good reason to know the potential, and the pitfalls, of biography. In this article on the reputations of Holmes and Brandeis, White has gone one step further, attempting the biography of biographers. As White makes clear in his evaluation of the quality of their work, this is a group with whose conclusions he often disagrees,<sup>6</sup> and at the same time he is convinced he has understood and compartmentalized their motive and *modus operandi*. The results are mixed. White's research into treatments of Holmes and Brandeis in traditional legal literature is impressive. As a narrative historian, White is just about the best there is working on Supreme Court biography. His analysis of the lives and strategies of those who produced the reputations of Holmes and Brandeis, I argue, is less well-grounded.

To probe the usefulness of the polysyllabic "epistemological modernism" label that White applies to the admirers of Holmes and Brandeis,<sup>7</sup> this Commentary tests his theory against the work of Max Lerner, one of the early lionizers whose books and articles helped cre-

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son" yet "struggle to preserve detachment"); Virginia Woolf, *The Art of Biography*, in *The Death of the Moth and Other Essays* 187 (1942) (describing biography as craft and art subject to factual limitations but open to creativity and imagination).

<sup>4</sup> See G. Edward White, *The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations*, 70 *N.Y.U. L. Rev.* 576 (1995).

<sup>5</sup> For a sampling of his extensive work, see, e.g., G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (1993) [hereinafter White, *Justice Oliver Wendell Holmes*]; G. Edward White, *Earl Warren: A Public Life* (1982); G. Edward White, *The Anti-Judge: William O. Douglas and the Ambiguities of Individuality*, 74 *Va. L. Rev.* 17 (1988); G. Edward White, *Chief Justice Marshall, Justice Holmes, and the Discourse of Constitutional Adjudication*, 30 *Wm. & Mary L. Rev.* 131 (1988). As White himself has described his work, he is not "troubled" by the "elitist character of academic life and of life in general." G. Edward White, *Intervention and Detachment: Essays in Legal History and Jurisprudence* 11 (1994) [hereinafter White, *Intervention and Detachment*].

<sup>6</sup> As White puts it, "the commentators were often simply wrong in their assessments of Holmes and Brandeis." White, *supra* note 4, at 578. A more concrete example of White's disagreement with Max Lerner is found in White's own work on Holmes, which directly challenges Lerner's conclusion that Holmes was virtually without ambition. For instance, while Lerner argued that "[w]hat disappoints many about Holmes is the absence of passion and of a feeling of dedication, the lack of the pattern of torture and complexity such as . . . [recent] generations . . . have come to expect of the modern hero," Max Lerner, *The Great Ganglion That Was Holmes*, in *Nine Scorpions in a Bottle: Great Judges and Cases of the Supreme Court* 109, 124 (Richard Cummings ed., 1994) [hereinafter *Nine Scorpions in a Bottle*], White concludes that the essence of Holmes was his drive, his thirst for success and recognition. White, *Justice Oliver Wendell Holmes*, *supra* note 5, at 476 (characterizing Holmes above all by "vast and driving ambition").

<sup>7</sup> White, *supra* note 4, at 579 n.11.

ate the reputations of the judicial titans. I conclude that, at least as currently constructed, White's modernism label does not reflect the nuances of liberal legal thought in the 1930s.<sup>8</sup>

## I

### LERNER, CAPITALISM, AND THE SCIENCE OF CLASS CONFLICT

Shortly before he died, Max Lerner reflected on six decades of commentary on the Supreme Court. What struck the octogenarian Lerner as he reread and collected his essays was not modernist epistemology, but the warlike tone of his commentary.<sup>9</sup> From the moment his first law review article, "The Social Thought of Mr. Justice

<sup>8</sup> Professor White rightly acknowledges that his theory is one that simplifies (even "radically oversimplif[ies]") the very epistemological categories he posits. *Id.* The question thus becomes at what level simplification becomes more obfuscatory than illuminative. Historians continually engage in disputes about whether a given time or place is best analyzed as a cohesive whole or as fragmented parts. Those who tend toward the whole are called "lumpers," while those who argue for particularity are called "splitters." One way to conceive of my argument in this Commentary is to point out that Professor White has lumped Holmes, Brandeis, and their admirers into a single category, while I am convinced that a more differentiated, "split" approach gives us more insight into the propagation of judicial titans of the 1930s, especially given that the very term "modern" is so overused as to have become almost meaningless, in danger of being applied to "every idea, every artifact, made since 1850." Peter Gay, *Freud, Jews, and Other Germans: Masters and Victims in Modernist Culture* 27, 26-27 (1978).

In this Commentary, I conclude that the simplified, decontextualized label "modernism" is not a particularly helpful device. This is so both because, as White correctly acknowledges, he has constructed a category that as a matter of history is "overbroad," White, *supra* note 4, at 579 n.11, but also because "modernism" is a term generally associated with the arts—literary, visual, and so on—rather than with the less bohemian enterprise of legal analysis. The "modern" artist has typically rejected the "scientism" White ascribes to modernism as shallow, naive, positivistic, and empty. David A. Hollinger, *The Knower and the Artificer*, in *Modernist Culture in America* 47 (David J. Singal ed., 1991). If the modernist label (epistemological or otherwise) is to be a useful one, therefore, it must be more precisely tailored to fit both those it purports to describe, and to take account of the many modernists who outright rejected the empiricism and rationality that White argues defines the modernism of our two judicial titans and their early admirers. For a recent alternative characterization of many of the same epistemological phenomena in legal thought as essentially "progressive," see generally Herbert Hovenkamp, *The Course of Progressive Legal Thought* 1 (unpublished manuscript) (on file with author) (characterizing "liberal intellectuals" who "dominated the New Deal" as part of long period of progressive legal thought running from turn of century to 1960). For a critique of the historiography of progressivism that elegantly captures the difficulties facing any historian who attempts to cabin the essence of any historical period, see Daniel T. Rodgers, *In Search of Progressivism*, *Rev. Am. Hist.*, Dec. 1982, at 113.

<sup>9</sup> See, e.g., Max Lerner, *Preface to Nine Scorpions in a Bottle*, *supra* note 6, at 3, 3 [hereinafter Lerner, *Preface*] ("The metaphors in this . . . batch of essays are unreservedly warlike."). The title of Lerner's book, a reference to the nine Justices of the Supreme Court, conveys Lerner's sense that the process of judicial decisionmaking is not characterized by peace and amity among judges. See also Max Lerner, *Ideas Are Weapons* (1939). This sense of combat, and of combativeness, was not unique to Lerner. See, e.g., William E. Leuchtenburg, *The New Deal and the Analogue of War*, in *Change and Continuity in*

Brandeis,” appeared in the *Yale Law Journal* in 1931,<sup>10</sup> Lerner was caught up in battles—constitutional interpretation, judicial review, economic analysis, and democratic theory, just to name a few. His second article, “The Supreme Court and American Capitalism,”<sup>11</sup> charged the Court with being the partner-in-crime of robber barons. Judicial review and capitalist business enterprise, Lerner argued, were part of “an aggressive and cohesive cultural pattern,” which strove “to drive a wedge of constitutional uniformity through heterogeneous sectional and economic groupings.”<sup>12</sup> Given the intimate relationship between the Supreme Court and capitalism, “it is no historical accident but a matter of cultural logic that a Field should grow where a Morgan does; and a Brandeis is none the less organic a product of capitalist society than is a Debs.”<sup>13</sup> Lerner left no doubt about which pair he thought was conducive to exploitation, and which was conducive to what he often called “democratic collectivism.” These were the issues Lerner cared about passionately, that he devoted a long career in journalism and academics to analyzing and elucidating, and in which he gloried.

Lerner was one of the most prolific and influential of the publicists whose admiration (even adulation) galvanized the reputations of Holmes and Brandeis in the 1930s. Editor, writer, economist, political scientist, one-time Yale law student, and passionate supporter of lib-

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Twentieth-Century America 81 (John Braeman et al. eds., 1964) (describing uses of analogies to combat in New Deal rhetoric).

Lerner was well known among liberals in the 1930s and 1940s, and to generations of New Yorkers through his columns in the *New York Post*. At his death in 1992, Lerner was the author of ten books, dozens of articles, and many hundreds of newspaper columns. Although an admirer recently claimed that “the wrath of Max Lerner reads like that of the Old Testament God of Noah’s flood,” Richard Cummings, Introduction to *Nine Scorpions in a Bottle*, supra note 6, at xv, xvii, Lerner was often more sound than fury. On my reading of most of his articles and several of his books, Lerner’s observations were certainly keen—his ability to draw connections between different phenomena in American society was impressive, for example—but his scope was limited. As one reviewer put it, “Mr. Lerner endows the posing of his question with more audacity than he does his quest for the answers.” C.R. Walker, 163 *Atlantic Monthly* 904, 904 (1939) (reviewing Max Lerner, *It Is Later than You Think: The Need for a Militant Democracy* (1938)). Lerner’s skill was more journalistic than analytical, as he ranged across topics and over decades with astonishing breadth but far less depth. See Granville Hicks, *The PM Mind*, *New Republic*, Apr. 16, 1945, at 514, 516 (reviewing Max Lerner, *Public Journal: Marginal Notes on War-time America* (1945)) (“[Lerner] does not speak freely [about troublesome issues] and, what is more, he does not probe deeply.”). A definitive assessment of Lerner’s contributions would require systematic review of the entire body of his work (Lerner’s papers are deposited at Sterling Memorial Library, Yale University, some 105 cubic feet of material), and is beyond the scope of this Commentary.

<sup>10</sup> Max Lerner, *The Social Thought of Mr. Justice Brandeis*, 41 *Yale L.J.* 1 (1931).

<sup>11</sup> Max Lerner, *The Supreme Court and American Capitalism*, 42 *Yale L.J.* 668 (1933).

<sup>12</sup> *Id.* at 668.

<sup>13</sup> *Id.*



eral causes in his youth, Max Lerner was a Russian Jewish immigrant,<sup>14</sup> his career a success story that is no less remarkable for a trajectory that was shared with other Jews of Eastern European origin in the first half of the twentieth century.<sup>15</sup>

Lerner's edited collection of Holmes's writings, his articles on Holmes and Brandeis in the *Nation* and the *New Republic*, as well as in law journals, swelled the tide of popular support for the two Justices.<sup>16</sup> Holmes and Brandeis, thanks in part to Lerner, became cultural icons of no mean order. So revered, so powerful, so lasting is the image of the two aged men of the law that threescore years after their deaths, legal scholars remain preoccupied with their jurisprudence, their public and private lives, and their continuing influence on American legal ideology. How (and why) did two long-lived Justices become heroes to a generation of upstarts like Lerner?

## II

### LIBERALISM AND THE MANIPULATION OF THE PAST

The phenomenal success of the publicity campaign ("canonization," Professor White calls it) was deeply, problematically related to New Deal liberalism and the constitutional revolution that transformed legal thought and federal power and that still governs much of constitutional interpretation today.<sup>17</sup> It was in the 1930s that the rep-

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<sup>14</sup> Richard Severo, Max Lerner, Writer, 89, Is Dead; Humanist on Political Barricades, *N.Y. Times*, June 6, 1992, at 11.

<sup>15</sup> On Lerner's career, see generally George W. Bain, *Liberal Teacher: The Writings of Max Lerner, 1925-1965* (1975) (unpublished Ph.D. dissertation, University of Minnesota). On the role of Jewish immigrants, see generally David A. Hollinger, *In the American Province: Studies in the History and Historiography of Ideas* (1985). Especially useful is chapter four: Ethnic Diversity, Cosmopolitanism, and the Emergence of the American Liberal Intelligentsia. *Id.* at 56-73 (examining role cosmopolitan ideal played in integration of Jewish people into American intellectualism during first half of twentieth century).

<sup>16</sup> Included among the list of Lerner's works on Holmes and Brandeis are: *The Mind and Faith of Justice Holmes: His Speeches, Essays, Letters, and Judicial Opinions* at vii (Max Lerner ed., 1943) [hereinafter *Mind and Faith of Justice Holmes*] (describing Holmes as "one who was perhaps the most complete personality in the history of American thought"); Lerner, *supra* note 6, at 109 (applying to Holmes the Justice's own epigram: "A great man represents a great ganglion in the nerves of society"); Lerner, *supra* note 10, at 1 (complimenting Brandeis's understanding in his opinions of realities of social change and vested interests and ideas); Max Lerner, *Homage to Brandeis*, *Nation*, Feb. 25, 1939, at 222 [hereinafter *Lerner, Homage to Brandeis*] (praising pragmatism and activism of Brandeis's jurisprudence); Max Lerner, *Justice Holmes: Flowering and Defeat*, *Nation*, June 10, 1936, at 746 (mourning movement of Supreme Court away from preindustrial aristocratic tradition represented by Holmes); cf. Brandeis at Eighty, *Nation*, Nov. 14, 1936, at 565 (unsigned editorial) (defending continued intellectual vitality of Justice Brandeis).

<sup>17</sup> On the revolution in constitutional doctrine during the first half of the twentieth century, see generally Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (1993).

utations of Holmes and Brandeis were forged. Lerner was a passionate defender of the New Deal, and of the fashioning of a judicial tradition compatible with substantial (although by no means radically redistributive) economic intervention.<sup>18</sup> He and other commentators argued (sometimes misleadingly) that the great constitutional questions of the day—the validity of congressional economic oversight and the corresponding duty of the federal judiciary to respect the democratic restructuring of the national economy in the interest of greater economic equality—had been addressed and analyzed by the two wise old men of the Supreme Court.

Although there have been peaks and valleys in the relative amounts of attention paid to the two titans, the impression of their importance to American jurisprudence created in the 1930s has remained constant in succeeding decades. Brandeis was tarnished only slightly by the revelation that he had paid Frankfurter to lobby for political causes;<sup>19</sup> the revelation in 1985 of Holmes's mid-life love affair<sup>20</sup> has only added to his stature in the late twentieth century,<sup>21</sup> when marital fidelity is hardly demanded of heroes.

The phenomenon has not escaped scholarly notice, as its lifespan lengthens and its reverberations expand.<sup>22</sup> Professor White himself made a foray into the field some time ago, with an article on the “rise

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<sup>18</sup> On the abandonment by proponents of the New Deal of wide-ranging redistribution, see generally Alan Brinkley, *The End of Reform: New Deal Liberalism in Recession and War* (1995).

<sup>19</sup> See Bruce A. Murphy, *The Brandeis-Frankfurter Connection: The Secret Political Activities of Two Supreme Court Justices 40-45* (1982) (assessing effect of financial arrangement between Brandeis and Frankfurter on Brandeis's reputation). For a probing and elegant new analysis of Brandeis's career as a lawyer, see Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as Lawyer and Reformer*, 105 *Yale L.J.* (forthcoming 1996) (suggesting Brandeis's detachment and independence eroded his ability to interact productively with his own clients).

<sup>20</sup> John Monagan, *The Love Letters of Justice Holmes*, *Boston Globe*, Mar. 24, 1985, *Magazine*, at 15 (publishing for first time excerpts of Holmes's love letters to Lady Clare Castletown); see also White, *Justice Oliver Wendell Holmes*, *supra* note 5, at 230-50 (using Holmes-Castletown correspondence to trace relationship).

<sup>21</sup> See G. Edward White, *Holmes's "Life Plan": Confronting Ambition, Passion, and Powerlessness*, 65 *N.Y.U. L. Rev.* 1409, 1442 (1990) (interpreting Holmes-Castletown relationship as part of Holmes's “conscious attempt to experience passion and feeling with a woman on terms compatible with the rest of his life plan”).

<sup>22</sup> See, e.g., Robert W. Gordon, *Introduction: Holmes's Shadows*, in *The Legacy of Oliver Wendell Holmes, Jr.* 1, 4 (Robert W. Gordon ed., 1992) (describing this collection of essays as “part of an astonishing general revival of interest in Holmes and his ideas”). On Brandeis, see, e.g., Clyde Spillenger, *Reading the Judicial Canon: Alexander Bickel and the Book of Brandeis*, 79 *J. Am. Hist.* 125, 150 (1992) (noting Bickel's “passionate but vain quest for the ‘real Brandeis’”).

and fall” of Justice Holmes.<sup>23</sup> Since the appearance of that article, White has done extensive work on the period, including a recent biography of Holmes and several articles on law and lawyers in the New Deal.<sup>24</sup>

In his work on the New Deal, White has used the term “modernism” to describe the legal philosophy of liberal proponents of an activist federal state.<sup>25</sup> He has now expanded the concept to include the jurisprudence of Holmes and Brandeis. According to White, both Holmes and Brandeis were themselves “epistemological modernists,” by which he means they “believed that humans were the principal architects of the universe,”<sup>26</sup> and are inherently rational beings, capable of ascertaining the truth through objective, scientific inquiry. The process of intellectual reorientation to modernism, White argues, stretched back “at least to the Enlightenment”<sup>27</sup> and presumably continues relatively unabated in the late twentieth century.<sup>28</sup>

Against this backdrop of modernism, White interprets the efflorescence of the reputations of Holmes and Brandeis in the 1930s. Even if those, like Lerner, who were most effusive in their praise significantly misunderstood (or distorted—White is not precisely clear) the jurisprudence of the twentieth century’s two most famous Supreme Court Justices, White argues, they were correct at a more fundamental, epistemological level. For it was “modernism” writ large, rather than a particular jurisprudence, that captivated the New Deal generation, and modernism that allows us to “recapture” them, pigeonholing them firmly and comfortably.<sup>29</sup>

Yet epistemological modernists also manipulated the very modernist judicial philosophy that excited their interest in the first place,

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<sup>23</sup> G. Edward White, *The Rise and Fall of Justice Holmes*, 39 U. Chi. L. Rev. 51 (1971) (tracing changing image of Holmes in eyes of American intellectuals). The “fall,” of course, turned out to be more of a blip.

<sup>24</sup> White, *Justice Oliver Wendell Holmes*, supra note 5 (biography); G. Edward White, *Looking at Holmes in the Mirror*, 4 L. & Hist. Rev. 439, 440-41 (1986) [hereinafter White, *Looking at Holmes*]; G. Edward White, *Recapturing New Deal Lawyers*, 102 Harv. L. Rev. 489, 489 (1988) [hereinafter White, *Recapturing New Deal Lawyers*]; G. Edward White, *Revisiting the New Deal Legal Generation*, 17 Cap. U. L. Rev. 37, 39 (1989) [hereinafter White, *Revisiting the New Deal*].

<sup>25</sup> See, e.g., White, *Intervention and Detachment*, supra note 5, at 3, 7 (arguing that New Deal figures were first generation to display “fully developed modernist sensibility”); White, *Recapturing New Deal Lawyers*, supra note 24, at 510-20 (describing modernist ideology of New Deal lawyers).

<sup>26</sup> White, supra note 4, at 580.

<sup>27</sup> *Id.*

<sup>28</sup> The continuing force of modernism, according to White, has been shaken, but by no means destroyed, by “postmodernism,” which is as yet only “nascent.” White, *Recapturing New Deal Lawyers*, supra note 24, at 520-21; see also *infra* text accompanying notes 71-72.

<sup>29</sup> See Introduction to White, supra note 4.



White argues, exaggerating its potential and mythologizing its purported progenitors. What we are left with is an agglomeration of compounded and confused contortions of both Holmesian and Brandeisian thought, as subsequent generations of modernists have appropriated whatever they thought most useful for the moment, turning the dour and unsympathetic Holmes into a civil libertarian<sup>30</sup> and the state policy-focused Brandeis into a supporter of massive federal regulation.<sup>31</sup>

White has given us a neat package, one that is satisfying at many levels: there is irony; there is gossip; there is a unifying theme. Yet can anything as vague and undifferentiated as this brand of “modernism” possibly explain an entire generation of liberal lawyers and legal thought (not to mention the jurisprudence of Holmes and Brandeis)? Did the created reputations, the visions of what Holmes and Brandeis meant for law and society, just “fit in” to a prepackaged modernism, or did they elbow other visions out? Was modernism’s only competitor an exhausted and empty formalism, a vestigial survivor of the late nineteenth century? Was everyone who could validly be called an “intellectual” a believer in this brand of epistemology by 1930? And who was the “intellectual elite” that adopted and reconfigured Holmes and Brandeis when they recognized their modernism?

The work of Max Lerner allows us to examine White’s epistemological modernism, on the ground as it were. Lerner was a product of, and a participant in, a self-consciously ambitious and aggressive effort to redefine and redirect American law and politics.<sup>32</sup> His embrace of “militant democracy” was deeply influenced by Thorstein Veblen, Charles Beard, Walton Hamilton, Sigmund Freud, Morris Cohen, and Vernon Parrington, just to name a few of the thinkers and activists whose work helped transform the understanding of what it meant to

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<sup>30</sup> See especially, White, *Looking at Holmes*, supra note 24, at 461-62 (noting that many commentators wrongly made Holmes into a liberal and humanitarian). Lerner was aware of the charge that he and other acolytes had overglorified their hero’s libertarianism. He denied this with some truculence, claiming that he had always been aware that a “tooth-and-fangs social Darwinism” was ever-present in the Holmesian universe. Lerner, supra note 6, at 109. It was judicial restraint, Lerner claimed, that really appealed to him. *Id.* On Holmes’s eugenist leanings, see generally Mary L. Dudziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law*, 71 *Iowa L. Rev.* 833 (1986) (discussing Holmes’s use of eugenically charged language to express ideology).

<sup>31</sup> See White, supra note 4, at 602.

<sup>32</sup> As Alan Brinkley put it recently, one of the most successful maneuvers executed by supporters of the New Deal was the redefinition of liberalism, away from its nineteenth-century roots in antistatism. Conservatives in the 1930s, including Herbert Hoover and Friedrich Hayek, countered that true liberalism rested on economic freedom, not state intervention. Alan Brinkley, *The Problem of American Conservatism*, 99 *Am. Hist. Rev.* 409, 416 (1994) (citing Herbert Hoover, *The Challenge to Liberty* (1934)); Friedrich Hayek, *The Road to Serfdom* 13 (1944).

be “liberal.” The historical literature of the period is voluminous and often contentious.<sup>33</sup> How does a jurisprudential “modernism” that was orthodox, even as the majority of the Supreme Court rejected it, fit in to the canonization of Holmes and Brandeis?

There was nothing inevitable, I would argue, about the “triumph” of what Lerner often referred to as liberal democracy, and the “elite” was at least in part the result of, rather than the cause of, the successful creation of the legends of Holmes and Brandeis. Lerner used the language of combat in his articles because a battle was what he understood the campaign to validate the New Deal to be. Holmes and Brandeis, in this view, were “canonized,” not because their world view was “orthodox,” but because they were canons—effective weapons against enemy fortifications.

It was in the liberal press—the *New Republic* and the *Nation*, for instance—and a few law journals (journals with “radical” student editors, among whom Abe Fortas of the *Yale Law Journal* was perhaps the most important) that Max Lerner and his confreres conducted their “militant” campaign and created a usable judicial past through the valorization of Holmes and Brandeis.<sup>34</sup>

There were good reasons for Jewish liberals (including Jerome Frank, Harold Laski, Morris Cohen, and most influential of all, Felix Frankfurter, in addition to Lerner) to turn to the press in the 1930s to conduct their campaign, and good reasons for choosing Holmes and Brandeis as their icons. Not only were the ideas that Lerner and this group espoused far from orthodox in the 1930s (however dated they sound in the 1990s), but these commentators’ status as immigrants—and above all their ethnicity—marked them as outside the elite. By transforming Holmes and Brandeis into titans, Lerner (who later

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<sup>33</sup> See generally Brinkley, *supra* note 18; Alan Brinkley, *Voices of Protest: Huey Long, Father Coughlin, and the Beat Depression* (1982); Alan Dawley, *Struggles for Justice: Social Responsibility and the Liberal State* (1991); Ellis Hawley, *The Great War and the Search for a Modern Order: A History of the American People and Their Institutions 1917-1933* (1979); Richard Hofstadter, *The Age of Reform: From Bryan to FDR* (1955); T.J. Jackson Lears, *No Place of Grace: Antimodernism and the Transformation of American Culture, 1880-1920* (1981); Edward A. Purcell, *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* (1973); Daniel T. Rodgers, *The Work Ethic in Industrial America, 1850-1920* (1978); Jordan A. Schwartz, *The New Dealers: Power Politics in the Age of Roosevelt* (1993); Morton G. White, *Social Thought: The Revolt Against Formalism* (1949); Gary Gerstle, *The Protean Character of American Liberalism*, 99 *Am. Hist. Rev.* 1043 (1994); Rodgers, *supra* note 8.

<sup>34</sup> As Lerner put it:

I was happy to have two emplacements from which to engage the enemy. One was the law journals, run by young militant student editors whom I knew at Yale, Harvard, Columbia, and the University of Pennsylvania. The other was my new post as political editor of the *Nation*, from 1936 to 1938.

Lerner, *Preface*, *supra* note 9, at 4.

called himself an “unchartered member” of both the liberal New Deal and legal realist schools<sup>35</sup>) played an integral part in the transformation of American public legal culture along the liberal lines he found so congenial.<sup>36</sup> But this was a bootstrap operation; Lerner struggled to expand and reconfigure constitutional culture just enough to include himself and those like him.<sup>37</sup>

### III

#### THE SCIENCE OF CLASS CONFLICT: MAX LERNER ON HOLMES, BRANDEIS, AND THE SUPREME COURT

Clearly, therefore, we need something more specific, more timebound than an intellectual tradition of humanism that stretches all the way from the Enlightenment to an undefined moment to help us situate the politics of judicial interpretation in the New Deal. One way to contextualize political theory in the 1930s is to highlight its gradual embrace of a fragmented polis, the recognition that behind high-flown words and ideals lurked stark realities of big business, class division, and capitalist manipulation of politics—that interest groups with irreconcilable and aggressive ambitions eroded the possibility of a common ground, however lofty the abstraction. Such a theory provided a significant opportunity for immigrants, even those of non-Western European origin.<sup>38</sup>

As Max Lerner put it, “[t]he philosophy is that individual rights and group claims are neither absolute nor unchanging and must be weighed in terms of the need for checking and democratizing our corporate capitalism.”<sup>39</sup> And the task of the judge was to grapple with change and determine whether legislatures had “reasonably weighed conflicting social values.”<sup>40</sup> Above all, competition, diverse and diver-

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<sup>35</sup> Max Lerner, Epilogue to *Nine Scorpions in a Bottle*, *supra* note 6, at 293, 298.

<sup>36</sup> See David A. Hollinger, *The “Tough-Minded” Justice Holmes, Jewish Intellectuals, and the Making of an American Icon*, in *The Legacy of Oliver Wendell Holmes, Jr.*, *supra* note 22, at 216, 224-25 (discussing Holmes’s skepticism and lack of anti-Semitism as key elements in creation of Jewish intelligentsia in United States).

<sup>37</sup> For an account of the significant political, ideological, and economic opposition to the New Deal, and the modification of the liberal agenda in response, see Alan Brinkley, *The New Deal and the Idea of the State*, in *The Rise and Fall of the New Deal Order, 1930-1980*, at 85 (Steve Fraser & Gary Gerstle eds., 1989); see also Barry D. Karl, *The Uneasy State: The United States from 1915 to 1945* (1983).

<sup>38</sup> For the distinct limitations on the window of opportunity, see *infra* text accompanying notes 82-87.

<sup>39</sup> Max Lerner, *Justice Louis D. Brandeis and Judicial Activism*, in *Nine Scorpions in a Bottle*, *supra* note 6, at 132, 133.

<sup>40</sup> *Id.* at 142.

gent classes, and change were vital to the maintenance of democracy, Lerner argued.<sup>41</sup>

There was more than a little scientism mixed in with this celebration of class conflict and competition. In a world plagued by class division and exploitation, social scientists argued forcefully that expertise was essential to the informed and rational judgment necessary to revitalize democracy.<sup>42</sup> As editor of the *Encyclopedia of the Social Sciences*, Lerner was a widely read devotee of political science, psychology, anthropology, economics, sociology, and so on. He believed deeply in scientific empiricism, including scientific analysis (and manipulation) of emotions, the popular will, and economic relations.<sup>43</sup>

The idea that a multiplicity of economic interests could in fact be a good thing for democracy was in place, as one scholar put it, “[w]ell before the encounter with the terrifyingly grandiloquent rhetoric of fascism in the late 1930s.”<sup>44</sup> The notion that *The Federalist No. 10*,<sup>45</sup> obscure before its rediscovery and celebration in the 1910s,<sup>46</sup> might have been right that factions were not necessarily evil paved the way for a fundamental retooling of political thought. By the second decade of the century, historian Charles Beard could paint American constitutional history as a struggle between interests—a battle for supremacy and for access to power, to political office, and above all,

<sup>41</sup> *Id.* at 144-47.

<sup>42</sup> On the fracturing of abstract theory and the understanding that interest groups made political unity a functional impossibility, see Rodgers, *supra* note 8, at 114-17 (discussing emergence of pluralistic reading of progressive politics). For an analysis of the response of social scientists to the social and intellectual disintegration they perceived in the early twentieth century, see Purcell, *supra* note 33, at 15 (noting development of formal social sciences in America); Dorothy Ross, *The Origins of American Social Science 143-71* (1991) (describing social scientists' reactions to social discord at turn of century). For analysis of legal thought, see generally Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (1992) (discussing Progressive ideological challenges to classical legal thought and idea of rational and objective rules of law).

<sup>43</sup> On the embrace of the language of “scientific reasoning” by both right and left in the early twentieth century, see Ross, *supra* note 42, at 154-57. For different interpretations of Holmes's scientism, see Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 *Stan. L. Rev.* 787, 789, 789-93 (1989) (“[T]he new philosophical interpretation of pragmatism stress[ed] certain ways in which it depart[ed] from and indeed undermin[e]d orthodox scientific empiricism . . . .”); Hollinger, *supra* note 36, at 216-17 (“Commentators on Holmes have described his ‘scientific’ proclivities as ‘Darwinist,’ ‘positivist,’ ‘pragmatist,’ ‘skeptical,’ ‘historicist,’ ‘empiricist,’ and ‘naturalist.’ None of these characterizations are mistaken.”).

<sup>44</sup> Daniel T. Rodgers, *Contested Truths: Keywords in American Politics Since Independence 178* (1987); see also Purcell, *supra* note 33, at 77-94 (discussing shared intellectual agenda and chronological parallels between professionalization of legal academics and social scientists in first three decades of twentieth century).

<sup>45</sup> *The Federalist No. 10* (James Madison).

<sup>46</sup> On the overlap of the new economism and the embrace of faction, see generally Paul F. Bourke, *The Pluralist Reading of James Madison's Tenth Federalist*, in *Perspectives in American History 271* (Donald Fleming & Bernard Bailyn eds., 1975).



to money.<sup>47</sup> It was Beard, of course, who gave us our first openly “economic interpretation of the Constitution.”<sup>48</sup> Beard was controversial to say the least—the fact that his focus on economic analysis has finally become so mainstream as to be almost unquestioned among politicians and lawyers, should not obscure the fact that his celebration of class interests was contested at every turn and that key in the ultimate acceptance of this peculiarly economic brand of scientific utilitarianism was the very canonization of Holmes and Brandeis.<sup>49</sup>

For the deeply contested significance (even the presence) of “interests” or “realism” or “class conflict” was at base a debate about economic determinism.<sup>50</sup> Progressive rhetoric, on the other hand, still very much alive in the 1910s and early 1920s, gave not an inch to interests. Drawing instead on the unity—the community—of Protestantism, muckraking journalists revealed the excesses of interests, held up the excrescences for all to see and condemn.<sup>51</sup> “Individualistic industrialism,” charged Teddy Roosevelt, was contrary to the common good, contrary to the moral unity that made America great.<sup>52</sup>

Yet Beard and the first Roosevelt shared a belief in the importance of empirical research. Investigation, accumulation, and publication of facts powered reform politics. Here the famous Brandeis brief<sup>53</sup> is a handy illustration of the contingent value of facts—socio-

<sup>47</sup> Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* 152-88 (1913).

<sup>48</sup> *Id.*

<sup>49</sup> For a description of both early optimism that objective research in the social sciences would solve social problems and the ensuing attempt to tie the relativism implied by this brand of social science to idealistic values, see Purcell, *supra* note 33, at 31-46, 139-58.

<sup>50</sup> See, e.g., Arthur M. Schlesinger, Jr., *The Crisis of the Old Order, 1919-1933* (1957) (describing evolution of policies directed toward democratic reform of capitalist economy).

<sup>51</sup> Rodgers, *supra* note 44, at 176-211, has an especially useful chapter on the role of “interests” in political and legal debate from the turn of the twentieth century through the New Deal. The following discussion of interests and the theory of class in Lerner’s work draws on Rodgers’s analysis of political rhetoric.

<sup>52</sup> Rodgers, *supra* note 44, at 182 (quoting John A. Gable, *The Bull Moose Years: Theodore Roosevelt and the Progressive Party 125* (1978)); see also Ross, *supra* note 42, at 143-62 (arguing that social scientists revised their disciplines away from ideological polarizations of socialism and thereby laid groundwork for twentieth-century social science). For an edited collection of progressive writings, see Christopher Lasch, *The New Radicalism in America, [1889-1963]: The Intellectual as a Social Type* (1965).

<sup>53</sup> Brief for Defendant in Error, *Muller v. Oregon*, 208 U.S. 412 (1908) (No. 107). Packed with the results of numerous studies of long work hours on the health and fertility of women, see *id.* at 36-42, the brief is an exemplar of the use of social science data to good legal effect. It has also become notorious among women’s groups as the kind of “protective” argument that serves as much to justify discrimination as protection. See, e.g., Nancy S. Erikson, *Muller v. Oregon Reconsidered: The Origins of a Sex-Based Doctrine of Liberty of Contract*, 30 *Lab. Hist.* 228, 228-29 (1989) (setting forth view that “[t]he Brandeis brief is supposed to have persuaded the Court in two ways; it . . . contained scientific and

logical evidence, rather than verbal abstraction, could be turned to a variety of uses, including establishing the contours of the "public good" broadly defined in Progressive language, or in the scientific "interest" of the new realpolitik. In either case, this was an era, like our own, that valorized the "expert," the gatherer and organizer of social fact, especially when culled by scientists, and harnessed to public debate by politicians, lawyers, and other wordsmiths.<sup>54</sup>

This empiricism had already been at work for decades in the post-Civil War bureaucracies, in the massive reports on labor, and marriage, in the census, and in statistics generally.<sup>55</sup> Sociology even invaded legal thought in the work of Roscoe Pound;<sup>56</sup> but it was in pragmatism, in the work first of William James and then of John Dewey, that empiricism morphed into a powerful political force.<sup>57</sup> Empiricists, among whom must be counted Lerner and other liberals of the 1930s, aimed to retool government, to disable legislation and legal theory based on abstract principles, and to replace theory with

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sociological materials rather than just dry legal precedent and . . . convinced the Court that the differences between men and women would justify a difference in legal treatment" but arguing that brief did not determine outcome in *Muller*).

<sup>54</sup> Rodgers, *supra* note 44, at 193; see also Eric F. Goldman, *Rendezvous with Destiny: A History of Modern American Reform* 250-68 (1977) (describing upsurge of positions in New Deal administrations for planners, economists, and reformers to pursue rational planning through empiricism); Horwitz, *supra* note 42, at 169-246 (defining concept of legal realism); Purcell, *supra* note 33, at 159-79 (describing crisis in jurisprudence created by conflict between scientific naturalism and traditional legal theory); John H. Schlegel, *American Legal Realism and Empirical Social Science* 1-13 (1995) (outlining use of empirical legal research by scholars, lawyers, and judges). Especially insightful in its analysis of one intellectual's efforts to tackle these and related questions in the realm of jurisprudence, as well as evidence that Holmes's ideas were fodder for intellectual debate well before the 1930s, is David A. Hollinger, *Morris R. Cohen and the Scientific Ideal* 165-99 (1975).

<sup>55</sup> Thomas L. Haskell, *The Emergence of Professional Social Science* 44 (1977) (describing emergence of factual inquiry to describe causation of social phenomena); William E. Nelson, *The Roots of American Bureaucracy, 1830-1900*, at 82-112 (1982) (describing late-nineteenth-century reformers' use of scientific methodology, classification, and data in their reform efforts and development of extensive American bureaucracies to support those efforts).

<sup>56</sup> Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence* (pt. 3), 25 *Harv. L. Rev.* 489 (1912) (arguing that there is sociological jurisprudence in law rooted in positivist philosophy and outlining its historical development).

<sup>57</sup> On pragmatism generally, see Philip P. Wiener, *Evolution and the Founders of Pragmatism* (1949) (studying genesis of several broad philosophical doctrines loosely comprising American pragmatism). For pragmatism in legal thought, see Robert W. Gordon, *Holmes' Common Law as Legal and Social Science*, 10 *Hofstra L. Rev.* 719, 722-23 (1982) (challenging pragmatism as basis for understanding Holmes's *The Common Law* and suggesting instead scientific positivism relying on empirical conditions); Grey, *supra* note 43, at 793-805 (distinguishing American pragmatism from scientific empiricism).



evidence, statistics, and expert testimony. Borrowing a term from Holmes, Lerner frequently called such scientism “tough-minded.”<sup>58</sup>

This was no comfortable and seamless evolution, however, as Lerner’s soldier mentality attests. His “militant democracy” of fact was a challenge to idealism at the most fundamental level, an (often unconscious, or at least uncomfortable) embrace of moral relativism that was in the deepest sense a rebellion against generality in favor of the particular.<sup>59</sup> Scientific reasoning, of course, could be every bit as formalistic as the natural law/substantive due process model it eventually elbowed out.<sup>60</sup>

Economic interest analysis quickly spread beyond the confines of politics traditionally defined. By the 1920s, advertising, consumerism, and above all the realization that propaganda, far more than any abstract unity, shaped public desires and predilections further eroded faith in any single public will or public good.<sup>61</sup> The “marketplace of ideas”<sup>62</sup> was a noisy, competitive, interest-group laden arena, where lobbyists, pressure-groups, and reformers vied for air time. Manipulation of preferences (rather than articulation of values) produced im-

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<sup>58</sup> The phrase “tough-minded” was coined by William James in 1907. See William James, *Pragmatism* 13 (Harvard Univ. Press 1975) (1907) (listing characteristics of “tender-minded” and “tough-minded” people). Holmes applied the epithet to himself in correspondence with James. Ralph B. Perry, *The Thought and Character of William James* 301 (Harvard Univ. Press, briefer version 1948) (1935) (“I am more sceptical than you are. You would say that I am too hard or tough-minded,—I think none of the philosophers sufficiently humble.”) (quoting Letter from Oliver W. Holmes to William James (Oct. 13, 1907)); cf. Hollinger, *supra* note 36, at 216 (discussing Holmes’s “scientific way of looking at the world”). For one of many examples of Lerner’s attraction to the term, see, e.g., Max Lerner, *The Personnel of the Supreme Court: Some Recent Literature*, 2 *Nat’l Law. Guild Q.* 9, 13 (1939) (criticizing Kenneth B. Umbreit, *Our Eleven Chief Justices: A History of the Supreme Court in Terms of the Personalities* (1938) for a “lack of tough-mindedness” for failing to incorporate all available historical data into this discussion).

<sup>59</sup> Rodgers, *supra* note 44, at 193. On the moral relativism incipient in the jurisprudence of the early twentieth century, see Heidi M. Hurd, *Relativistic Jurisprudence: Skepticism Founded on Confusion*, 61 *S. Cal. L. Rev.* 1417, 1427-37 (1988) (discussing Holmes’s rejection of moral absolutism). For relativism in scholarly legal commentary, see Purcell, *supra* note 33, at 74-94 (discussing legal realism during first four decades of twentieth century).

<sup>60</sup> I am not the first to notice the irony. See Ross, *supra* note 42, at 183-86 (noting that proponents of economics sometimes asserted that their conclusions were absolute and advocated naturalism).

<sup>61</sup> See, e.g., Edward L. Bernays, *Propaganda* 150 (1928) (describing modern propaganda as necessary tool in democratic society for structuring public relations and debate); Walter Lippmann, *The Phantom Public* 112-13 (1925) (illustrating power of propaganda as tool by which private interests sought to manipulate disinterested public); Frederick E. Lumley, *The Propaganda Menace* 45 (1933) (describing propaganda as major, continuous, omnipresent, implacable activity in American society).

<sup>62</sup> See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.”).

mediate payoffs, a new reality reflected in the theories that law is made (not found) by judges and that politics consists of coalition-building, rather than direct appeal to a unified people.<sup>63</sup>

The most powerful confirmation of the theory that the machine of capitalism had created a multiplicity of economic (and thus political) interests, of course, came with the Great Depression. The second Roosevelt's administration flowed into pragmatic consequentialism, stressing empirical fact, class conflict, the inseparability of law and politics, and, by no means least, economics.<sup>64</sup> The conservative opposition made hay out of New Dealers' abandonment of moral absolutes, appealing to the shades of the Framers, the Declaration of Independence, and the Constitution itself.<sup>65</sup> They turned to the courts, where abstractions and bright lines had long been welcome. They came very, very close indeed to victory, as the Supreme Court cloaked itself in powerful constitutional metaphors, refusing to cater to the clamor of interests.<sup>66</sup>

#### IV

#### PROPAGANDA, SYMBOLISM, AND A USABLE PAST

Even after victory in 1937,<sup>67</sup> good New Dealers acted on the lessons that they had internalized in the first two decades of the twenti-

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<sup>63</sup> Purcell, *supra* note 33, at 74-94 (discussing rise of "legal realism" and corresponding decline of natural law theory during 1920s); Rodgers, *supra* note 44, at 199 (discussing development of advertising and corresponding fears of propaganda in post-World War I era).

<sup>64</sup> Horwitz, *supra* note 42, at 193; Rodgers, *supra* note 44, at 203-04; see also Richard H. Pells, *Radical Visions and American Dreams: Culture and Social Thought in the Depression Years 78-86* (1984) (discussing New Deal's empirically driven approach to social reforms).

<sup>65</sup> Hofstadter, *supra* note 33, at 315 (describing how conservatives used "inspirational literature of American life" to attack New Dealers' allegedly immoral "experimentation").

<sup>66</sup> For the most recent analysis of the Supreme Court crisis of 1937, see generally William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (1995). The significance of the 1937 victory for the New Deal has recently been challenged by Alan Brinkley, who argues that active reform had for the most part ceased by the advent of the Court-packing plan. Brinkley, *supra* note 18, at 17-20.

<sup>67</sup> There are many superb treatments of Roosevelt's Court-packing plan, and the so-called "Switch in Time that Saved Nine." See *supra* note 66. Lerner, who like some other passionate supporters of the New Deal, wrote editorials in the *Nation* in support of the Court-packing plan, was fired for his apparent abandonment of principle in the interests of politics. Lerner, Preface, *supra* note 9, at 5 (discussing Lerner's support for Roosevelt in 1937 and noting that "I lost my *Nation* editorship as a consequence"). For a recent controversy on the Revolution of 1937, see Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 *Harv. L. Rev.* 620, 641 (1994) ("Instead of vindicating Roberts, the timing defense suggests (but doesn't prove) the opposite . . ."); cf. Felix Frankfurter, *Mr. Justice Roberts*, 104 *U. Pa. L. Rev.* 311, 314-15 (1955) (citing memorandum in which Roberts explained that he had not acted under pressure created by Court-packing plan when he shifted his vote in critical minimum wage cases of 1936 and 1937); Richard D. Friedman, *A Reaffirmation:*

eth century. They recognized that they needed symbols as well as statistics, heroes in addition to hearings. Like their opponents, they searched for plausible precedents for their present actions. They created usable pasts, redacting and refracting history to create a bedrock of tradition. Among historians, Arthur Schlesinger, Jr.'s *Age of Jackson* exemplifies the New Deal's search for historical roots, to quell the voices of opposition by claiming a heritage every bit as American as the conservatives could muster.<sup>68</sup>

The recognition that proponents of the New Deal were wedded to both economic analysis and empirical research and that they understood the value of clever public relations efforts, especially the need for a credible link to tradition, provides useful clues to the "canonization" of Holmes and Brandeis. For the judicial revolution of the 1930s, as Max Lerner and other supporters recognized, needed legal roots to stabilize it in the public's mind, much less in legal thought. A child of the age of propaganda, Lerner understood the value of symbols and heroes that established connections to the present through the past.

Lerner defended what he referred to as the "necessary economic and political adjustments" of industrial capitalism to protect liberal democracy.<sup>69</sup> He maintained that the economic and judicial crises of the Great Depression were inevitably linked by the fact that the propertied elite had undermined the integrity of both the economy and the judiciary by their greed.<sup>70</sup> Yet truly patriotic judges could not be controlled; Holmes and Brandeis became models of what Lerner called "the realities of the judicial power."<sup>71</sup>

Lerner's book, *The Mind and Faith of Justice Holmes*, was intended to demonstrate, as he put it, that "[t]he constitutional crisis of the New Deal . . . cleared the way for the complete adoption of

The Authenticity of the Roberts Memorandum, or Felix the Non-Forger, 142 U. Pa. L. Rev. 1985, 1993 n.36 (1994) (pointing out that timing of events in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), precluded possibility that Roberts had cast his vote under pressure created by Court-packing plan). Thanks to my colleague A. Leo Levin for this insight.

<sup>68</sup> Arthur M. Schlesinger, Jr., *The Age of Jackson* at ix (1945). As Schlesinger himself put it, "history can contribute nothing in the way of panaceas. But it can assist vitally in the formation of that sense of what is democratic, of what is in line with our republican traditions, which alone can save us." *Id.* at x. See also the work of George H. Soule, including George H. Soule, *The Future of Liberty* (1934) (arguing that protection of liberty requires reexamination of traditional symbols of American faith).

<sup>69</sup> Max Lerner, *Constitution and Court as Symbols*, 46 *Yale L.J.* 1290, 1303-04 (1937); see also Lerner, *supra* note 11, at 687 (arguing that Supreme Court power affects nexus between law and economic institutions).

<sup>70</sup> Lerner, *supra* note 69, at 1317-18.

<sup>71</sup> *Id.*

Holmes's views on constitutional law. The new doctrinal directions of the present Supreme Court spell more than anything else a return to Holmes."<sup>72</sup> And to Brandeis he attributed leadership of the "phalanxes that have brought the economic emphasis into legal thought."<sup>73</sup> As Lerner put it, Holmes and Brandeis had "refertilized American law" with "pragmatism" and a "hard-headed statistical bent," reinvigorating a scientific legal tradition essential to democracy since Jefferson.<sup>74</sup>

On any view, this is a creative reading of the place of Holmes and Brandeis in American law and history, by a man who was alive to the cultural value of being able to claim two Justices for his side of the great divide of the late 1930s. The exceptionalism that sustained such an optimistic reinterpretation of Jefferson, let alone Holmes, was characteristic both of Lerner<sup>75</sup> and of the development of a "satisfying interpretation of America itself" of which the construction of the reputations of Holmes and Brandeis was a constituent part.<sup>76</sup> Lerner's mission, he all but admitted openly, was to construct a new set of symbols for the Court, a new pantheon of American heroes with credible historical roots. He used the tools of his background in social science to elaborate a context for himself and his allies. Holmes and Brandeis were by far the most likely judicial exemplars of Lerner's liberal philosophy, but the fit was by no means seamless.

In an article in the *Yale Law Journal* in 1937 entitled "Constitution and Court as Symbols,"<sup>77</sup> Lerner began by noting that Holmes understood the power of symbols and that in the twentieth century, propaganda was the most effective of political tools—the successful

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<sup>72</sup> Mind and Faith of Justice Holmes, *supra* note 16, at xlix.

<sup>73</sup> Lerner, *Homage to Brandeis*, *supra* note 16, at 222.

<sup>74</sup> *Id.*

<sup>75</sup> So relentless was Lerner's faith in American exceptionalism, and in the end so unfocused and unreflective, that one caustic reviewer accused him of believing in "ectoplasmic uplift." Lerner's *Flying Carpet*, *Time*, Jan. 6, 1958, at 76, 78 (reviewing Max Lerner, *America as a Civilization* (1957)). Only two years later, another reviewer dismissed Lerner, who was in his day a "daring" and dangerous commentator, as "chuckle-headed" and "sentimental." Phoebe Adams, 205 *Atlantic Monthly* 120, 120-21 (1960) (reviewing Max Lerner, *The Unfinished Country: A Book of American Symbols* (1959)). One scholar remarked recently that Lerner and Oscar Hammerstein shared a "cock-eyed optimism" common to Jewish immigrants of their generation. Conversation with Lawrence Fleischer, Professor, City College of New York and Adjunct Professor, New York University (July 10, 1995).

<sup>76</sup> See Hollinger, *supra* note 36, at 225 (discussing efforts of Jewish intellectuals and WASP antiparochialists to espouse common cosmopolitan ideal and construct liberal, emblematic culture for America); see also Ross, *supra* note 42, at 58-59 (noting that crisis in American exceptionalism rejected inherited cultural traditions in favor of visible, comprehensible, statistic-based reality).

<sup>77</sup> Lerner, *supra* note 69.



manipulation of symbols is an essential technique in the struggle for power and meaning.<sup>78</sup> “Men possess thoughts,” Lerner maintained, “but symbols possess men.”<sup>79</sup>

Fetishism, be it of the Constitution or any other symbol, Lerner asserted in language heavy with anthropological and psychological undercurrents, could be a powerful instrument in “cementing internal order,”<sup>80</sup> especially when both sides understand themselves to claim allegiance to the symbol, be it the Constitution in antebellum America or the “cult of judicial power,” as he put it, in the years since the Civil War.<sup>81</sup> But Lerner was sensitive to the possibility that the symbol could be perverted, claimed by those “professional patrioteers [who] use the Constitution in a coldly instrumental way for their own purposes.”<sup>82</sup> The Court, too, could be captured, as by Taney in the *Dred Scott* decision, when the power that the Court had accreted through the Marshall years was revealed in all its raw strength. And, Lerner charged, this capture could be accomplished by the “capitalist élite,” that had “used the Supreme Court so long and so blindly for their own purposes that they ha[d] finally succeeded in undermining its strength and prestige.”<sup>83</sup>

The question then was whether the Court could ever recover its place of honor, whether it could be wrested from the stranglehold of the narrow and stagnant ruling class. Would judges recognize that they did not rule as by divine right, that they could not stand “between the hungry generations and the appeasement of their hunger, between Bill Jones and a minimal standard of decency in living?”<sup>84</sup> Truly great judges understood this fundamental mandate. Lerner could point to Brandeis’s jurisprudence as “checking and democratizing our corporate capitalism,”<sup>85</sup> and Holmes as “a great spokesman for our constitutional tradition because he was a great enough conservative to enlarge the framework of the past to accommodate at least some of the needs of the present.”<sup>86</sup> Both understood the realities of class conflict, the force of economic analysis, the relativism of law, and the limits of judges; that is, they were “tough-minded.” As

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<sup>78</sup> Id. at 1292.

<sup>79</sup> Id. at 1293. For a general review of how symbols operate as cultural strategies, see Clifford Geertz, *Ethos, World View and the Analysis of Sacred Symbols*, in *The Interpretation of Cultures* 126, 140-41 (1973).

<sup>80</sup> Lerner, *supra* note 69, at 1298.

<sup>81</sup> Id. at 1303.

<sup>82</sup> Id. at 1305.

<sup>83</sup> Id. at 1317.

<sup>84</sup> Id. at 1315.

<sup>85</sup> Lerner, *Homage to Brandeis*, *supra* note 16, at 222.

<sup>86</sup> Lerner, *supra* note 6, at 125.

Lerner saw the world in the late 1930s and early 1940s, these were hallmarks of “liberal,” even “militant” democracy.

### CONCLUSION

In the late 1980s and early 1990s, these same qualities (that is, economic analysis, legal relativism, and judicial limitation) strike a far different note<sup>87</sup>—one that Max Lerner in his old age charged had been perverted into a “tenacious cult of property.”<sup>88</sup> Those who claim to be the intellectual heirs of Holmes and Brandeis fight out their meaning over the generations, telling us more than whether they are resourceful lawyers, more even than what modernism is for legal thought in a given century. They point us to the camouflaged weaknesses of a given legal philosophy, the places where heroes are needed to cover the exposed terrain.

For liberals in the 1930s, the embrace of economics was a retreat from yawning and complex questions of race, ethnicity, and gender.<sup>89</sup> The racial and nativist violence of the first two decades of the twentieth century, rather than prompting Lerner and other liberals to address questions of racial or ethnic equality, instead provoked a reconfiguration of social science research away from cultural questions that seemed dogged by “irrationality,” and toward studies of class division that could be rendered in comforting numerical terms.<sup>90</sup> The politics of class and the rationality of economic science were the essence of what was knowable to Lerner and other liberals; and knowability in turn defined “rationality,” especially for purposes of

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<sup>87</sup> Robert Gordon made this point about the contemporary law and economics movement’s admiration for Holmes:

What [the movement] overtly responds to in Holmes is primarily his utilitarian economism: the conception of law as a risk-allocation mechanism of incentives and disincentives rather than as a set of commands or moral precepts; the quasi behaviorism in Holmes’s insistence that law is a set of “external” standards directed to outward behavior; and the programmatic ambition (which Holmes himself . . . did nothing to fulfill) to reconstruct law on a foundation of welfare economics, a science of satisfying measurable desires.

Gordon, *supra* note 22, at 6.

<sup>88</sup> Severo, *supra* note 14, at 11.

<sup>89</sup> On the liberal elision of race and ethnicity in the 1930s, see generally Gerstle, *supra* note 33, at 1063-67. On gender, see Nancy Fraser & Linda Gordon, *A Genealogy of Dependency: Tracing a Keyword of the U.S. Welfare State*, 19 *Signs* 309 (1994).

<sup>90</sup> Gary Gerstle points to the work of Robert S. Lynd & Helen M. Lynd, *Middletown: A Study in American Culture* (1929), as exemplary of the sanitization of racial and ethnic conflict, and a simultaneous embrace of economics as a substitute for other forms of analysis. See Gerstle, *supra* note 33, at 1061 (noting that only four pages of Lynds’ voluminous case study of midwestern industrial town examined activities of active local Ku Klux Klan).



political debate and social action.<sup>91</sup> Lerner's battle was the creation of a new orthodoxy, the reconfiguration of the rationality of law in the image of a particular, time-bound understanding of the term. That the perceived rational basis of class conflict had sharply eroded by the late 1940s, with the celebration of racial and ethnic diversity as the locus of healthy difference effectively displacing the focus on class, was just the first of many twists and turns that ultimately rendered Max Lerner's brand of liberalism obsolete<sup>92</sup> and required a reinterpretation of the judicial past—a recrafting of what it meant to be a “titan.”

The historiography of judicial biography, the study of the canonization of Holmes and Brandeis, is the examination of just this kind of shifting understanding and the creation of usable pasts. Historians delight in this kind of parsing when dealing with the appropriation of political ideas and political heroes. We have only just begun, as one legal historian noted recently, to conduct similarly searching analyses of legal ideas and judicial heroes.<sup>93</sup> This symposium promises to further the enterprise, to quicken our sense that legal words have multiple (and even contradictory) meanings over time—that contests over the meaning of judicial titans have a fascinating history, ripe for study.

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<sup>91</sup> Psychiatrists and psychologists confirmed and redacted the conviction that irrationality plagued much of the population and could not be checked by reasoned debate. See generally Robert M. Crunden, *From Self to Society, 1919-1941* (1972) and especially chapter two on the influence of psychology on intellectual debate. *Id.* at 29-75. Lerner, of course, both exploited the insights of psychology in his embrace of propaganda as a political tool, and sharply limited his use of such tools to the advocacy of “rational” reform.

<sup>92</sup> This insight into Lerner's failure to come to grips effectively with the civil rights movement, to adjust his liberalism to a changed world, was first noticed, and suggested to me, by Lawrence Fleisher. Conversation with Lawrence Fleisher, *supra* note 75.

<sup>93</sup> For a particularly perceptive analysis of one example of the production of meaning through the redaction of Brandeis's jurisprudence, and a call for understanding that “the ongoing interpretation and reinterpretation of our canonical judicial figures is itself embedded in political commitments,” see Spillenger, *supra* note 22, at 150.