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A Progressive Creed: The Experimental Federalism of Justice Brandeis

E. E. Steiner*

It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. †

As Alexander Bickel predicted in 1970,¹ the doctrine of experimental federalism² espoused by Justice Brandeis in *New State Ice Co. v. Leibmann*³ is exhibiting new vigor throughout the American legal community. Citations to this famous dissent are no longer confined to U.S. Supreme Court dissents, as they were during the Warren Court era.⁴ Instead,

* Associate, Taft, Stettinius & Hollister, Cincinnati, Ohio. B.A. University of Virginia, M.A. Johns Hopkins University, J.D. Yale University. The author would like to thank Jan G. Deutsch, David Spring, Eugene Illovsky, Rajesh Garg, R.A. Mason, A. Blair Dorminey and Jose Berrocal for advice in preparing earlier drafts of this article and Robin Tucker for assistance in preparing the manuscript.

† *New State Ice Co. v. Leibmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

1. A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 116 (1970) ("There is in being a reaction to the steady unification and nationalization of recent years, a movement toward a decentralization and a diversity of which the as yet unacknowledged prophet—due, I should suppose, for a revival—is Brandeis.").

2. This term is borrowed from Wilkinson, *Justice John M. Harlan and the Values of Federalism*, 57 VA. L. REV. 1185, 1192 (1971).

3. 285 U.S. 262 (1932).

4. See *Duncan v. Louisiana*, 391 U.S. 145, 193 (1968) (Harlan, J., dissenting) (due process should not require nationwide uniformity with respect to availability of jury trial in state criminal proceedings); *Lucas v. Colorado Gen. Assembly*, 377 U.S. 713, 752 (1964) (Stewart, J., dissenting) (states should be permitted to consider local factors, in addition to population, in apportioning their legislatures). The second Justice Harlan, a consistent advocate of federalist values in the Warren Court era, see Wilkinson, *supra* note 2; Bourguignon, *The Second Mr. Justice Harlan: His Principles of Judicial Decision-Making*, 1979 SUP. CT. REV. 251, 252-53, often paraphrased the above-reproduced passage from *New State Ice* without citing it. See, e.g., *Williams v. Florida*, 399 U.S. 78, 133 (1970) (Harlan, J., concurring and dissenting) (states should be accorded some "elbow room" in administering their criminal justice systems); *Memoirs v.*

they have emerged in Burger Court majority opinions,⁵ as well as in concurrences and dissents.⁶ Further, Brandeisian localism has been brought to the attention of a growing number of lower federal⁷ and state

Massachusetts, 383 U.S. 413, 460 (1960) (Harlan, J., dissenting) (states should be permitted wider latitude than the federal government to experiment in regulation of obscenity); *Roth v. United States*, 354 U.S. 476, 505 (1957) (Harlan, J., concurring and dissenting) (same).

For earlier citations to the *New State Ice* passage in the Supreme Court, see, e.g., *Federal Power Comm'n v. East Ohio Gas Co.*, 338 U.S. 464, 488-89 (1950) (Jackson, J., dissenting) (Natural Gas Act not intended to preclude all state experimentation in utility regulation); *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 96 (1948) (Rutledge, J., dissenting) (courts should "indulge every reasonable presumption" in favor of state modifications of property law governing oil and gas); *Fay v. New York*, 332 U.S. 261, 296 (1947) (Jackson, J.) (upholding use of "blue-ribbon" jury under policy of judicial self-restraint in imposing uniform criminal procedures on states).

5. See *Chandler v. Florida*, 449 U.S. 560, 579 (1981) (Burger, C.J.) (Constitution does not prohibit state from permitting broadcast coverage of criminal trials); *Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980) (Blackmun, J.) (upholding resident preference in sale of cement from state-operated plant on grounds that contrary holding would, *inter alia*, "threaten the future fashioning of effective and creative programs for solving local problems"); *Whalen v. Roe*, 429 U.S. 589, 597 n.20 (1977) (Stevens, J.) (state may constitutionally require reporting to state agency of identities of patients who have obtained prescriptions for dangerous drugs); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973) (upholding Texas system of school financing, analogizing challenged state-local funding scheme to "the Nation-State relationship in our federal system").

6. See *Equal Employment Opportunity Comm'n v. Wyoming*, — U.S. —, 103 S. Ct. 1054, 1075 (1983) (Burger, C.J., dissenting) (protesting extension of federal Age Discrimination in Employment Act to state and local governments on ground that "[n]othing in the Constitution permits Congress to force the states into a Procrustean national mold that takes no account of local needs and conditions"); *Zobel v. Williams*, 457 U.S. 55, 77 (1982) (O'Connor, J., concurring in the judgment) (state cannot discriminate based on length of residency in distribution of state funds because "[j]ust as our federal system permits the States to experiment with different social and economic programs . . . it allows the individual to settle in the State offering those programs best tailored to his or her tastes"); *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 788 n.20 (1982) (O'Connor, J., concurring and dissenting) (federal requirements that state agencies "spend their time evaluating federally proposed standards" will retard "creative experimentation" by states in utility regulation); *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 67 (1982) (Rehnquist, J., dissenting) (local governments will be "unable to experiment with innovative social programs" if their actions are subjected to antitrust scrutiny under the Sherman Act); *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389, 439 n.27 (1978) (Stewart, J., dissenting) (same); *Brooks v. Tennessee*, 406 U.S. 605, 616 (1972) (Burger, C.J., dissenting) (observing that Court's overturning of state statute requiring criminal defendants to testify before other defense witnesses "erodes the important policy of allowing diversity of method and procedure to the States"); *Johnson v. Louisiana*, 406 U.S. 356, 376 (1972) (Powell, J., concurring) (commenting on importance of state experimentation in criminal procedure in connection with decision upholding less than unanimous jury provision).

7. See, e.g., *McMorris v. Israel*, 643 F.2d 458, 463 (7th Cir. 1981), *cert. denied*, 455 U.S. 967 (1982) (state's reasonable assertion that court-made evidentiary rule requiring stipulation to admissibility of polygraph test results is justified because stipulation enhances the reliability of the test not to be questioned, citing value of experimentation); *Vruno v. Schwarzenwalder*, 600 F.2d 124, 131 & n.10 (8th Cir. 1979) (state statute establishing standards and procedures to be followed when criminal offenders seek public employment designed to encourage rehabilitation "reflects the type of social experimentation reserved to the states by the Constitution"); *New York Tel. Co. v. New York State Dep't of Labor*, 566 F.2d 388, 393, 395 (2d Cir. 1977), *aff'd*, 440 U.S. 519 (1979) (Congressional intent to avoid excessive intrusion into local affairs consistent with New Deal era belief in experimental federalism); *Standard Oil Co. of California v. Agsalud*, 442 F. Supp. 695, 711 (N.D. Cal. 1977), *aff'd*, 633 F.2d 760 (9th Cir.

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appellate courts.⁸ Growing judicial interest has been mirrored by an increasing scholarly attention to "the still exciting idea . . . that states are laboratories for experimentation."⁹

The *New State Ice* dissent is currently regarded as a relevant precedent in a number of federal constitutional contexts.¹⁰ That is, the dissenting opinion is widely and, this article argues, correctly perceived both as (1) a rational judicial solution to the particular set of facts and issues before the *New State Ice* court and (2) a legal development which promises to contribute significantly to a just future. Therefore, Brandeisian experimental federalism deserves the careful historical explication required to identify precisely what the author of the dissent meant when he wrote those oft-quoted words. Much has been written about Brandeis,¹¹ yet no work has focused squarely or accurately on the political

1980), *aff'd*, 454 U.S. 801 (1981) (Congress admonished for preempting state laws without discussion of the states' relative ability to provide protection), *Anthony v. Massachusetts*, 415 F. Supp. 485, 502 (D. Mass. 1976), *vacated sub. nom. Massachusetts v. Feeny*, 434 U.S. 884 (1977) (Murray, J., concurring and dissenting) (the principle of federalism is a recognition of the value of state experimentation).

8. See, e.g., *Williams v. Zobel*, 619 P.2d 422, 447 (Alaska 1980), *aff'd*, 457 U.S. 55 (1982) (Connor, J., dissenting) (questions of broad tax policy should be left to the state legislature); *Cuciak v. State*, 394 So. 2d 500, 505 (Fla. App. 1981) (Hurley, J., concurring) (progressive state policy should not be abandoned just because another state's policy differs); *State v. Leonardis*, 71 N.J. 85, 120, 363 A.2d 321, 339-40 (1976) (value of experimentation supports modification, rather than elimination, of judicially created program); *Sharrock v. Dell Buick-Cadillac, Inc.*, 45 N.Y.2d 152, 160, 379 N.E.2d 1169, 1173, 408 N.Y.S.2d 39, 44 (1978) (principles of federalism support construction of state due process clause independent of construction of United States Constitution).

9. Newman, *The "Old Federalism": Protection of Individual Rights by State Constitutions in an Era of Federal Court Passivity*, 15 CONN. L. REV. 21, 23 n.10 (1982). See also Collins, *Reliance on State Constitutions: Away from a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1, 7-8 (1981); Thompson, *Electronic Media in the Courtroom: Some Observations on Federalism and State Experimentation*, 9 OHIO N.U.L. REV. 349 (1982); but see, Rose-Ackerman, *Risk-Taking and Reflection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593 (1980) (arguing that pressures of electoral politics inhibit political experimentation.).

A classic statement of the doctrine is found in Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 493 (1954). Hart was Brandeis' law clerk when *New State Ice* was decided.

10. The term "relevant precedent," as used here, was developed in Deutsch, *Precedent and Adjudication*, 83 YALE L.J. 1553, 1584 (1974). See also *infra* text accompanying notes 176-77.

11. See, e.g., A. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS* (1957); N. DAWSON, *LOUIS D. BRANDEIS, FELIX FRANKFURTER AND THE NEW DEAL* (1980); T. FREYER, *HARMONY AND DISSONANCE: THE SWIFT AND ERIE CASES IN AMERICAN FEDERALISM* 88-89, 120, 130-53 (1981); A. GAL, *BRANDEIS OF BOSTON* (1980); H. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* 104-06 (1981); P. IRONS, *THE NEW DEAL LAWYERS* 19-21 (1982); *LETTERS OF LOUIS D. BRANDEIS* (M. Urofsky & D. Levy eds. 1971-1978) [hereinafter cited as *LETTERS*]; A. LIEF, *BRANDEIS: THE PERSONAL HISTORY OF AN AMERICAN IDEAL* (1936); A. MARTIN, *ENTERPRISE DENIED: ORIGINS OF THE DECLINE OF AMERICAN RAILROADS, 1897-1917*, 160-62, 197-218 (1971) (a study which is quite critical of Brandeis' public utility economics); A. MASON, *BRANDEIS: LAWYER AND JUDGE IN THE MODERN STATE*, (1933) [hereinafter cited as A. MASON (I)]; A. MASON, *BRANDEIS: A FREE MAN'S LIFE* (1946) [hereinafter cited as A. MASON (II)]; B. MURPHY, *THE BRANDEIS/FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES*

and ideological sources of his well-known commitment to constitutionally unfettered local self-government.¹² Schlesinger¹³ and Laski¹⁴ have depicted (and dismissed) Brandeisian localism as mere twentieth-century Jeffersonianism, but the truth is rather more complex and certainly more interesting.

The first and most basic source of Brandeis' experimental federalism (and the *New State Ice* dissent particularly) was the Progressive Republicanism practiced by two generations of LaFollettes in Wisconsin. Brandeis' noted reluctance to employ the due process clause of the fourteenth amendment to invalidate state legislation cannot properly be understood without knowledge of his advocacy of the "Wisconsin Idea"—a political ideal which assumed that the states, rather than the federal government, were the preferred political fora.

Brandeis is known to have been a Progressive. However, it is not generally known that Progressivism was a trans-Atlantic phenomenon. Long before Teddy Roosevelt's New Nationalists and the advocates of Wilson's New Freedom battled for control of American reform politics in the 1912 presidential election, Unionist (Tory) Tariff Reformers and the "Progressive Alliance" led by Asquith and Lloyd George offered similarly opposed reform programs to the British electorate.¹⁵ Although

(1982); M. UROFSKY, *A MIND OF ONE PIECE: BRANDEIS AND AMERICAN REFORM* (1971) [hereinafter cited as UROFSKY (I)]; M. UROFSKY, *LOUIS D. BRANDEIS AND THE PROGRESSIVE TRADITION* (1981) [hereinafter cited as UROFSKY (II)]; Freund, *Mr. Justice Brandeis: A Centennial Memoir*, 70 HARV. L. REV. 769 (1957); Freund, *Mr. Justice Brandeis*, in MR. JUSTICE 97 (A. Dunham & P. Kurland eds. 1945); Lerner, *The Social Thought of Mr. Justice Brandeis*, 41 YALE L.J. 1 (1931); Rabban, *The Emergence of First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1320-44 (1983); Note, *Mr. Justice Brandeis, Competition and Smallness: A Dilemma Re-examined*, 66 YALE L.J. 619 (1956); Cover, Book Review, THE NEW REPUBLIC, May 5, 1982, at 17; Danielski, Book Review, 96 HARV. L. REV. 312 (1982).

12. Lerner, *supra* note 11, and A. MASON (I), *supra* note 11, come nearest to accuracy in this matter. Accuracy, however, is impossible until one discards the New Deal-treated lenses through which Brandeis is usually viewed.

13. A. SCHLESINGER, JR., *THE AGE OF ROOSEVELT: THE CRISIS OF THE OLDER ORDER*, 1919-1933 28-33 (1957); A. SCHLESINGER, JR., *THE AGE OF ROOSEVELT: THE POLITICS OF UPHEAVAL* 220, 235-38 (1960); compare F. RODELL, *NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 TO 1955*, 228 (1955) ("Brandeis' somewhat nineteenth-century scheme of things").

14. 2 HOLMES-LASKI LETTERS 1448 (M. Howe ed. 1953) (Laski, writing in 1933 of Brandeis: "[H]e is really a Jeffersonian Democrat. . . . I take him to be intellectually . . . a romantic anachronism").

15. See, Keller, *Anglo-American Politics, 1900-1930*, in *Anglo-American Perspective: A Case Study in Comparative History*, 22 COMP. STUD. SOC'Y & HIST. 458, 476-77 (1980) (characterizing the British and American political experience of the period as a "rare and distinctive historical convergence"); Morgan, *The Future at Work: Anglo-American Progressivism 1890-1917*, in CONTRAST AND CONNECTION: BICENTENNIAL ESSAYS IN ANGLO-AMERICAN HISTORY 245 (H. Allen & R. Thompson eds. 1976); Rodgers, *In Search of Progressivism*, 10 REV. AM. HIST., Dec. 1982, at 113, 125-26 n.54 (1982); Steiner, *The Legal Profession in the Progressive Era: Localism and Legal Education in the Sixth Circuit States, 1890-1925*, 14 U. TOL. L. REV. 759, 780 n.100 (1983).

For recent works treating the British Progressive Alliance, see P. CLARKE, LANCAIRE

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the Progressive Alliance, a grouping of "advanced" Liberal intellectuals and Liberal-Labour trade unionists, disintegrated during World War I,¹⁶ British Progressives were nevertheless able to refurbish Liberal political ideology in the 1920's.

This trans-Atlantic Progressive impulse provided a second source for Brandeis' experimental federalism. Brandeis borrowed the concept of social invention from Graham Wallas, a British Progressive intellectual, to describe political response to socio-economic change. Brandeis also owed a significant intellectual debt to the 1928 Liberal Party "Yellow Book" on industrial policy, a Progressive tract written in part by John Maynard Keynes.

A third, more abstract and more important source of Brandeisian experimental federalism was a strand in American political culture—Aristotelian in origin—which cannot be ignored nor fitted within or reduced to the contemporary liberal constitutional theorist's paradigm of fundamental rights and judicially-ordered "structural remedies." Brandeis did not predicate his federalism on a supposed constitutional *right* to local self-government. Rather, Brandeis' federalism followed from a vision of politics as creative activity, of politics as active participation by individual citizens in ruling and being ruled.¹⁷ For Brandeis, federalism

AND THE NEW LIBERALISM (1971); S. COLLINI, *LIBERALISM AND SOCIOLOGY: L.T. HOBBHOUSE AND POLITICAL ARGUMENT IN ENGLAND, 1880-1914*, 98-99 (1979); M. FREEDEN, *THE NEW LIBERALISM: AN IDEOLOGY OF SOCIAL REFORM* (1978); B. MURRAY, *THE PEOPLE'S BUDGET 1909-10: LLOYD GEORGE AND LIBERAL POLITICS* (1980); Clarke, *The Progressive Movement in England*, 24 *TRANSACTIONS ROYAL HIST. SOC'Y* 159 (5th ser. 1974); Petter, *The Progressive Alliance*, 58 *HIST. (n.2.)* 45 (1973).

On the Tariff Reform campaign, see G. PHILLIPS, *THE DIEHARDS: ARISTOCRATIC SOCIETY AND POLITICS IN EDWARDIAN ENGLAND*, 103-08, 118-26 (1979); G. SEARLE, *THE QUEST FOR NATIONAL EFFICIENCY: A STUDY IN BRITISH POLITICS AND POLITICAL THOUGHT, 1899-1914*, 145-57 (1971); A. SYKES, *TARIFF REFORM IN BRITISH POLITICS, 1903-1913* (1979); Dutton, *The Unionist Party and Social Policy, 1906-1914*, 24 *HIST. J.* 871 (1981).

Other useful works on British politics of the period include D. CREGIER, *BOUNDER FROM WALES: LLOYD GEORGE'S CAREER BEFORE THE FIRST WORLD WAR* (1976); J. HARRIS, *WILLIAM BEVERIDGE: A BIOGRAPHY* (1977); R. JAY, *JOSEPH CHAMBERLAIN: A POLITICAL STUDY* (1981); D. MARQUAND, *RAMSAY MACDONALD* (1977); K. MORGAN & J. MORGAN, *PORTRAIT OF A PROGRESSIVE: THE POLITICAL CAREER OF CHRISTOPHER, VISCOUNT ADDISON* (1980); M. WIENER, *BETWEEN TWO WORLDS: THE POLITICAL THOUGHT OF GRAHAM WALLAS* (1971).

16. See M. COWLING, *THE IMPACT OF LABOUR, 1920-1924: THE BEGINNING OF MODERN BRITISH POLITICS* (1971); K. MORGAN, *CONSENSUS AND DISUNITY: THE LLOYD GEORGE COALITION GOVERNMENT, 1918-1922* (1979); J. TURNER, *LLOYD GEORGE'S SECRETARIAT* (1980). See also, Petter, *supra* note 15, at 51 (stressing the "inability [of the Progressive Alliance] to tackle at its source that traditional conflict which arose whenever Labour's desire for continued expansion came up against the Liberal party organization's instincts for self-preservation").

17. For an inquiry into the nature of the "active citizenry," as distinct from the "fundamental rights" model of politics, see Pocock, *Virtues, Rights and Manners: A Model for Historians of Political Thought*, 9 *POL. THEORY* 353 (1981); J. POCKOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975); see

was important because it was only at the state and local levels of government that most Americans could participate in creative political activity. In short, federalism provided the essential context for Brandeis' conception of what might be termed civic individualism.¹⁸ It is this political theoretical aspect of Brandeis' experimental federalism that makes a significant contribution to a just future and therefore establishes the *New State Ice* dissent as a precedent relevant to the 1980's and beyond.

I. *The New State Ice Case*

When the New State Ice Company filed a complaint against Ernest A. Liebmann in Oklahoma City's federal district court in March, 1930,¹⁹ that city had not felt the Great Depression's full force. In fact, the local economy was expanding in 1930, largely on the strength of construction activity and recent oil and gas discoveries.²⁰ Oklahoma's capital city seemed well positioned to endure hard times.²¹

The gist of the New State Ice Company complaint was that Liebmann, an ice merchant who was active in other Southwest markets, intended to exploit Oklahoma City's buoyant economy by erecting an ice plant without first going through proper state regulatory channels. In other words, New State Ice complained that Liebmann failed to procure the certificate of convenience and necessity a 1925 Oklahoma statute required him to obtain prior to beginning construction work on his ice plant in February, 1930.²² Accordingly, the New State Ice Company, which possessed such a certificate, asked the federal district court "perpetually [to] enjoin . . . and restrain . . . [Liebmann] from the manufacture, sale and distribution of ice within Oklahoma City without first having obtained a license or permit . . ."²³

Why New State Ice, a Delaware corporation doing business in

also Nagel, *Federalism as a Fundamental Value: National League of Cities in Perspective*, 1981 SUP. CT. REV. 81.

18. "Civic individualism" is discussed in detail in R. FLATHMAN, *THE PRACTICE OF RIGHTS* (1976). See *infra* text accompanying notes 225-231.

19. Record at 1, *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) [hereinafter cited as "Record"].

20. See R. STEWART, *BORN GROWN: AN OKLAHOMA CITY HISTORY*, 149-50, 203, 212-15, 233 (1974).

21. See *New State Ice Co. v. Liebmann*, 42 F.2d 913, 918 (W.D. Okla. 1930) (describing Oklahoma City as a "young, industrious, wide-awake growing city"). The appearance of economic stability was, of course, short-lived. See J. STEINBECK, *GRAPES OF WRATH* (1939) (plight of "Okies" during the Great Depression); see also *Edwards v. California*, 314 U.S. 160, 167-68 (1941).

22. Record at 2-3.

23. *Id.* at 3.

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Oklahoma, and the Southwest Utility Ice Company,²⁴ an Oklahoma corporation which filed an essentially similar action, chose a federal forum is not clear. Not diversity actions, the suits were framed by counsel as equity actions “arising under and involving the construction and application of the Constitution of the United States.”²⁵ However, the complainants only sought enforcement of a state regulatory statute.

The statute in question, while apparently the first of its kind in the nation, did no more than apply standard regulatory technology in a new context, the ice industry. In relevant part, the statute provided:

§ 1. That the manufacture, sale and distribution of ice . . . is hereby declared to be a public business, as defined by Section 11032 of the Compiled Statutes of Oklahoma.

§ 2. That no person . . . shall be permitted to manufacture, sell and distribute ice within the State of Oklahoma without having first secured a license for such purpose from the Corporation Commission of the State of Oklahoma.

§ 3. That the Corporation Commission shall not issue a license to any person . . . except upon a hearing . . . at which said hearing competent testimony and proof shall be presented showing the necessity for the manufacture, sale or distribution of ice . . . at the point, community or place desired.²⁶

Violations of this statute were misdemeanors punishable by fines.²⁷

Liebmann’s defense to the two injunctive suits was straightforward. His attorneys first “specifically denie[d]” that the ice business was “in fact a public business and that the properties used therein [were] public utilities.”²⁸ Attempts to enforce the Oklahoma ice legislation, which hinged on the state legislature’s classification of ice manufacture and distribution as a “public business,” were therefore wrongful, amounting to a violation of “rights guaranteed . . . and protected under and by virtue of the Constitution of the United States.”²⁹ The ice statute par-

24. Ice manufacture, sale and distribution was a common (and apparently profitable) sideline for Oklahoma’s electric utilities. *See* R. STEWART, *supra* note 20, at 151 (manufacture of ice in Oklahoma City by Oklahoma Gas & Electric); Record at 34, 36 (public service corporations owned one third of the city’s ice plants and operated them in connection with their public utility business).

25. Record at 1.

26. 1925 Okla. Sess. Laws 226-28 (1925); *New State Ice Co. v. Liebmann*, 52 F.2d 349, 350-51 n.1 (10th Cir. 1931). This ice regulation bill was intended, whatever its ultimate effects, to curb abuses in the sale of ice, especially the purveying of short-weighted or unclean ice by itinerant seasonal vendors and price discrimination; *see* Record at 25-26, 32-35, 39-40.

27. Each day’s violation of the statute constituted a separate offense for which a twenty-five dollar (\$25.00) fine could be assessed. In addition, the Corporation Commission was empowered to promulgate general orders, violations of which was punishable by a five hundred dollar (\$500.00) fine. 1925 Okla. Sess. Laws 227-28 (1925).

28. Record at 6.

29. *Id.* at 7.

ticularly impinged, Liebmann's counsel continued, on Liebmann's rights under the contract clause of the federal Constitution and the fourteenth amendment.

While Liebmann's attorneys also questioned New State Ice's standing to sue as an alleged non-participant in the Oklahoma City ice business,³⁰ Liebmann was, in a sense, fortunate that the trial court disregarded this argument and proceeded to the merits of the case. Federal district Judge Pollock³¹ looked upon the New State Ice and Southwest Utility Ice suits, which he had consolidated for trial, as primarily intended to "further [the complainants'] practical monopoly of the [Oklahoma City] ice business."³² Pollock believed that the actions had been brought only because New State Ice Company and Southwest Utility Ice "did not invite and do not welcome . . . competition . . . whether the same be beneficial to purchasers of ice dealing with them or not."³³ Judge Pollock also wrote that the 1925 Oklahoma ice statute "tend[ed] of necessity to the creation and perpetuation of monopolies and to the destruction of all competition."³⁴

Guided by the arguments of Liebmann's trial attorney, former Oklahoma Supreme Court Justice George M. Nicholson,³⁵ the trial court first held that, as a matter of state law, the ice business was *not* a "public business" as defined by the general regulatory statute, § 11032, notwithstanding the explicit declaration in the 1925 ice statute.³⁶ Judge Pollock found that Nicholson's Oklahoma Supreme Court had so limited the reach of state regulation through interpretation of § 11032 as to preclude the application of statutory regulation to the state's ice business.³⁷

Alternatively, in the trial court's judgment, the 1925 ice statute failed to survive federal constitutional analysis. Using the then-recent U.S. Supreme Court cases of *Wolff Packing Co. v. Industrial Court*³⁸ and *Tyson & Bros. v. Banton*³⁹ as touchstones, Judge Pollock argued that there were

30. *Id.* at 8.

31. John C. Pollock (1857-1937), A.B. Franklin College, 1882; private study of law, St. Clairsville, Ohio, 1882-84; private practice, Wingfield, Kansas, 1888-1901; Justice, Kansas Supreme Court, 1901-02; Judge, Federal District of Kansas, 1903-37. It is not clear why Pollock, rather than one of the Oklahoma federal district judges, heard the case.

32. 42 F.2d at 914.

33. *Id.*

34. *Id.*

35. George M. Nicholson had been elected to the state high court in November, 1920 and served from January 10, 1921 (*see* 80 Okla. iii) to January 10, 1927 (*see* 123 Okla. iii).

36. 42 F.2d at 915-16.

37. *Id.* at 916.

38. 262 U.S. 522 (1923).

39. 273 U.S. 418 (1927).

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federal constitutional limits, embedded primarily in the fourteenth amendment, to the enterprises states could legitimately regulate as public utilities.⁴⁰ Ice manufacture and distribution was not a regulable enterprise. Therefore, the court ruled for defendant Liebmann, dismissing the complaints as without equity.⁴¹ Judge Pollock's opinion is murky, but it seems to invalidate the 1925 Oklahoma ice statute.

The established ice companies appealed. The Tenth Circuit Court of Appeals,⁴² *per* Circuit Judge Orie L. Phillips,⁴³ noted that appellants had failed either to plead or to prove possession of Oklahoma ice licenses valid after June 1930, the date of the opinion below. In the panel's opinion, that fact "alone would justify an affirmance of the decree below."⁴⁴

Notwithstanding the availability of this legal "out", the appellate tribunal proceeded to the case's merits. The court framed the sole issue on appeal as follows:

Is the business of manufacturing and selling ice of such a character that it is subject to regulation to the extent of requiring a certificate of convenience and necessity before a person may engage in such business? Or, to put it another way, may the state prohibit one man from manufacturing ice on his own property and selling it to his neighbor at a price they mutually agree upon?⁴⁵

In answering these questions, the appellate tribunal dealt exclusively with federal constitutional law: the minutiae of Oklahoma public utility law which had in part occupied Judge Pollock's time were ignored. General federal constitutional principles had pride of place. The Tenth Circuit panel postulated that freedom with respect to entry into (and maintenance of) occupations and businesses was the general American rule, and restraint the exception.⁴⁶ Extensive regulation was justified only in the case of businesses legally "affected with a public interest."⁴⁷

Judge Phillips then invoked *Wolff*,⁴⁸ a unanimous decision of the early

40. 42 F.2d at 916-17.

41. *Id.* at 918.

42. The panel consisted of Circuit Judges John H. Cotteral (1864-1933) of Guthrie, Oklahoma, George T. McDermott (1886-1937) of Topeka, Kansas, and Orie L. Phillips.

43. Orie L. Phillips (1885-1974), attended Knox College, 1903-04; J.D. U. Mich. 1908, LL.D. U. Mich. 1935; private practice, New Mexico, 1910-23; state district attorney, 1912-16; GOP majority leader, New Mexico Senate, 1920-23; Judge, federal District of New Mexico, 1923-29; Judge, Tenth Circuit Court of Appeals, 1929-1974; Chief Judge, Tenth Circuit Court of Appeals, 1940-1955. *See* 516 F.2d 5 (1975) (posthumous tribute to Judge Phillips).

44. 52 F.2d at 351.

45. *Id.*

46. *Id.* at 351-52.

47. *Id.* at 352, *quoting* *Williams v. Standard Oil Co.*, 278 U.S. 235, 240 (1928).

48. *Wolff Packing Co. v. Industrial Court*, 262 U.S. 522 (1923) (Taft, C.J.), *rev'g* 111 Kan. 501, 207 P. 806 (1922). *See also* *Wolff Packing Co. v. Industrial Court*, 267 U.S. 552 (1925), *rev'g* 114 Kan. 304, 219 P. 259 (1923).

Taft Court, for its tripartite classification of businesses “affected with a public interest.”⁴⁹ The first category of regulable businesses under *Wolff* consisted of enterprises “carried on under the authority of a public grant of privileges which either expressly or impliedly impose[d] the affirmative duty of rendering a public service demanded by any member of the public.”⁵⁰ The second category was comprised of “[c]ertain occupations, regarded as exceptional, the public interest attaching to which . . . has survived the period of arbitrary laws by Parliament or colonial Legislatures for regulating all trades and callings.”⁵¹ The court was certain that Liebmann’s projected ice business was not covered by either of these first two *Wolff* categories.⁵²

Whether or not it was encompassed by the third *Wolff* category of businesses “affected with a public interest” was a closer question. This last group included “businesses which, though not public at their inception, may be fairly said to have risen to be such and have become subject in consequence to some government regulation.” Such businesses “have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner [of a third *Wolff* category enterprise], by devoting [it] to the public use, in effect grants the public [a legal] interest in that use and subjects himself to public regulation to the extent of that interest.”⁵³

Third-category businesses generally provided indispensable services to consumers who, absent government regulation, would theoretically be exposed to the threat of exorbitant charges by monopoly vendors.⁵⁴ Given this pattern, the court found that the Oklahoma ice business probably lay outside the third *Wolff* category.⁵⁵ Not only were electric home refrigerators rapidly making market ice sales less and less of an indispensable service, but it was also a fact that ice prices in non-regulated states were lower, for the most part, than in regulated Oklahoma.⁵⁶

Moreover, even if the “public interest” in Oklahoma extended to the ice business—which the court doubted—it did not extend so far as to justify the exclusion of would-be ice entrepreneurs from available markets through use of a mandatory licensing scheme.⁵⁷ “[A] limitation on

49. 52 F.2d at 352.

50. *Id.* at 353.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 354.

55. *Id.* at 355.

56. *Id.* (table showing average ice prices in regulated and non-regulated states).

57. *Id.* at 354.

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the right to engage in a business which is a matter of common right is an even greater encroachment on the rights of the citizen than the regulation of prices in such business.”⁵⁸ Therefore, the Tenth Circuit reluctantly upheld the 1925 Oklahoma statute insofar as it permitted price regulation, but overturned it insofar as it required prior licensing of those who desired to engage in the ice business. In so doing, the appellate panel followed a recent opinion by the Arkansas Supreme Court, an opinion which had invalidated the entry licensing provisions of an Arkansas statute regulating the ice business.⁵⁹

New State Ice Company—this time alone⁶⁰—appealed from the Tenth Circuit to the U.S. Supreme Court, relying on 28 U.S.C. § 347(b).⁶¹ New State Ice asserted that two errors had been made by the appellate court: (1) it erred in holding the 1925 Oklahoma ice statute unconstitutional in part; and (2) it erred in affirming the district court’s dismissal of the equitable suits against Liebmann.⁶²

The U.S. Supreme Court invalidated the statute.⁶³ Justice Sutherland delivered the Court’s opinion on March 21, 1932. Sutherland agreed with trial court Judge Pollock’s assertion that the 1925 ice statute could lead to nothing but monopoly.⁶⁴ Further, he agreed with the Tenth Circuit panel’s ruling that “a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business . . . cannot be upheld consistently with the Fourteenth Amendment.”⁶⁵

58. *Id.*

59. *Id.*, citing *Cap. F. Bourland Ice Co. v. Franklin Utilities Co.*, 180 Ark. 770, 22 S.W.2d 993 (1929). The Tenth Circuit’s reliance on this decision was not entirely well-founded. The Arkansas high court’s decision in *Bourland* was bottomed on a state constitutional provision—for which there was no Oklahoma or federal equivalent—prohibiting the granting or creation of monopolies. 180 Ark. at 774, 22 S.W.2d at 994-95. Justice Brandeis later referred to the Arkansas statute and the *Bourland* decision in his *New State Ice* dissent. 285 U.S. at 283 n.4 (1932) (Brandeis, J., dissenting).

60. However, Southwest Utility Ice’s counsel was listed as “Of Counsel” on New State Ice’s legal papers. Appellant’s Statement of Basis for Appeal at 9, *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

61. The contemporary statutory counterpart is 28 U.S.C. § 1254(2) (1976) (allowing appeal of federal question by party relying on state statute held unconstitutional by court of appeals).

62. See Appellant’s Brief at 32, *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

63. This was the third time in twelve years that the Supreme Court invalidated Oklahoma public-utility legislation. See *Oklahoma Operating Co. v. Love*, 252 U.S. 331 (1920) (Brandeis, J.); *Oklahoma Gin Co. v. Oklahoma*, 252 U.S. 339 (1920) (Brandeis, J.) (holding predecessor to § 11032 unconstitutional under the fourteenth amendment for failure to provide adequate judicial review of Oklahoma Corporation Commission determinations); *Frost v. Corp. Comm’n.*, 278 U.S. 515 (1929) (holding regulation of cotton ginning enterprises violative of fourteenth amendment); see also *id.*, 278 U.S. 528 (Brandeis, J., dissenting).

64. 285 U.S. at 278-79.

65. *Id.* at 278.

In the critical passage of his opinion, Sutherland found Oklahoma ice enterprises to be no more than "lawful private business[es]."⁶⁶ The tripartite classificatory scheme of *Wolff* lay just beneath the surface of the opinion. The majority opinion, like that of the Tenth Circuit, focused on whether or not ice enterprises lay within the ambit of the third *Wolff* category. If they did not, then the Oklahoma legislature's classification was erroneous and the 1925 statute was unconstitutional.

Sutherland gave content to the third *Wolff* category of businesses legally "affected with a public interest" by discussing his opinion in *Frost v. Corporation Commission*,⁶⁷ in which the Court assumed that Oklahoma's cotton ginning industry fell within the third *Wolff* classification. Citing to a subsequent Tenth Circuit decision which directly addressed the question,⁶⁸ Sutherland explained and confirmed the *Frost* assumption.

The production of cotton is the chief industry of . . . Oklahoma, and is of such paramount importance as to justify the assertion that the general welfare and prosperity of the state in a very large and real sense depend upon its maintenance. . . . The relation between the growers of cotton, who constitute a very large proportion of the population, and those engaged in furnishing the [cotton-ginning] service, is thus seen to be a peculiarly close one in respect of an industry of vital concern to the general public. These considerations render it not unreasonable to conclude that the [cotton] business "has been devoted to a public use and its use thereby, in effect, granted to the public."⁶⁹

By comparison, the Oklahoma ice business displayed none of these indicia. Ice manufacture, sale and distribution, while perhaps important to civilized life in parched, sweltering Oklahoma, was but "an ordinary business, not . . . a paramount industry upon which the prosperity of the entire state . . . depend[ed]."⁷⁰ It was an "essentially private" undertaking: it bore "no such relation to the public as to warrant its inclusion in the [third *Wolff*] category of businesses charged with public use."⁷¹ Therefore, the legislation regulating the ice industry was void.⁷²

Sutherland concluded with an attack on the experimental federalism Brandeis advocated in his *New State Ice* dissent, writing that "it is plain that unreasonable or arbitrary interference or restrictions cannot be saved from the condemnation of [the Fourteenth] Amendment merely by calling them experimental. . . . [T]here are certain essentials of lib-

66. *Id.*

67. 278 U.S. 515 (1929).

68. *Chickasha Cotton Oil Co. v. Cotton County Gin Co.*, 40 F.2d 846 (10th Cir. 1930).

69. 285 U.S. at 276-77.

70. *Id.* at 277.

71. *Id.*

72. *Id.* at 278-80.

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erty with which the state is not entitled to dispense in the interest of experiments.”⁷³

II. *Brandeis and American Progressivism*

It is puzzling that “the classic conception of states as laboratories”⁷⁴ seems to appear first in a dissenting opinion which seems merely to advocate the maintenance of regulated public service monopolies in Oklahoma.⁷⁵ The short explanation for this is that Brandeis was primarily concerned at the time of *New State Ice* with the legal fate of LaFollette Progressive Republicanism’s most recent “political invention”—the unemployment insurance reserves scheme Wisconsin had enacted two months earlier, in January of 1932.⁷⁶ Bruce Murphy has recently noted that this unemployment insurance reserves program was so “important . . . to the Justice that he . . . devoted much of his public life to seeking its adoption.”⁷⁷ Murphy’s comment applies not only to Brandeis’ public life, but also to the enunciation of one of the Justice’s most enduring ideas.

A. *The Received Brandeis*

Many American historians, and not a few practicing attorneys, could sketch Justice Brandeis’ biography. A Louisville, Kentucky native, Brandeis attended Harvard Law School. After graduation, he became a successful corporate attorney in Boston who also used his legal expertise in the service of what he perceived to be the public interest. In the

73. *Id.* at 279-80. *Accord* *Pointer v. Texas*, 380 U.S. 400, 413 (1965) (Goldberg, J., concurring) (attacking experimental federalism in similar language); *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring) (same); *Gilliard v. Mississippi*, — U.S. —, 104 S. Ct. 40, 41-42 (1983) (Marshall, J., dissenting from denial of *certiorari*) (Court should not make use of the experimental federalism metaphor to shrink from its duty of review); Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253, 321-25 (1982).

It is important to note that jurists who have opposed experimental federalism have often been motivated by political (and political-theoretical) concerns. Sutherland’s *New State Ice* volley recalls words he spoke, as a GOP Stalwart, during the days of LaFollette’s Progressive Republican Insurgency (1911-1912). See G. SUTHERLAND, *GOVERNMENT BY BALLOT* 6, 7, 9, 13, 34 (1911) (Sutherland’s speech, as a U.S. Senator from Utah, criticizing the “experimental” state constitutions of New Mexico and Arizona prior to their admission to the Union and Progressive Republicanism generally). The politics of Justices Marshall and Goldberg are clearly not those of Justice Sutherland, but they too may have motivated the later justices’ aversion to “experimental federalism,” at least in those federal constitutional preserves deemed to be above or immune from state political experimentation.

74. *E.E.O.C. v. Wyoming*, — U.S. —, 103 S. Ct. 1054, 1075 (1983) (Burger, C.J., dissenting).

75. See A. MASON (II), *supra* note 11, at 609; Freund, *A Centennial Memoir*, *supra* note 11, at 785-86.

76. See D. NELSON, *UNEMPLOYMENT INSURANCE: THE AMERICAN EXPERIENCE, 1915-1935* (1969).

77. See B. MURPHY, *supra* note 11, at 94-95.

latter, "People's Attorney" role, Brandeis sought to obtain labor-management accord on the necessity of stable employment, decent wages and safe working conditions. He worked to break up public-utility and industrial trusts, believing that small economic units were nearly as efficient as larger entities. In a successful attempt to protect social-reform legislative gains in litigation, he wrote the first "Brandeis brief," a lengthy court pleading replete with sociological and economic data as well as (and sometimes in place of) traditional legal authorities. An ardent believer in political decentralization, Brandeis was appointed to the U.S. Supreme Court by the essentially Jeffersonian President Wilson and enjoyed perhaps his greatest influence in American government in the mid-1930's, when Franklin D. Roosevelt's Second New Deal included several neo-Brandeisian features.⁷⁸

One of the major defects of Brandeis historiography is its domination by an embellished or slightly modified version of this sketch. Oversimplification shades insensibly into distortion when historians, assuming that Brandeis was a life-long partisan Democrat,⁷⁹ interpret his localism as a latter-day Jeffersonianism.⁸⁰ Remarks made by commentators in the 1930's, when Brandeis was (at least theoretically) able to respond to misleading summations or characterizations of his thought,⁸¹ have buttressed this view, making it the received wisdom on the topic.⁸²

B. *Brandeis as a Jeffersonian*

One can chip away at this orthodoxy by investigating the Jeffersonianism Brandeis embraced. It was clearly not what Merrill Peterson has termed "code Jeffersonianism." That is, Brandeis was not a western or southern agrarian Democrat who "retained the traditional *ethos* of the [Democratic] party in relatively pure form and believed that Jefferson,

78. This biographical sketch is a composite of the sources cited in note 11, *supra*. See also L. FRIEDMAN, A HISTORY OF AMERICAN LAW 548 (1973); J. JOHNSON, AMERICAN LEGAL CULTURE, 1908-1940, 29-46 (1981); J. SEMONCHE, CHARTING THE FUTURE: THE SUPREME COURT RESPONDS TO A CHANGING SOCIETY, 1890-1920, 219-20, 312-16 (1978).

79. See, e.g., A. LIEF, *supra* note 11, at 30 (Brandeis said to be a partisan Democrat in national politics from 1884).

80. See sources cited *supra* notes 13-14. See also A. LIEF, *supra* note 11, at 93 (Brandeis "an old-fashioned Jeffersonian Democrat").

81. Cf. 5 LETTERS, *supra* note 11, at 418 (letter to publisher James Henle, Feb. 10, 1930) (Brandeis' refusal to examine a 1930 volume concerning his socio-economic views prior to its publication).

82. See A. SCHLESINGER, JR., THE AGE OF ROOSEVELT: THE CRISIS OF THE OLD ORDER, 1919-1933, *supra* note 13, at 30 ("For Wilson, Jeffersonianism had been a faith; Brandeis seemed to transform it into a policy . . ."); N. DAWSON, *supra* note 11, at 21 ("If one were forced to reduce the complex blend of liberal and conservative elements in Brandeis' thought to a formula, one could say that he advocated the use of liberal means to obtain conservative ends. He was willing to use the power of the state, sometimes in surprising ways, to secure and guard the traditional values to Jeffersonian democracy.").

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like the Messiah, would rise again.”⁸³ As a wealthy northeastern corporate attorney, Brandeis found Grover Cleveland’s genteel, low-tariff, pro-civil service mugwumpery more satisfying than code Jeffersonianism; he rejected William Jennings Bryan and bi-metallism in both 1896 and 1908.⁸⁴ Never averse to supporting good-government Republicans in Boston municipal politics,⁸⁵ Brandeis was by 1911 altogether outside Jefferson’s party.

Brandeis’ interest in Jefferson as an historical *persona* appears to have begun in 1926.⁸⁶ He made his first trip to Charlottesville in September 1927, coming away from Monticello and the University of Virginia with an overwhelming sense of Jefferson’s personal greatness as a cultured, educated Man of the Enlightenment.⁸⁷ Brandeis was attracted by Jefferson’s civility, not by his partisan political image. In perceiving Jefferson primarily as a figure in the American cultural past, rather than as a partisan politician, Brandeis was in accord with writers such as Albert Jay Nock and Gilbert Chinnard, who presented a “new Jefferson” to the nation in the mid-1920’s.⁸⁸ Nock’s Jefferson was hardly the omniscient, unerring political hero of partisan Democratic memory; rather, the “new Jefferson,” albeit an accomplished *savant*, was woefully deficient in basic economic knowledge, a deficiency which allowed his arch-rival Hamilton to shape the new republic’s protectionist industrial economy.⁸⁹

83. M. PETERSON, *THE JEFFERSONIAN IMAGE IN THE AMERICAN MIND* 254 (1960).

84. *Id.* at 259 (Bryan and code Jeffersonianism); A. LIEF, *supra* note 11, at 366, 621 (Brandeis’ high regard for Grover Cleveland); A. GAL, *supra* note 11, at 22 (same); 1 LETTERS, *supra* note 11, at 123-24 (letter to Elizabeth Evans, August 6, 1896) (Brandeis’ rejection of Bryan in 1896); 2 LETTERS, *supra* note 11, at 213-14 (letter to Alfred Brandeis, November 4, 1908) (Brandeis’ vote for Taft in 1908).

85. *See* A. GAL, *supra* note 11, at 92-95 (Brandeis and good-government Republicans in Boston politics); 2 LETTERS, *supra* note 11, at 31 (letter to Alfred Brandeis, October 19, 1907) (Brandeis asked by Boston GOP to run for mayor in 1907); A. LIEF, *supra* note 11, at 260 (Brandeis’ GOP registration in 1911).

86. *See* 5 LETTERS, *supra* note 11, at 209 (letter to Felix Frankfurter, March 14, 1926) (Brandeis reading Jefferson’s biography).

87. *Id.* at 302 (letter to Alfred Brandeis, September 22, 1927) (“Returned home last evening with deepest conviction of T.J.’s greatness. He was a civilized man.”); *id.* at 302 n.2 (letter to Felix Frankfurter, September 22, 1927) (“Alice & I have spent a day at Charlottesville to see Monticello & the University. It is strong confirmation that T.J. was greatly civilized. Washington, Jefferson, Franklin, Hamilton were indeed a Big Four.”).

88. *See* M. PETERSON, *supra* note 83, at 412.

89. *See* A. NOCK, *JEFFERSON* 192-93 (“Others were more quick than Mr. Jefferson to assess the economic implications of Hamilton’s fiscal system. By an odd coincidence, Mr. Jefferson had stood by the bedside of its birth in Paris; he knew its parents and godparents, both personally and by their writings, and yet seems never quite to have known what manner of child had been brought fourth. . . . He had occasional brilliant flashes of insight into fundamental economics and its relations to government, but they were too brief and unsteady to be illuminating.”); *id.* at 194 (“It does not appear that Mr. Jefferson’s mind ever quite

Brandeis' willingness to be called a Jeffersonian⁹⁰ in the 1930's takes on new meaning given its basis in appreciation of the third president's civility.⁹¹ Brandeis did not advocate pristine Jeffersonian agrarianism as a panacea for depression-ridden Americans in the 1930's, as others did.⁹² Such a strategy would, following Nock's analysis, result in further Hamiltonian economic development and eventually in distress. What Brandeis, like Nock's "new" civilized Jefferson, did advocate was political decentralization and the importance of vital local cultures.⁹³ Moreover, it should be noted that individuals of many ideological colors claimed a Jeffersonian heritage in the 1930's. "Jefferson shaded the entire political spectrum, from the American Liberty League on the far right to the Communist party on the far left."⁹⁴

C. *Brandeis as a Progressive Republican*

Accurately delineating Brandeis' Jeffersonianism is far less important than finding experimental federalism's political source. The assumption that Brandeis was a partisan Democrat impedes progress in this inquiry, too. For if Brandeis was, following the assumption, a Democrat but not a code Jeffersonian (or states'-rights) Democrat, then what political belief animated his federalism? Or was Brandeisian localism, as is suggested alternatively by Schlesinger,⁹⁵ no more than a personal "moral preference"?

Brandeis' experimental federalism did indeed rest on a political foundation. This foundation, however, will not be unearthed until the notion that it rests on the rock of some type of Democratic ideology is discarded. Brandeisian localism was formed against the backdrop of Robert M. LaFollette's idiosyncratic brand of Progressive Republicanism. As noted above, Brandeis bolted the Democratic party in 1908 and

struck through to this fundamental ground of economic objection to Hamilton's fiscal system, or that it ever effectively followed those which did."); *id.* at 202-03 (1926).

Brandeis read and commented favorably on Nock's work. See 5 LETTERS, *supra* note 11, at 315-16 (letter to Felix Frankfurter, December 6, 1927). Late in the Justice's life, a popular edition of Nock's book was issued, dedicated to him; *id.* at 647-48 (letter to Bernard Flexner, November 16, 1940).

90. See A. LIEF, *supra* note 11, at 478.

91. In the printed edition of his correspondence, Brandeis' last word on Jefferson was that the third president was "our most civilized American and true Democrat." See 5 LETTERS, *supra* note 11, at 648 (letter to Bernard Flexner, November 16, 1940).

92. See Leverette, Jr. & Shi, *Herbert Agar and Free American: A Jeffersonian Alternative to the New Deal*, 16 J. AM. STUD. 189 (1982).

93. A comparison of Jefferson's actions in the promotion of the University of Virginia and Brandeis' efforts to reinvigorate the University of Louisville in the mid-1920's and 1930's might prove to be interesting.

94. See M. PETERSON, *supra* note 83, at 363.

95. A. SCHLESINGER, JR., *THE AGE OF ROOSEVELT: THE POLITICS OF UPHEAVAL*, *supra* note 13, at 220 ("Localism was for him a moral preference, not a constitutional injunction.").

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voted for Taft. His subsequent disenchantment with Taft did not manifest itself in an immediate return to the Democratic party; instead, it took the form of Republican Insurgency and culminated in an attempt in 1911 and early 1912 to help then-Senator LaFollette obtain the Republican presidential nomination.

Brandeis met LaFollette not long after the future Justice's first trip west of St. Louis.⁹⁶ A leader of the Midwestern Progressive Republican Insurgents, LaFollette, like Brandeis, was a foe of the Trusts and an advocate of strict public control of American railroads.⁹⁷ The two men quickly became friends and worked together in 1910 and 1911 on behalf of conservationist Gifford Pinchot in his struggle against Taft Administration conservation policy in the Pinchot-Ballinger controversy. The friendship deepened as time passed, enduring until LaFollette's death in 1925.

Never a favorite of the Republican Old Guard, LaFollette distanced himself from the Taft Administration in 1910 and 1911. By November 1911, the Insurgent Wisconsin senator had been persuaded by similarly disaffected Progressive Republicans to run for president in 1912. Indeed Brandeis—a registered Republican in 1911—reportedly dined with LaFollette on the evening that the fateful decision to run was made.⁹⁸

Brandeis campaigned hard for LaFollette. After delivering a stirring address to Ohio Progressives on January 1, 1912, Brandeis toured the midwestern states “urging LaFollette’s nomination and declaring that ‘only the revolutionary and Civil wars . . . surpassed in importance the progressive movement . . . [then] before the people.’”⁹⁹ These campaign efforts, and those of other members of the National Progressive Republican League,¹⁰⁰ seemed to be having the desired political effect. LaFollette gained adherents outside Republican Insurgency’s traditional Midwestern strongholds. For example, a mass meeting at New

96. A. GAL, *supra* note 11, at 120-21.

97. See THE POLITICAL PHILOSOPHY OF ROBERT M. LAFOLLETTE 62-64 (E. Torelle ed. 1920); H. MERRILL & M. MERRILL, THE REPUBLICAN COMMAND, 1897-1913, 73, 258, 301-02 (1971); B. LAFOLLETTE & F. LAFOLLETTE, ROBERT M. LAFOLLETTE 295-96 (1953).

98. H. & M. MERRILL, *supra* note 97, at 284-85, 286-87, 320; see also A. LIEF, *supra* note 11, at 260 (Brandeis’ GOP registration in 1911); B. & F. LAFOLLETTE, *supra* note 97, at 361.

99. B. & F. LAFOLLETTE, *supra* note 97, at 380.

100. The National Progressive Republican League was organized January 21, 1911. Among its organizers are 9 leading United States Senators and 13 leading members of the House of Representatives and 6 governors of states. This organization has for its avowed purpose not only the election of United States Senators by popular vote, but the establishment of the Initiative, Referendum, Recall, Direct Primaries, Corrupt Practices Acts, and other democratic legislation throughout the country.

G. ROE, OUR JUDICIAL OLIGARCHY 20 n.6 (1912). See also PAPERS OF EDWARD P. COSTIGAN RELATING TO THE PROGRESSIVE MOVEMENT IN COLORADO, 1902-1917, 175-77 (C. Goodykoontz ed. 1941).

York's Carnegie Hall on January 22, 1912 was well-attended by enthusiastic partisans.¹⁰¹

However, LaFollette's presidential campaign ended suddenly just a few days after the Carnegie Hall rally. His daughter Mary was scheduled to undergo major surgery, a life-threatening ordeal in those days. The strain of parental concern, added to the rigors of campaigning, broke LaFollette's health and forced him to withdraw from the race.¹⁰² Returning from a speaking engagement in St. Louis, Brandeis wrote the following note of consolation to Mrs. LaFollette: "My thoughts have been much with you and Bob and the children . . . and I long to be East where I may hear something authentic. Only make Bob take the rest he needs and make a pleasure trip out of this necessity. When he comes back we will take up the good fight again together."¹⁰³

After LaFollette quit the contest, Brandeis gravitated toward Wilson's camp. In time, Brandeis came to be one of Wilson's close advisors and was, in fact, widely rumored to be destined for a legal post in Wilson's cabinet.¹⁰⁴ However, despite these new political links, the Brandeis-LaFollette connection endured. While strengthened by mutual affection, the connection was primarily political. Wilson himself understood the importance of this earlier political nexus; the only politician he consulted prior to nominating Brandeis to the U.S. Supreme Court was LaFollette.¹⁰⁵

One characteristic of the archetypical American Progressive was an inability to accept the restraints of regular party membership. Brandeis shared this trait. While he occasionally expressed a hope in the 1920's that he would live to see another Democratic president¹⁰⁶ and energetically supported Al Smith's Democratic candidacy against Hoover in 1928,¹⁰⁷ he also continued his ties to LaFollette's Progressive Republicanism. For example, when LaFollette ran for president as an Independent Progressive in 1924, Brandeis considered but declined an offer to be his running mate.¹⁰⁸ Mrs. Brandeis wrote the following note to Mrs. LaFollette shortly thereafter: "My great—indeed only regret is that Louis should not be standing shoulder to shoulder with Bob in the fight. But he will help, I feel sure, in his own way when the opportunity

101. See B. & F. LAFOLLETTE, *supra* note 97, at 388-89.

102. *Id.* at 394-406.

103. *Id.* at 406.

104. See A. MASON (II), *supra* note 11, at 375-97.

105. J. SEMONCHE, *supra* note 78, at 312.

106. See 5 LETTERS, *supra* note 11, at 308.

107. *Id.* at 260-62, 212, 360-64.

108. See B. & F. LAFOLLETTE, *supra* note 97, at 1085, 1115-16; see also K. MCKAY, THE PROGRESSIVE MOVEMENT OF 1924, 134 (1947).

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offers.”¹⁰⁹

Brandeis’ loyalty to LaFollette in national politics had its equivalent at the local level; Brandeis adhered to LaFollette’s “Wisconsin Idea.” The Wisconsin Idea entailed the use of taxation as a conscious instrument of social policy—Wisconsin was the first state in the nation to enact a progressive income tax on individuals and corporations¹¹⁰—and legislation intended to ameliorate the lives of industrial workmen, such as generous workmen’s compensation laws and laws outlawing “yellow-dog” contracts.¹¹¹ Advocates of the Wisconsin Idea prescribed tough, searching regulation of rail carriers and other public utility corporations¹¹² and a never ending vigil to protect the integrity of the political process against corruption by “special interests.”¹¹³

These programs were to be advanced primarily at the state and local levels. The integral part that localism played in LaFollette’s Progressive Republicanism is apparent in the writings of Frederick C. Howe.¹¹⁴ Howe, like Brandeis a corporate attorney,¹¹⁵ was active in LaFollette’s 1912 and 1924 presidential campaigns.¹¹⁶ Howe and Brandeis, who corresponded until the 1930’s,¹¹⁷ were equally intimate with LaFollette.¹¹⁸

109. See B. & F. LAFOLLETTE, *supra* note 97, at 1115.

110. See W. BROWNLEE, JR., PROGRESSIVISM AND ECONOMIC GROWTH: THE WISCONSIN INCOME TAX, 1911-1929 (1974).

111. Cf. J. PATTERSON, THE NEW DEAL AND THE STATES: FEDERALISM IN TRANSITION 18, 36 (1969).

112. THE POLITICAL PHILOSOPHY OF ROBERT M. LAFOLLETTE, *supra* note 97, at 62-64. However, railroad regulation was not, in practice, as stringent in Wisconsin as in some other states. Cf. J. PATTERSON, *supra* note 111, at 18.

113. See THE POLITICAL PHILOSOPHY OF ROBERT M. LAFOLLETTE, *supra* note 97, at 20-21; see also K. MCKAY, *supra* note 108, at 143, 147.

114. See F. HOWE, THE CONFESSIONS OF A REFORMER (J. Braeman ed. 1967); Steiner, *supra* note 15, at 774-75.

115. Howe was a partner in the Cleveland, Ohio firm of Garfield, Garfield & Howe.

116. Howe was Secretary of the National Progressive Republican League in 1911; see 2 LETTERS, *supra* note 11, at 403-05 (letter to Frederick C. Howe, February 7, 1911); *id.* at 406 (letter to Howe, February 13, 1911); *id.* at 544-45 (letter to Howe, February 13, 1912). He was also president of the New York City-based Insurgents’ Club, the group which arranged the January 1912 Carnegie Hall meeting for LaFollette; see B. & F. LAFOLLETTE, *supra* note 97, at 389. A member of the Committee of Forty-Eight, Howe attended the national Conference for Progressive Political Action in Chicago in February 1922. He was named Chairman of the Committee on Organization and, later, Secretary of the national Committee of Fifteen; see K. MCKAY, *supra* note 108, at 62-64. Howe handled the groundwork for LaFollette’s speeches in 1924; see B. & F. LAFOLLETTE, *supra* note 97, at 1130.

117. See N. DAWSON, *supra* note 11, at 71-72, 75; Steiner, *supra* note 15, at 782 n.107.

118. As when they sat with the Wisconsin Senator monitoring the 1916 Republican Convention. See B. & F. LAFOLLETTE, *supra* note 97, at 570. Howe met LaFollette in 1907. *Id.* at 224. He considered the LaFollette Republican platform of 1910 the best partisan document of its kind ever written. *Id.* at 306.

Like LaFollette, Howe had doubts about the American entry into World War I. He wrote a critical book, WHY WAR (1916), which LaFollette recommended to his older son. *Id.* at 913. Howe’s wife, herself a radical, was held by Secret Service agents in 1919 and was not permitted to see her husband or an attorney. *Id.* at 938. LaFollette himself suffered great

In *The City, the Hope of Democracy* (1905), Howe argued that meaningful urban reform would be forthcoming only if American cities were granted extensive home rule powers. Howe was confident that, if decentralization within the states were accomplished, the American city would then truly be a democratic "experiment station, offering new experiences to the world."¹¹⁹

Decentralization on the national level in the form of federalism was assumed by Howe and by LaFollette Progressive Republicans generally. In *Wisconsin: An Experiment in Democracy* (1912), a work which may have been intended to serve as a LaFollette campaign tract, Howe emphasized the political primacy of the states.

[P]robably our most conspicuous political failure . . . the state has wide possibilities. It controls the machinery of nomination and election for federal, state and municipal officials . . . the success or failure of the city is traceable to the laws which the state enacts. . . . The state is the source of civil and criminal law, of domestic and industrial relations. It is the guardian of the peace, of the health and education of the people. It controls the roads and highways. It regulates the railroads and common carriers . . . Its taxing power is ample to promote a social policy.¹²⁰

In an "efficient commonwealth,"¹²¹ much might be accomplished to improve social conditions. LaFollette's Wisconsin was, Howe said, "a state-wide laboratory in which popular government is being tested in its reaction on people, on the distribution of wealth, on social well-being."¹²²

It was essential to the advocate of the Wisconsin Idea that state and

verbal abuse by pro-war zealots in the years 1917-1919. Further, Howe was so close to LaFollette that he was said to be the most likely first biographer of the Wisconsin Senator. See J. CHAMBERLAIN, *FAREWELL TO REFORM: THE RISE, LIFE AND DECAY OF THE PROGRESSIVE MIND IN AMERICA* 242 (1965 ed.).

Eventually, Howe became Consumers' Counsel in the Federal Agricultural Adjustment Administration during the New Deal. He was demoted during the purge of 1935. P. IRONS, *supra* note 11, at 131, 177-79.

119. F. HOWE, *THE CITY, THE HOPE OF DEMOCRACY* 303 (1905). For Howe's status as an urban theorist, see Frisch, *Urban Theorists, Urban Reform and American Political Culture in the Progressive Period*, 97 POL. SCI. Q. 295, 311-12 n.47 (1982).

120. F. HOWE, *WISCONSIN: AN EXPERIMENT IN DEMOCRACY* vii-ix (1912).

After the several states have prepared the way by giving to the people direct and continuous control over all the branches of government, they are ready to direct their attention more profitably to the problems connected with the prevention and relief of social and economic distress. Because they are not so strictly limited by their constitutions, because they can more easily amend their constitutions when they are limited, because of the liberal interpretation of the so-called police power, states are able to grapple with modern social and economic problems much more effectively than the federal government can.

B. DE WITT, *THE PROGRESSIVE MOVEMENT: A NON-PARTISAN, COMPREHENSIVE DISCUSSION OF CURRENT TENDENCIES IN AMERICAN POLITICS* 244 (1915).

121. F. HOWE, *supra* note 120, at ix.

122. *Id.* at vii.

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federal judges refrain from invalidating the experimental legislation which emerged from home-rule cities and laboratory states. LaFollette Progressive Republicans were extremely critical of judges who routinely struck down statutes and ordinances as unconstitutional. Indeed, LaFollette personally regarded “the least dangerous branch” as no less than a “judicial oligarchy.”¹²³

The judiciary has grown to be the most powerful institution in our government [B]y usurping the power to declare laws unconstitutional and by presuming to read their own views into statutes without regard to the plain intention of the legislators, they have become in reality the supreme law making and lawgiving institution of our government. They have taken to themselves a power it was never intended they should exercise; a power greater than that entrusted to the courts of any other enlightened nation.¹²⁴

Brandeis was also concerned by the almost cavalier manner with which some federal judges struck down state statutes. In a 1914 introduction to Albert Barton’s *LaFollette’s Winning of Wisconsin, 1894-1904* (1922), he wrote the following words, words which interweave ideas of experimental federalism and judicial restraint in a way which strikingly anticipated the *New State Ice* dissent:

Lovers of American liberty are full of hope; but the period of boyish exuberance has been followed by one of maturer consideration of the grave problems of democracy. The need of solving these problems is urgent. There is insistent demand for political and social invention. The best conceived plans for the amelioration of our conditions will require for success laborious development of details, careful adjustment to local conditions, and great watchfulness for years after their introduction. We must encourage such social and political inventions, though we feel sure the successes will be few and the failures many. Most of these inventions can be applied only with the sanction and aid of the government. *It is America’s good fortune that her federal system furnishes in the forty-eight states political and social laboratories in which these inventions may be separately worked out and tested, thus multiplying the opportunities for inventors and minimizing the dangers of failure.*¹²⁵

123. G. ROE, *supra* note 100, at vii.

124. *Id.* at vi-vii.

125. Brandeis, *Introduction* to A. BARTON, *LaFOLLETTE’S WINNING OF WISCONSIN, 1894-1904* (unpaginated) (1922) (emphasis added).

This chronology for experimental federalism helps to explain Holmes’ use of the concept in his dissenting opinion in *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (“There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect.”) and Brandeis’ complaint about Holmes’ discounting of most social experiments; *see* Freund, *Mr. Justice Brandeis*, in *MR. JUSTICE*, *supra* note 11, at 106 (Holmes to Brandeis, probably concerning the *Truax* dissent: “Generally speaking I agree with you in liking to see social

Thus, it seems beyond cavil that Brandeis' experimental federalism and its immediate political source in LaFollette's Wisconsin Idea and not, *pace* Laski, Schlesinger and the American historical community, in mere twentieth-century Jeffersonianism. Further, it is clear that Brandeisian localism cannot be reduced, as Schlesinger would sometimes have it, to nothing more than personal "moral preference."

D. *Brandeis' New State Ice Dissent*

In the early 1930's, Progressive Republicanism was again much on Brandeis' mind. The Justice perceived 1929-32 as a repetition of 1909-11, the years in which he had been most closely and directly identified with Senator LaFollette and Progressive Republican Insurgency. In May 1930, for example, Brandeis succinctly expressed this view in a letter to Norman Hapgood:

Politically—things American have taken a great turn since May 1929. The Hoover debacle is more complete than that of Taft in 1909-10; and the distance between promise and performance is greater. The opposition [to Hoover] in the Senate—[a] coalition of insurgent Republicans and Democrats—has been very able led and has proved very effective. Norris, Borah, [the younger Robert] LaFollette and others have shown much ability; and the Democrats (among others, some new men like [future Supreme Court Justice Hugo] Black) have done much to redeem the shattered Democratic reputation.¹²⁶

Brandeis concluded one year later that "times [are] hopeful for progressives."¹²⁷

experiments tried but I do so without enthusiasm because I believe that it is merely shifting the pressure and that so long as we have free propagation Malthus is right in his general view. P.S. Your slight twit—that it is easy for those who don't suffer to philosophize—touched me. I have known some suffering in my day . . ."). The complaint seems somewhat exaggerated in light of Brandeis' own devaluation of most social experiments in the passage quoted in the text to this footnote.

Holmes undoubtedly took the concept of experimental federalism from Brandeis, who was using it in correspondence in the months prior to the *Truax* decision; see 5 LETTERS, *supra* note 11, at 16 (letter to Seventh Circuit Judge Julian Mack, a fellow Zionist, September 20, 1921) (regarding the Jewish State: "Beware of constitutional limitations in Social Economic Experimentation"); *id.* at 17 (letter to Harold Laski, September 21, 1921) ("America has not been averse to social-political experimentation. But there has been a twofold lack of study and care in developing and adjusting inventions; and a lack of both patience and persistence in applying them. Few of our political inventions have had, therefore, a fair test."). In his separate *Truax* dissent, which Justice Holmes interestingly did not join, Brandeis urged the Court not "to close the door to experiment within the law." *Truax v. Corrigan*, 257 U.S. at 357 (1921) (Brandeis, J., dissenting).

126. See A. MASON (II), *supra* note 11, at 600-01.

127. *Id.* at 601.

Brandeis was certainly not alone in this perception. Recent historical work indicates the vitally important role played by Insurgent Republicans—especially in statehouses and the U.S. Senate—from 1929 to 1935. D. BURNER, *THE POLITICS OF PROVINCIALISM: THE DEMOCRATIC PARTY IN TRANSITION, 1918-1932* (1970) (Democratic party fragmentation af-

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The Wisconsin Idea took on renewed significance for Brandeis early in 1932. At that time, a special session of the Wisconsin state legislature summoned by Governor Phil LaFollette, a Progressive Republican like his father, enacted an unemployment insurance reserves bill.¹²⁸ Brandeis had been advocating such a scheme, in one form or another, for twenty years. This advocacy was reflected in the Wisconsin legislation. The enacted bill had been drafted by the Justice's daughter and her husband; their draft had, in turn, been based on an outline supplied by Brandeis in mid-1931.¹²⁹

Wisconsin's unemployment insurance law—signed by Governor LaFollette four weeks before oral argument in *New State Ice*—was clearly on Brandeis' mind when *New State Ice* was decided. For example, the Justice wrote the following to Harold Laski nine days after oral argument in the case:

The Unemployment Reserves Act recently adopted in Wisconsin is our first step in grappling with irregularity of employment. Possibly you saw Elizabeth's recent articles in the *Survey Graphic*. She and [her husband] Paul have had the largest part both in drafting the bill and in securing its passage.¹³⁰

None of this concern with Progressive Republican politics is apparent in the earlier portions of Brandeis' *New State Ice* dissent, which was written in his standard technical, heavily-annotated style. The Justice first explained the intended function of certificates of public convenience and necessity in contemporary public-utility regulation.¹³¹ He then

ter World War I, weakness during the 1920's and slow reunification); R. MUDDER, *THE INSURGENT PROGRESSIVES IN THE UNITED STATES SENATE AND THE NEW DEAL, 1933-1939* (1979) (gradual shift away from support of the New Deal to forthright opposition); L. ASHBY, *THE SPEARLESS LEADER: SENATOR BORAH AND THE PROGRESSIVE MOVEMENT IN THE 1920S* (1972); R. FEINMAN, *TWILIGHT OF PROGRESSIVISM: THE WESTERN REPUBLICAN SENATORS AND THE NEW DEAL xi passim* (1981) ("As the 1930s began, the progressive Republican Senate bloc members were regarded as being among the leading reformers in American politics.").

128. See B. MURPHY, *supra* note 11, at 93-96; D. NELSON, *supra* note 76, at 118-28; JOURNALS AND INDEXES OF THE 1931 SPECIAL SESSION OF THE WISCONSIN LEGISLATURE 3-4, 60, 216-19, 442 (1932); ADVENTURE IN POLITICS: THE MEMOIRS OF PHILLIP LAFOLLETTE 163-65 (D. Young ed. 1970).

129. See B. MURPHY, *supra* note 11, at 95.

130. 5 LETTERS, *supra* note 11, at 497-99 (letter to Harold Laski, February 28, 1932) (quoted passage); *id.* at 526-27 (letter to Elizabeth Brandeis Raushenbush, November 17, 1932) (referring to the Unemployment Insurance Reserves Act as the "Wisconsin idea").

Brandeis in 1932-33 instructed Frankfurter to use whatever political clout he possessed to have Massachusetts follow Wisconsin's legislative lead. See D. NELSON, *supra* note 76, at 177-93 (ultimately unsuccessful introduction of a Raushenbush/Frankfurter unemployment reserves bill in Massachusetts in 1933); B. MURPHY, *supra* note 11, at 96; Freund, *A Centennial Memoir*, *supra* note 11, at 781 (the Brandeis-Wisconsin plan's heavy emphasis on employer responsibility rather than simply on high employee benefits).

131. 285 U.S. at 282-83.

noted that "the conception of a public utility is not static,"¹³² implicitly criticizing Justice Sutherland's use of the procrustean *Wolff* public-utility categories in the majority opinion. Finally, he attributed to the 1925 Oklahoma ice statute rationality sufficient to withstand scrutiny by a reviewing court.¹³³

Having completed these statutory apologetics, Brandeis moved on to more important matters. He addressed the nation's economic woes, practical political measures which might be undertaken to ameliorate conditions and the federal judiciary's role in reviewing remedial state legislation. Americans in 1932 were, Brandeis asserted, "confronted with an emergency more serious than war,"¹³⁴ an economic emergency engendered, in Brandeis' Keynesian view,¹³⁵ by chronic underconsumption.¹³⁶ One possible strategy in dealing with the complex problem of balancing productive capacity and consumption would be to require would-be entrepreneurs to obtain certificates of public convenience and necessity prior to embarking on new ventures, in effect applying the regulatory technology of the 1925 Oklahoma ice statute to all sectors of an economy.¹³⁷

To say that a given strategy was judicially countenanced by Brandeis is not to say that he personally advocated it. Indeed, in the *New State Ice* dissent Brandeis clearly recognized that the certificate-of-public-convenience-and-necessity remedy "might bring evils worse than the disease" it was intended to treat.¹³⁸ Further, the Justice was quite sceptical of the many economic "stabilization" plans circulating in the winter of 1931-32, particularly those entailing centralized national economic planning.¹³⁹

Brandeis' preferred long-term remedy for serious economic distress in a capitalist economy, employer-financed unemployment insurance reserves, was aimed directly at "irregularity of employment," which Brandeis described as the "greatest of . . . evils" in the *New State Ice*

132. *Id.* at 284.

133. *Id.* at 285-300.

134. *Id.* at 306.

135. *See infra* text accompanying notes 151-56.

136. 285 U.S. at 307-08 n.52.

137. *Id.* at 308-09.

138. *Id.* at 309.

139. *Id.* at 308-09 n.53; A. MASON (II), *supra* note 11, at 601 (need to save the country from General Electric executive Owen D. Young, a conservative-planning Democrat); R. HIMMELBERG, *THE ORIGINS OF THE NATIONAL RECOVERY ACT: BUSINESS, GOVERNMENT AND THE TRADE ASSOCIATION ISSUE, 1921-1933* 88-134 (1976); 5 LETTERS, *supra* note 11, at 537-38 n.2 (letter to Elizabeth Brandeis Raushenbush, April 22, 1934) (Brandeis' opposition to National Recovery Administration and centralized economic planning in 1934).

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dissent.¹⁴⁰ This reference to “irregularity of employment” and to schemes to relieve unemployment provides direct textual support for the assertion that the *New State Ice* dissent’s language about the experimental legislative efforts of “a single courageous State”¹⁴¹ primarily referred, not to Oklahoma’s unprecedented 1925 ice statute, but rather to Wisconsin’s new unemployment insurance reserves legislation. If this is the case, then much more than an abstract fear of federal judicial prevention of state legislative experimentation animated Brandeis’ *New State Ice* dissent. A substantial political interest—the survival of the Wisconsin unemployment insurance scheme—undergirded Brandeis’ *apologia* for federalism. This substantive political interest was also reflected in Brandeis’ assertion in the *New State Ice* dissent that he could not “believe that the framers of the fourteenth amendment, or the States which ratified it, intended to deprive [Americans] of the power to correct the evils of technological unemployment and excessive productive capacity which have attended progress in the useful arts.”¹⁴²

III. *Brandeis and British Progressivism*

The foregoing historical analysis of the *New State Ice* dissent supports Justice O’Connor’s recent observation that “state innovation” has been “no myth” in American political history.¹⁴³ Further, it connects the concept of states as laboratories with a vital political tradition of experimental state politics: whatever might be said of the tenth amendment, experimental federalism is no negligible truism. More will be said later¹⁴⁴ of the political theoretical underpinnings of experimental federalism. At this point, a further unpacking of Brandeis’ experimental federalism will be undertaken to reveal its second, trans-Atlantic, source.

140. 285 U.S. at 308.

141. *Id.* at 311.

142. *Id.*

143. *Fed. Energy Reg. Comm’n v. Mississippi*, 456 U.S. 742, 788-89 (1982). According to Laski:

One who comes to America from Europe may well crave leave to doubt whether, fundamentally, there is truth in the judgement that federalism is conservative. The forms, it is true, may be preserved, may even seem to be revered as sacred things, but the spirit glows with a life that is ever new and abundant. The one thing that must strike the modern observer of any federal Constitution is the growing impatience with its rigid encasement, the ever insistent demand that the form shall be made equally elastic with the spirit. And in the variety of its group life, the wide distribution of guarantee of its perennial youth.

H. LASKI, *STUDIES IN THE PROBLEM OF SOVEREIGNTY* 275 (1917).

144. *See infra*, text accompanying notes 176-241.

A. *Graham Wallas and the Yellow Book*

The British Progressive best known to Americans was probably Graham Wallas.¹⁴⁵ In works such as *Human Nature in Politics* (1908) and *The Great Society: A Psychological Analysis* (1914), Wallas applied a philosophical psychology to the political problems facing industrialized nations in the early twentieth century. He argued that a series of inventions in technology and the useful arts in the nineteenth century had sparked economic growth in the Western world. However, this growth had considerable social costs, in Wallas' view, such as technological unemployment (and underemployment) and unsanitary working conditions in some trades. Therefore, Wallas thought that a corresponding series of "social inventions" was necessary, not only to add to the happiness and well-being of the citizenry, but also to ward off a cold, technocratic Fabian socialism.¹⁴⁶

Brandeis, a personal friend of Wallas,¹⁴⁷ frequently used the English philosopher's concept of "social invention" in defending controversial state legislation against fourteenth amendment challenges.¹⁴⁸ For example, while seeking to uphold an Oregon minimum-wage law for women in December 1914, Brandeis stated that America's "social and industrial welfare demands that ample scope should be given for social as well as

145. See M. WIENER, *supra* note 15.

146. See G. WALLAS, *THE GREAT SOCIETY: A PSYCHOLOGICAL ANALYSIS* 3, 81-85, 182-87, 355-61, 367 (1914). One begins to wonder about the novelty of Lyndon Johnson's political programs after discovering that the Great Society was Wallas' concept and that Lloyd George, as a British Progressive, seems to have announced the first governmental "war against poverty" in 1909. See Dutton, *supra* note 15, at 876.

147. See 4 LETTERS, *supra* note 11, at 403-05 (letter to Alice Brandeis, June 24, 1919).

148. In 1931, Max Lerner had the following to say about Brandeis:

In two important respects he stands out from the group of turn-of-the-century liberals with whom his name is associated. He had a passion for detail and concreteness where most of them dealt in invective and generalities. And he had a capacity for constructive achievement in the field of social legislation and social invention.

... In the stress he laid upon social invention he was closely related to the Jeremy Bentham whom Mr. Wallas interprets; more closely even than was the administrative constructiveness which the Webbs were seeking to effect in London.

Lerner, *supra* note 11, at 6. See also, Brandeis, *supra* note 125 ("social and political invention" in a 1914 anticipation of the experimental federalism concept).

Frankfurter also employed the concept of "social invention" frequently. See, e.g., F. FRANKFURTER, *The Taste of Administrative Law*, in *LAW AND POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER* 234 (A. MacLeish & E. Prichard eds. 1939) ("Profound new forces call for new social inventions, or fresh adaptations of old experience. The 'great society,' with its permeating influence of technology, large-scale industry and progressive urbanization, presses it problems; the history of political and social liberty admonishes us of its lessons"). See also F. FRANKFURTER, *Social Issues Before the Supreme Court*, *id.* at 48, 52; F. FRANKFURTER, *Why I am For Governor Roosevelt*, *id.* at 329, 331; F. FRANKFURTER, *What We Confront in American Life*, *id.* at 334, 337.

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mechanical invention.”¹⁴⁹ The notion also appears in the *New State Ice* dissent.¹⁵⁰

Other aspects of Brandeis’ thought at the time of *New State Ice* show tell-tale signs of British Progressive influence. For example, the Justice’s underconsumptionist theory of the Great Depression and his early¹⁵¹ advocacy of massive public works (to be undertaken by *state* governments¹⁵²) as an antidote to unemployment can both be derived from 1920’s British Progressivism. In particular, they can be derived from the British Liberal party’s 1928 “Yellow Book” on industrial policy—*Britain’s Industrial Future*.¹⁵³

The Yellow Book was an “exhaustive and penetrating survey of the British post-war economy” written by a group of New Liberal intellectuals and politicians headed by Lloyd George and Keynes. The work featured, in addition to various currency and securities law reforms, a proposal to “absorb unemployment and re-equip the country for future prosperity by a great programme of public works.”¹⁵⁴ Brandeis read the Yellow Book and was deeply influenced; he described it as “the most comprehensive reasonable and generally able modern state paper” in existence.¹⁵⁵ The Justice’s public-works Keynesianism, a trait recently highlighted by Dawson,¹⁵⁶ coupled with his admiration for Graham Wallas’ British Progressivism, suggests a second, trans-Atlantic source for experimental federalism.

149. L. BRANDEIS, *The Constitution and the Minimum Wage*, in *THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS* 52, 68 (O. Fraenkel ed. 1934).

150. 285 U.S. at 304.

151. See N. DAWSON, *supra* note 11, at 28-29, 30-33 (Brandeis’ advocacy of public works in 1932-33). Franklin D. Roosevelt’s adoption of large-scale spending—at the federal level—as a way out of the Depression did not occur until 1938. The following words are needed to make clear Roosevelt’s political genius and economic ineptness:

The medicine actually used [to combat the 1937 “Roosevelt Recession”] was pure Keynes. Very quickly it relieved the pain. The patient was soon as well as it had ever been in the thirties—but only after Roosevelt floundered for months in greater indecision than Hoover had in 1930 and 1931.

P. CONKIN, *FDR AND THE ORIGINS OF THE WELFARE STATE* 99 (1967). For a discussion of Roosevelt’s resistance to Keynesianism, see H. STEIN, *THE FISCAL REVOLUTION IN AMERICA* 39-59, 131 (1969). (FDR’s conversion to Keynesianism in the period 1937-39.) It should be noted that the younger LaFollette and the other Progressive Republican senators were far more ready to espouse public-works programs than was Roosevelt.

152. See 5 LETTERS, *supra* note 11, at 527-28 (letter to Elizabeth Brandeis Raushenbush, Nov. 19, 1933) (Brandeis’ plan of public works for the Wisconsin Progressive Party).

153. *LIBERAL INDUSTRIAL INQUIRY, BRITAIN’S INDUSTRIAL FUTURE* (1928).

154. Campbell, *The Renewal of Liberalism: Liberalism without Liberals* in *THE POLITICS OF REAPPRAISAL, 1918-1939*, 88, 104 (G. Peele & C. Cook eds. 1975); *LIBERAL INDUSTRIAL INQUIRY*, *supra* note 153, at 280-360.

155. See A. MASON (II), *supra* note 11, at 599-600; see also, Clarke, *The Progressive Movement in England*, *supra* note 15, at 179-80 (quoting Graham Wallas on Liberalism after publication of the Yellow Book).

156. N. DAWSON, *supra* note 11.

B. *Harold Laski and Experimental Federalism*

History abounds in instructive ironies. Harold Laski's advocacy of experimental federalism in 1925-26, seven short years before he dismissed Brandeis as an ideological relic,¹⁵⁷ must be considered one of these.

A lecturer in government at Harvard College from 1916 to 1920, Laski befriended then-Professor Frankfurter. Through Frankfurter, Laski became acquainted with Justices Holmes and Brandeis, the leading contemporary exponents of federal judicial self-restraint. Learning American federalism from these three masters, Laski quickly grafted it onto the stock of his own pluralist political theory.¹⁵⁸ By 1917, Laski was employing American federalism as a foil to arguments emanating from political monists, *i.e.*, from persons who believed that sovereignty was necessarily indivisible and that, therefore, power was preferably centralized.¹⁵⁹

In what has been perceived as his finest theoretical work,¹⁶⁰ *A Grammar of Politics* (1925), Laski articulated his belief in strong local self-government and in the value of American-style federalism. Not only did participation in local government serve as a vital part of the average citizen's political education, it also facilitated socio-economic experimentation.¹⁶¹ American-style federalism "provide[d] the means for important experiment[s] in social matters, while restricting the necessary

157. See *supra* note 13; see also, H. LASKI, *THE AMERICAN DEMOCRACY: A COMMENTARY AND AN INTERPRETATION* 212 (1948) ("Jeffersonian Democrats like Justices Brandeis and Cardozo"); *id.* at 441-42 (Brandeis' "almost Jeffersonian conception of democracy").

158. See B. ZYLSTRA, *FROM PLURALISM TO COLLECTIVISM: THE DEVELOPMENT OF HAROLD LASKI'S POLITICAL THOUGHT* 72-77 (1968).

159. Aside from the historical accident which has given the constituent States of the American federation a certain sovereignty . . . it may well be argued that Hamilton and his coadjutors would have had theoretical justification even if they had not had history to guide them in their determination of the division of constitutional powers. That division is more consonant with political facts than the unitary theory so favored by the majority of European observers. Certain local groups have a life of their own that is not merely delegated to them by the State [read: the national government]. They are capable of directing their own concerns. Their interest in themselves is revived and inspired by the responsibility for such direction. When New York wants a new Constitution it can apply itself to that manufacture. When Australia needs one, or Canada, they must be made—the phrase is sinister—in Whitehall. The history of Lord Grey's experiments in the direction of colonial self-government makes clear the utter inadequacy of the latter method. If Wisconsin wants an income tax it can obtain one by winning the assent of its citizens. If Manchester wants a ship canal it must persuade Parliament that its needs are more important than the jealousies of Liverpool.

H. LASKI, *supra* note 143, at 271-72. See also *id.* at 274 ("The price of liberty is exactly divergence of opinion on fundamental questions"); *id.* at 281-82 (advocating state, rather than uniform national, action on the prohibition question); *id.* at 284 (quoting Brandeis on the virtues of small units).

160. See B. ZYLSTRA, *supra* note 158, at 2-3 n.2, 94.

161. See H. LASKI, *A GRAMMAR OF POLITICS* 413 (1925).

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area of the experiment, and, therefore, what danger may be inherent in its nature.”¹⁶²

Returning to Britain, Laski gave experimental federalism a trans-Atlantic flavor in the 1920's. The advantages of experimental federalism were never clearer to Laski than in 1926, when the House of Lords' judicial decision in the *Poplar* case¹⁶³ impelled him to write *Judicial Review of Social Policy in England* for the *Harvard Law Review*.¹⁶⁴ In the *Poplar* case, the socialist borough council's political decision to pay its employees higher wages than the Conservative national government thought “reasonable” was, in effect, reversed by the House of Lords.¹⁶⁵ For Laski, this case seems to have had the impact the famous *Lochner* case had on Justice Holmes: he believed that the House of Lords had invalidated the borough council's acts simply because they were predicated on economic assumptions the law Lords found politically distasteful.¹⁶⁶

The *Poplar* case threatened to delegitimize the British judiciary. This was a development which, in Laski's eyes, threatened far more than the outer bulwarks of the legal establishment. According to Laski, when the judicial office was brought into controversy, it was “always a sign of *malaise* in the [political] life of the community.”¹⁶⁷ Further, judicial overreaching was contrary to basic Anglo-American political impulses. Laski considered Anglo-Americans to be animated by “an experimental philosophy of government” which led them to value local self-government.¹⁶⁸

162. *Id.* at 422.

163. *Roberts v. Hopwood*, [1925] A.C. 578.

164. Laski, *Judicial Review of Social Policy in England: A study of Roberts v. Hopwood et al.*, 39 HARV. L. REV. 832 (1926).

165. Laski, *supra* note 164, at 834-35.

166. *Id.* at 847-48.

The *Poplar* case was, in a sense, the culmination of a series of legal skirmishes between the Poplar borough council, led by future Labour party leader George Lansbury, and more conservative (and sometimes Conservative) regional and national authorities. See *R. v. Poplar Borough Council ex parte London County Council* (No. 1), [1921] All E.R. 429; *R. v. Poplar Borough Council ex parte London County Council* (No. 2), [1921] All E.R. 437; *Poplar Metro. Borough Assessment Committee v. Roberts* [1922] All E.R. 191. Interestingly, there are indications that some sort of experimental localism may once again emerge in Britain's opposition parties in light of current Tory plans to restrict the ability of left-wing local councils to spend; see *When the Cap Fits*, *ECONOMIST*, January 14, 1984, at 14.

167. See Laski, *supra* note 164, at 846-47.

168. Laski's apostasy from experimental federalism seems to have occurred after 1930. See H. LASKI, *THE DANGER OF BEING A GENTLEMAN AND OTHER ESSAYS* 229 (1940) (speaking of Holmes in 1930: “He has not made himself the jailer of experiment. . . . He has recognized, as some of his colleagues have failed to recognize, that the American Constitution does not forbid experiment, but asks only that experiment shall be tender to established expectation”); *id.* at 231 (in *Noble State Bank v. Haskell*, 219 U.S. 104 (1911), “Mr. Justice Holmes made it plain that not only does federalism mean variety in unity; it means also, in the proper sphere, a license to experiment with the unknown, a right to sail one's ship upon

Laski's espousal of experimental federalism in the 1920's is indicative of the trans-Atlantic nature of the broader Progressive movement of which Brandeis, LaFollette and Howe were integral parts. American Progressives have been the subject of intense historical scrutiny and of no less intense historiographic debate. Attempts to isolate single socio-economic and/or ideological traits as the Progressive quintessence have failed, and the current wisdom¹⁶⁹ is that American Progressivism was irreducibly plural in nature. Thus, to recognize the existence of identifiably Progressive American businessmen who sought to impose order on a rapidly changing society is not necessarily to deny the Progressive label to consumer groups interested in combating business "corruption" of the American political process.¹⁷⁰

American Progressives argued endlessly and came to no generally accepted conclusions about ideology. However, they tended to regard (and Brandeis, as a Progressive, did in fact regard) the following three issues as of paramount ideological importance: (1) the prevention or elimination of economic monopolies; (2) the maintenance of social bonds in the face of rapid socio-economic change (including the New Immigration of the 1890's from eastern and southern Europe); and (3) the attainment of social efficiency.¹⁷¹

the rocks. He has wisely set his face against the idea that the constituent states of the American Commonwealth are to limit their activities to canons of conduct which some vital interests . . . thought beneficial to themselves. He may have believed the experiment foolish; not seldom one can glimpse a smile of indulgence even in the cold print of the decision. But he has steadfastly refused to substitute his own wisdom for the foolish experiments of others, granted only that the right to experiment is there." Laski's rejection of experimental federalism as well as the trans-Atlantic Progressivism he had shared with Brandeis had several causes: (1) the shift from "progressive" being shorthand for Liberal-Labour cooperation in British politics to being indicative of anti-Socialist (Liberal-Tory) coalitions, especially in municipal politics; see Cook, *Liberals, Labour and Local Elections*, in *THE POLITICS OF REAPPRAISAL, 1918-1939* 166 (G. Peele & G. Cook eds. 1975); (2) Laski's activity in British electoral politics—in which federalism was a non-issue—led him to devalue pluralist values like diversity and forms of pluralism like federalism; see B. ZYLSTRA, *supra* note 158, at 94-103; H. LASKI, *THE DECLINE OF LIBERALISM* 21-24 (1940) (lecture at London School of Economics advocating national, centralized economic and social planning). Laski's appreciation of diversity had so weakened by the mid-1930's that he was able to write quite optimistically about the Soviet Union; see B. ZYLSTRA, *supra* note 158, at 166-68 n.162; H. LASKI, *THE DANGER OF BEING A GENTLEMAN AND OTHER ESSAYS*, *supra*, at 59 ("[T]here are definitely many features in which [Soviet culture] brings law more substantially into relation with justice than anything the Common law system has so far been able to attain").

169. See, e.g., Rodgers, *supra* note 15, at 113-15, 126.

170. For a discussion of Progressive businessmen, see, e.g., S. HAYS, *CONSERVATION AND THE GOSPEL OF EFFICIENCY* (1959); R. WIEBE, *BUSINESSMEN AND REFORM: A STUDY OF THE PROGRESSIVE MOVEMENT* (1962); R. WIEBE, *SEARCH FOR OLDER, 1877-1920* (1967). For a discussion of Progressives as consumers resisting business "corruption" see D. THELEN, *THE NEW CITIZENSHIP: ORIGINS OF PROGRESSIVISM IN WISCONSIN, 1885-1900* (1972); R. MCCORMICK, *FROM REALIGNMENT TO REFORM: POLITICAL CHANGE IN NEW YORK STATE, 1893-1910* (1981).

171. See Rodgers, *supra* note 15, at 123-26. For a discussion of Brandeis and monopolistic

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Even before Teddy Roosevelt's centralizing New Nationalists clashed with Wilson and the advocates of the New Freedom in 1912, comparable reform activity shook the British body politic. Certain members of the Unionist (Tory) party, many of whom followed Roosevelt's New Nationalists in admiring Hamilton,¹⁷² urged that social ills in industrialized Britain be cured by using funds generated by higher import duties; this was the Tariff Reform program.¹⁷³ The Progressive Alliance of New Liberals and Labourites agreed with Tariff Reformers that ameliorization was necessary, but disagreed about financing. The British Progressives preferred to finance reform with the proceeds of redistributive direct taxation.¹⁷⁴ While historians are only now beginning to appreciate fully British Progressivism's political force, it is clear that Progressivism was an important factor in British center-left politics from the mid-1890's until the early 1930's.¹⁷⁵

IV. *The Philosophical Roots of Experimental Federalism*

As Jan Deutsch has argued, a precedent—the legal artifact created by the jurist's choice between theoretically possible grounds of decision in a case—cannot be sprung from its temporal context.¹⁷⁶ For a precedent from time *X* to be relevant in Deutsch's sense to lawyers and judges at a later time, say *X*+50, it must be perceived both as a rational judicial solution to the set of issues before the court at *X* and as a legal development which promises to contribute significantly to a just future, both at *X*+50 and beyond.¹⁷⁷

Most legal scholars and jurists agree that economic substantive due process of the sort displayed by the majority in *New State Ice* is deservedly dead and buried.¹⁷⁸ Brandeis' dissent is generally perceived as a

practices, see A. GAL, *supra* note 11, at 23-25. For a discussion of Brandeis and social bonds, see *id.* at 125, 148-49. For a discussion of Brandeis and "social efficiency" see *id.* at 142-43, 158; A. MARTIN, *supra* note 11, at 160-62.

172. Compare F. OLIVER, ALEXANDER HAMILTON: AN ESSAY ON AMERICAN UNION (1907) with H. CROLY, THE PROMISE OF AMERICAN LIFE (1912).

173. See A. SYKES, *supra* note 15, at 288-90; Dutton, *supra* note 15, at 879-84.

174. See A. SYKES, *supra* note 15, at 288-90; B. MURRAY, *supra* note 14; A. OFFER, PROPERTY AND POLITICS, 1870-1914: LAND-OWNERSHIP, LAW, IDEOLOGY AND URBAN DEVELOPMENT IN ENGLAND 221-406 (1981).

175. See Clarke, *supra* note 15, at 177-81; Campbell, *The Renewal of Liberalism: Liberalism without Liberals*, in THE POLITICS OF REAPPRAISAL, 1918-1939 88 (G. Peele & C. Cook eds. 1975).

176. See Deutsch, *Precedent and Adjudication*, 83 YALE L.J. 1553 (1974); Deutsch, *Corporate Law as the Ideology of Capitalism*, 93 YALE L.J. 395, 396 (1983).

177. Deutsch, *Precedent and Adjudication*, *supra* note 176, at 1584.

178. But see, McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34; Jackson & Jefferies, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979); G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 511-70 (10th ed. 1980).

rational if not optimal solution to the issues presented to the court in *New State Ice*. The foregoing historical analysis enhances this perception. It states the constitutional and political issues involved in the case and Brandeis' proposed solution—active state governments, experimenting without harassment by federal courts.¹⁷⁹

However, it is less clear that most legal scholars and judges currently perceive experimental federalism as a significant contribution to a just future. A few scholars, seeing no justice in American federalism, would not be disturbed by the disappearance of the states as distinct political entities.¹⁸⁰ Others are better described as attracted to the pure theory of federalism, but are uneasy with what have been presented to them as typical federalist claims. Such persons understandably find little to cheer them in the essentially racist, Southern Democratic states'-rights tradition. For this second group, the preceding pages can and should operate to restore a repressed faith in the American federal system. Unpacking the *New State Ice* dissent locates this version of American federalism in a different, more attractive political tradition; it thereby helps to make the dissent a relevant precedent.¹⁸¹

Accordingly, the foregoing historical analysis has focused on controverting the characterization of Brandeis as a Jeffersonian Democrat and of Brandeisian localism as mere twentieth-century Jeffersonianism. The analysis should be understood as an attempt to render harmless a potent ideological weapon used to delegitimize federalism—the association of federalism and federalists with the Jeffersonian Democratic impulse.

When an American jurist (it could be Brandeis; it might be Rehnquist¹⁸²) is depicted as a Jeffersonian in robes, a complex political imagery is evoked. Individual liberty and local self-government appear, but clothed in apparel (the intellectual/ideological equivalents of powdered wigs and knee breeches) which virtually entails residence in a hall of atavisms. The liberty is decidedly of the negative sort; it is colored by

179. This is not to say that state legislatures would legislate without any enforceable constitutional limits. Brandeis believed that due process required judicial review, but by *state* rather than *federal* courts, at least in the overwhelming majority of cases. See *Oklahoma Operating Co. v. Love*, 252 U.S. 331 (1920); *Oklahoma Gin Co. v. Oklahoma*, 252 U.S. 339 (1920). For a similar perspective, see Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953). Brandeis also clearly saw structural limits to state experimentation embedded in the federal constitution's commerce clause. For a discussion of this topic, see *infra* note 261.

180. Professor Robert Cover, for example, expressed this sentiment in a response to a question at a 1983 symposium on the New Deal, sponsored by the *Yale Law Journal*.

181. Cf. Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017, 1021 (1981) (recovery of past political languages may threaten to make the past irrelevant to contemporary legal concerns).

182. See Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J. 1317 (1982).

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a preference for minimal government.¹⁸³ The Jeffersonian cry for local self-government, admirable in the context of 1776, loses appeal and credibility when repeated by Calhoun and then by Secessionists and sundry other white racists.¹⁸⁴ And, of course, the imagery's economic setting is archaic; sturdy yeoman farmers flourish on all sides.

Restoring experimental federalism's true Progressive (and Progressive Republican) colors enables the modern federalist to avoid the snare so carefully set by federalism's detractors. Brandeisian localism, as a Progressive phenomenon, assumes the existence of a political world in which liberty is positive. State governments therein are not minimalist institutions. Wisely or not, they engage in a wide variety of official acts which, whatever their ultimate effects, are intended to promote the general welfare. The yeomen have vanished, replaced by cooperating market farmers and industrial workers.¹⁸⁵ Finally, and most importantly to contemporary legal minds, experimental federalism has been a stranger to Jim Crow. Lynchings and cross-burnings were not LaFollette Progressive Republican "social inventions."

However, before the *New State Ice* dissent can be definitively established as a relevant precedent in the full range of contemporary constitutional adjudication, experimental federalism's potential contributions to a just future must be delineated.

Experimental federalism can contribute significantly to a just future because it resonates strongly with the most distinctive strand in American political culture. It emerges from the non-legalist, ultimately Aristotelian conception of politics which, contrary to the obsession of American political theorists with Locke and social contract theory,¹⁸⁶

183. *Id.* at 1363-65.

184. *See, e.g.*, Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1304 & n.54 (1982) ("With the Reconstruction Amendments, the very idea of federalism became closely associated with race"). More recently, this cry was echoed by Southerners opposed to the school desegregation orders of *Brown v. Board of Educ.*, 347 U.S. 483 (1954). For example, five Southern legislatures adopted resolutions "interposing" their sovereignty between the federal government and their people. *See* 1 RACE REL. L. REP. 437-47 (1956).

185. *See supra* notes 110-19; R. FEINMAN, *TWILIGHT OF PROGRESSIVISM: THE WESTERN REPUBLICAN SENATORS AND THE NEW DEAL*, *supra* note 127, at 13.

186. *See* Pocock, *The Myth of John Locke and the Obsession with Liberalism*, in JOHN LOCKE: PAPERS READ AT A CLARK LIBRARY SEMINAR 3 (1980); Pocock, *The Machiavellian Moment Revisited: A Study in History and Ideology*, 53 J. MOD. HIST. 49 (1981).

It is, for example, a conventional wisdom that American political tradition is overwhelmingly, even monolithically Lockean; and though this now seems historically unsound—the thesis of Louis B. Hartz cannot be said to have stood the rest of time—any attempt, like that recently made by Garry Wills, to remove Locke from the center of American values is sure to provoke vigorous response. There exists what I have elsewhere termed a "myth of liberalism," which traces its undivided sway from the appearance of the systems of Hobbes and Locke in the seventeenth century; and the destruction wrought upon

served as the ideological framework within which the Framers did their work. This conception of politics—Flathman's civic individualism¹⁸⁷—has deep roots in the American constitutional past, which makes it especially palatable to interpretivist tastes. It also offers a more satisfactory account of several aspects of contemporary American political experience than do liberal rights-based theories. Civic individualism stresses the importance and value of specifically political activity. Experimental federalism is no more than the adaptation of civic individualism to the American federal system.

A. *Civic Virtue*

The dominant political language in the new American republics from 1776 to 1787 was generated by the concepts of "virtue" and "corruption."¹⁸⁸ It was, ultimately, an Aristotelian language, transmitted to the North American continent by way of Florentine civic humanism, James Harrington and the "Country" opposition to early Hanoverian administrations in Great Britain.¹⁸⁹ In this political language, man was defined (and defined himself) as a *zoon politikon* or political animal, not as a bearer of rights.¹⁹⁰

The "virtuous" political animal was "independent." That is, he¹⁹¹

this myth, both by the rediscovery of republican thought and by the discovery that Scottish moralism had more to do with Shaftesbury and Hutcheson than Locke, has produced rejoinders which attempt to minimize the republican component or subsume it under liberalism.

Id. at 70 (footnotes omitted).

187. Public or civic individualism does not deny the value or the significance of the primarily personal interests and desires on which private individualists lay so much emphasis. Satisfaction of at least the most fundamental of these interests—*needs*, as they are likely to be called in this context—is necessary to life itself and hence is, in at least this sense, a necessary condition of the satisfaction of other interests. But from Aristotle forward civic individualists have insisted that there are interests and desires, purposes and objectives that cannot be served or satisfied apart from the public, political realm. The activities that satisfy these latter interests are intrinsically or necessarily public in character; they are directed to ends and objectives shared among persons as members of a political order and they can only be pursued through interaction among persons so identified. These interactions redound to the benefit of individuals, but to individuals in their character as members of a political order, in their character as citizens.

R. FLATHMAN, *THE PRACTICE OF RIGHTS* 204 (1976) (footnote omitted). *See also id.* at 9.

188. *See* J. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975); J. POCOCK, *POLITICS, LANGUAGE AND TIME: ESSAYS ON POLITICAL THOUGHT AND HISTORY* 104-47 (1973).

189. *See* J. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION*, *supra* note 188, at 333-505.

190. *Id.* at 462-65, 550-51; Pocock, *Virtues, Rights and Manners: A Model for Historians of Political Thought*, 9 *POL. TH.* 353, 357-60 (1981).

191. *See* J. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION*, *supra* note 188, at 465, 475 (sexism of early eighteenth-century British "Country" Opposition ideology).

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owned landed property or maintained a trade¹⁹² and was armed.¹⁹³ These traits enabled him to engage in the republic's political life without being easily susceptible to administration (or "Court") "corruption." A number of devices were employed to subvert the body politic: standing armies, national debts, and places or pensions for elected political representatives did "corruption's" work.¹⁹⁴

The U.S. Constitution of 1787 defines individuals consistently with this political idiom: it speaks of citizens.¹⁹⁵ (It was only in 1791 that individuals were also officially recognized as bearers of federal rights.) The primary fora for the exercise by citizens of civic virtue were, under the Constitution, the several states. *Federalist* No. 45 makes this point well:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the [federal] power of taxation will, for the most part, be connected. *The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.*¹⁹⁶

Further, the preconditions of civic virtue—owning real property and bearing arms—were constituted and/or regulated by state rather than federal law.¹⁹⁷ Real property was protected from direct federal taxation,¹⁹⁸ arms-bearing citizens were organized in militias governed by state laws, except when the militias were in the service of the federal government. Even then, militiamen were trained and commanded by officers chosen by state governments.¹⁹⁹

The Aristotelian-based language of civic virtue "continued to domi-

192. *Id.* at 423-61.

193. See Shallope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599 (1982); Kates, *Handgun Prohibition and The Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983).

194. See Steiner, *Separating the Soldier from the Citizen: Ideology and Criticism of Corporal Punishment in the British Armies, 1790-1815*, 8 SOC. HIST. 19, 20-21 (1983).

195. See U.S. CONST. art. I, §§ 2, 3; U.S. CONST. art. II, § 1; U.S. CONST. art. III, § 2; U.S. CONST. art. IV, § 2. It is of some interest that federal judges are not explicitly required to be U.S. citizens.

196. THE FEDERALIST No. 45, at 303 (J. Madison) (E. Earle ed. 1937) (emphasis added).

197. For exceptions to this generalization, see U.S. CONST. art. I, § 8 (federal government control of intellectual property); U.S. CONST. art. IV, § 3 (federal government control of territorial landed property).

198. U.S. CONST. art. I, § 8 (requirement of uniform federal taxation); U.S. CONST. art. I, § 9 (prohibition of direct taxes by federal government not apportioned to census figures).

199. U.S. CONST. art. I, § 8; THE FEDERALIST, No. 46, at 309-11 (J. Madison) (E. Earle ed. 1937) (local ties of state militia officers); See Kates, *supra* note 193, at 230-35.

nate the American mind in the nineteenth century,"²⁰⁰ albeit in altered form. The key change was that non-landed property of all sorts—even government securities, long regarded as the ultimate "corrupting" possession—could be said after 1830 to confer the "independence" necessary to qualify one for engagement in American republican politics.²⁰¹ The struggle to produce qualifying property, always a part of the citizen's (or would-be citizen's) task, was unduly exalted: material success served, by 1850, as the gauge of civic virtue.²⁰² With this shift in emphasis, "the model independent citizen of the original doctrine had become something essentially different, the ideal free enterpriser."²⁰³

Notwithstanding this development, which subordinated republican civic virtue to a rights-based acquisitive liberalism,²⁰⁴ the distinctive accents of the older idiom could yet be heard in the late nineteenth century. For example, federal civil service reformers inveighed against political corruption and spoke of the need to purify American politics by abolition of the spoils system.²⁰⁵ The anti-imperialists of 1898 invoked the authentic language of civic virtue, associating imperial government with an inevitable decay in domestic American political life.²⁰⁶

Brandeis' initial encounter with the political language of civic virtue may have come during his period of active opposition to American imperialism.²⁰⁷ But whatever the exact circumstances of Brandeis' exposure to this political language, one thing is quite clear: he was using it in the 1920's and 1930's. For example, Professor Tushnet recently argued that the famed *Whitney v. California* concurrence—with its emphasis on the primacy of political activity in the states—should be located in the civic virtue paradigm.²⁰⁸ Brandeis also read G.D.H. Cole's *The Life of*

200. Berthoff, *Peasants and Artisans, Puritans and Republicans: Personal Liberty and Communal Equality in American History*, 69 J. AM. HIST. 579 (1982); See J. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION, *supra* note 188, at 513-52. See also L. BANNING, THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY (1978); but see, Kramnick, *Republican Revisionism Revisited*, 87 AM. HIST. REV. 629 (1982) (attempt to reinstate Lockean liberalism as the American ideology around 1760).

201. See Berthoff, *supra* note 200, at 585-86; Berthoff, *Independence and Attachment, Virtue and Interest: From Republican Citizen to Free Enterpriser, 1787-1837*, in UPROOTED AMERICANS: ESSAYS TO HONOR OSCAR HANDLIN 97-123 (R. Bushman *et al.* eds. 1979).

202. Berthoff, *supra* note 200, at 585.

203. *Id.* at 585-87.

204. See Berthoff, *supra* note 200; Berthoff, *supra* note 201.

205. See Berthoff, *supra* note 200, at 596-98.

206. See J. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION, *supra* note 188, at 542-45.

207. Brandeis was a member of a Boston based "Committee of Fifteen," a forerunner to the anti-imperialist Philippine Information Society. See 1 LETTERS, *supra* note 11, at 147-59. (letters concerning activities of Philippine Information Society, dated November 13, 1900 to January 22, 1901).

208. See Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Princi-*

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William Cobbett, an early nineteenth-century English “Country” ideologue,²⁰⁹ and was moved by it to contrast a politically active citizenry which responded to public duties with a compliant, non-political populace which relied on “paid expert[s]” or “mercenar[ies]” (the latter term evoking Country imagery of the strongest sort²¹⁰) to perform their public obligations. In the 1920s, Americans resembled the latter group. A pessimistic Brandeis then wrote about America’s inadequate store of political virtue²¹¹ and about the nation’s complacency about corruption in the age of Teapot Dome.²¹²

Further, Brandeis’ reading in the 1920’s traced the political language of civic virtue back to its Greek sources. In December, 1923, he informed Frankfurter that he was “deep again in early Italian history, now in the thirteenth century from which much modern wisdom may be deduced.”²¹³ This comment is particularly revealing given Professor Skinner’s recent finding that the civic virtue paradigm re-emerged in thirteenth-century Italian city-states.²¹⁴ Brandeis also expressed an interest in Roman history and the political works of Tacitus and Cicero.²¹⁵ More importantly, his “daily companions” were English-language books on the Greeks.²¹⁶

As an adherent to the politics of civic virtue, Brandeis did not believe that transfer payments to the less advantaged in a society were to be justified on the ground that beneficiaries had a *right* to such payments. On the contrary, “[i]mprovement in material conditions of the worker and ease are the incidents of better conditions—valuable mainly as they may ever increase opportunities for development”,²¹⁷ especially political self-development. Transfer payments, in a word, were justifiable only so long as they served the purposes of civic virtue.

For Brandeis, political self-development was a process which occurred

ples, 96 HARV. L. REV. 781, 798-99 (1983) (discussing *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring)); see also Rabban, *supra* note 11, at 1321-22 n.719.

209. 5 LETTERS, *supra* note 11, at 227-28 (letter to Felix Frankfurter, July 2, 1926).

210. See Steiner, *supra* note 194, at 20 n.6, 32.

211. 5 LETTERS, *supra* note 11, at 228 (letter to Felix Frankfurter, July 2, 1926).

212. *Id.* at 324 (letter to Felix Frankfurter, February 22, 1928).

213. *Id.* at 106 (letter to Felix Frankfurter, November 20, 1923).

214. Q. SKINNER, *THE FOUNDATION OF MODERN POLITICAL THOUGHT: THE RENAISSANCE* (1978).

215. 5 LETTERS, *supra* note 11, at 185 (letter to Felix Frankfurter, September 1, 1925).

216. *Id.* at 140-41. (letter to Adele Brandeis, September 29, 1924). Perhaps the most influential of these was Zimmern’s *THE GREEK COMMONWEALTH*, (1911), an exhaustive and critical economic and political analysis of the Greek *polis*. See Freund, *Mr. Justice Brandeis*, in *MR. JUSTICE*, *supra* note 11, at 119 (Zimmern’s book was the one Brandeis urged visitors to read. In addition, a passage from Zimmern was paraphrased in his *Whitney v. California* concurrence, 274 U.S. 357 (1927) (Brandeis, J., concurring)).

217. 5 LETTERS, *supra* note 11, at 45-46 (letter to Robert Walter Bruce, Feb. 25, 1922).

primarily in states and localities. With political development came political responsibility; indeed, responsibility was the best index of political development.²¹⁸ The paradigm of civic virtue may help to account for Brandeis' hostility to federal court diversity jurisdiction and to the doctrine of *Swift v. Tyson*.²¹⁹ In this paradigm, citizens of a state (including corporate citizens) ought not to be able to engage in remunerative economic activity in a state, operating in markets regulated or constituted by the state, and then to escape the responsibilities imposed by that state's law by invoking federal diversity jurisdiction and federal common law. This would amount to an abuse of state citizenship, a type of political irresponsibility signalling political underdevelopment.

Finally, experimental federalism should be seen as the major structural feature of Brandeis' world of civic virtue. States were laboratories for creative politics, for socio-economic "inventions" arising out of the collective and responsible exercise of individuals' civic virtue. The maintenance of that civic virtue required collective political self-restraint; external restraints on state political processes might correct excesses or mistakes, but only at the cost of eroding civic virtue.²²⁰ That cost, for Brandeis, was too high. Hence, it was his judgment that federal courts should not intervene in state political matters simply because the loser in a state or local political battle claimed abridgement of a federal constitutional right. To do so, the theory continues, is not only unnecessarily and illegitimately to aggrandize the power of the federal government vis-a-vis the states and localities; it is also to sap the civic virtue upon which American liberty, in the last resort, depends.

B. *Rights-Based Liberal Individualism*

Instead of predicating his federalism on a conception of politics as the practice of civic virtue, Brandeis could have adopted a rights-based theory of political decentralization. Such a theory was readily available. For example, in his *Treatise on Constitutional Limitations*, Thomas Cooley stated that "[t]he right of local self-government cannot be taken away, because all our [state] constitutions assume its continuance as the undoubted right of the people, and people as an inseparable incident to

218. *Id.* at 46.

219. 41 U.S. (16 Pet.) 1 (1842) (federal courts have discretion to determine "general law" in diversity cases, regardless of state law on the subject). See *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) (Brandeis, J.) (overruling *Swift*). See generally T. FREYER, HARMONY AND DISSONANCE: THE SWIFT AND ERIE CASES IN AMERICAN FEDERALISM 84-94, 131-138 (1981) (discussing Brandeis' early exposure to the *Swift* problem and his drafting of the *Erie* opinion).

220. See 5 LETTERS, *supra* note 11, at 45-46 (letter to Robert Walter Bruere, February 25, 1922); *id.* at 204-05 (letter to Felix Frankfurter, January 24, 1926).

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republican government.”²²¹

From the political theorist’s point of view, Brandeis’ choice of the Aristotelian-derived political language of civic virtue over that of rights-based liberal individualism was felicitous. The Justice thereby avoided fashioning a state of nature, an artificial world of dubious ontological status within which its framer invidiously drains most social content from individuals, the carefully selected residuum serving to account for political association as seen by the framer.²²² The social content the framer leaves in individuals in this state of nature (or “original position”) largely determines which rights will be emphasized as “fundamental” in the ensuing socio-political life.²²³ An examination of the many critiques socialists and conservatives have offered of rights-based liberal individualism would be beyond the scope of this essay. It is, however, fair to say that the autonomous, self-determining liberal individual of the social contractarian tradition is often perceived as incredible, and that the state of nature device is primarily a means of dodging hard questions, such as how allegedly isolated individuals manage to agree to form societies or bodies politic absent shared means of agreement, such as language.²²⁴

What is particularly important to this essay is that the civic individualism implicit in Brandeisian localism better accounts for the particular rights found in Anglo-American political cultures than does rights-based

221. T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 192 (3d ed. 1874) (emphasis added). *See also id.* at 40, 208 (“The American System is one of complete *decentralization*”); *People ex rel. Leroy v. Hurlbut*, 24 Mich. 44, 96-99 (1871) (Cooley, J. concurring) (discussing right to local self-government); T. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 378-79 (3d ed. 1898); 1 DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 16, 18, 24 (3d ed. 1881) (discussing local self-government and decentralization).

222. *See* A. MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 31-32, 230 (1981); S. HAMPSHIRE, THOUGHT AND ACTION 34 (1959) (“the self-refuting assumption of man in a partial state of nature, retaining one social institution, one means of communication and one set of conventions, but one that he has freely invented for himself, without the prior institutions, the means of communication and conventions, which would enable him to attach a sense to his invention”).

We cannot now separate the world as we now see it, as a result of the infinitely complicated evolution of our ways of thought and speech as civilised beings, from the world as it really is, somehow divided into its elements by a “natural” system of classification . . . In any man’s experience, Nature has always been overlaid by, and approached through, a set of social conventions, the conventions of a language in being The world is always open to conceptual re-arrangement. But the re-arrangement is only the addition of new tiers of discrimination to a foundation that remains constant

Id. at 39-40.

223. *See* A. MACINTYRE, *supra* note 222, at 230-34.

224. *See, e.g.,* S. HAMPSHIRE, *supra* note 222, at 34; A. MACINTYRE, *supra* note 222; M. OAKESHOTT, RATIONALISM IN POLITICS AND OTHER ESSAYS (1962); P. WINCH, THE IDEA OF A SOCIAL SCIENCE (1958).

liberal individualism.²²⁵ Beginning with the Hohfeldian insight that X 's right imposes a correlative duty on Y (or a member or class of Y s),²²⁶ Flathman has argued that rights-based liberal individualism, which is admittedly useful in expounding the number and scope of X 's rights, cannot adequately explain why Y (or a class of Y s) should continue to accept the burden of correlative duties.²²⁷ Liberal rights-theorists may attempt to justify the imposition of duties on Y (or a class of Y s: the task becomes especially difficult in countermajoritarian circumstances) by postulating broadly defined "shared public values" or the existence of an "interpretative community" within which such burdens are accepted as incidents of membership.²²⁸ To the extent that these moves appear to be attractive or persuasive, however, they necessarily undercut the more basic rights-based liberal individualist premise that individuals are autonomous, associate beings whose rights must be preserved to the maximum extent possible in politically-organized society.

Flathman's response to the dilemma of Y s accepting duties correlative to X 's rights refers to the socio-political context in which individuals are embedded, and within which the practice of rights takes place (and form). Indeed, the practice of rights derives not only its form but also its primary importance from that socio-political context.²²⁹ Y 's acceptance of or acquiescence in the correlative duties following from the assertion of a particular right by X depends upon the *political* recognition of X 's right-claim by the political community in which Y is a member. The rights-claims of X which are not accorded political recognition may be disregarded by Y , especially in the absence of private, non-political ties or relations that might alter the situation.

Not only does civic individualism better account for Y 's acceptance of or acquiescence in correlative duties, but it also helps to explain the preferred position that politically-related rights enjoy in Anglo-American communities. If rights are components of a socially-constituted practice rather than brute facts, and if that practice is importantly political (as it is and has been in Anglo-American political culture), then it follows that rights related to political practice—especially the so-called Great Rights against the State—are paramount.²³⁰ Hence, for example, political

225. See R. FLATHMAN, *supra* note 187, at 2.

226. See Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

227. R. FLATHMAN, *supra* note 187, at 38-63.

228. See Fiss, *Objectivity and Interpretation*, 34 STAN L. REV. 739 (1982); Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 7 (1983).

229. See R. FLATHMAN, *supra* note 183, at 9 *passim*.

230. When allied to this conception [of civic individualism] the notion of individual rights, and especially the Great Rights [read: freedom of speech, press and association;

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speech enjoys a preferred position in American constitutional law.²³¹

C. Federalism

The emphasis on the political content of rights separates Brandeis' experimental federalism, which rests on a conception of politics as an exercise of civic virtue, from Justice Brennan's views on federalism. For Brandeis, federal rights merely enhance the primarily political lives of citizens in the several states. Thus the federal judiciary, which is primarily concerned with federal rights, should not intervene to alter the results of state political processes. As Brandeis' mentor J.B. Thayer wrote: "Under no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere."²³²

Justice Brennan's federalism is rather different.²³³ Politics therein is defined by and largely limited to the realization and adjustment of preferred or "fundamental" rights. The federal Constitution, in this conception, defines individuals as bearers of certain fundamental rights which cannot be abridged but which may be augmented by the states.²³⁴ Federalism is, for Brennan, therefore little more than a

habeas corpus], takes on a significance very different and very much greater than that which it carries in private individualism. Having such rights is important not merely to protect individuals in what they now are and in what they now have, but also to make it possible for them to develop to a level that they have not yet achieved and could not achieve without engaging in the activities that the liberties protect. The political order is thought of as an opportunity, not a threat.

Id. at 205.

231. *Id.* at 9 *passim*. As has recently been noted, the first amendment itself is essentially the result of federalist considerations. Congress' power to regulate political speech was denied in order to preserve power in this sensitive legal area in the several states. See Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 128 n.191, 131-133 (1984).

232. J. THAYER, *LEGAL ESSAYS* 39 (1908).

233. Brennan's version of federalism is a narrow one-way street. States, as grantors of rights, are enjoined from distributing them in bundles less ample than the federal Constitution—as interpreted by a court which can take "selective incorporation" seriously—demands. On the other hand, distribution in greater quantities than a majority of the (post-Warren Court era) U.S. Supreme Court thinks absolutely required is permissible and, indeed, encouraged. This is basically a reactive position used by advocates of greater or more equally-distributed rights-bundles when the federal high court is not listening. It has nothing to do with experimental federalism as conceived by Brandeis. Brennan's one-way federalism is now vulnerable to attack on the ground that state court decisions seeking merely to instantiate Warren Court era federal constitutional law are not based on "adequate and independent" state grounds. See, e.g., *Michigan v. Long*, — U.S. —, 103 S. Ct. 3469 (1983) (O'Connor, J.) (reversing state supreme court opinion as based exclusively on erroneous federal fourth amendment law).

234. For a criticism of the historical and judicial processes by and through which certain federal constitutional rights came to be viewed as "fundamental," see my chapter on Philippine law in the American period, from 1898 to 1935 in 2 *LAWS OF SOUTH-EAST ASIA* (B. Hooker ed. 1984) (forthcoming).

"double source of protection for . . . rights."²³⁵

Justice Brennan's conceptions of politics and federalism are one-sided and profoundly unsatisfactory. Professor Tushnet employs a kind of social psychology to express his dissatisfaction with this rights-based conception of political life. For Tushnet, politics is a realm of civic virtue which affords members of local communities the important experience of ruling and being ruled. (Tushnet labels this the experience of "the Constructed Other."²³⁶) In Brennan's world, this experience is trivialized. However, even when not trivialized, politics cannot be said to be the only valuable engagement in life. There are important activities in which individuals engage apart from, and sometimes in fixed opposition to, the local community's political consensus. (Tushnet terms this the experience of "the External Other."²³⁷) Federal constitutional law exists as it does—or did before the Warren Court—in order to allow individuals simultaneously to realize political and private, non-political satisfactions.

Tushnet's observations are better framed in Aristotelian, or diluted Arendtian, rather than social psychological language.²³⁸ Notwithstanding dubious success in translating much of experience into legalistic formulae, Anglo-Americans have characteristically defined themselves as political animals. Political engagement has been and currently is viewed as necessary to the actualization of human potential. That being the case, it is difficult not to agree with Brandeis rather than with modern rights-based liberal constitutional theorists: the study of politics (and not the study of deontological moral philosophy) is the first science.²³⁹

Federalism properly viewed allows civic individuals to achieve their political potentialities through socio-economic experimentation. The

235. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502-03 (1977).

It is worth noting that even the later Bickel had difficulty disentangling citizens from their appurtenant rights; see A. BICKEL, *THE MORALITY OF CONSENT* 33-54 (1975) (citizenship as a Lockean/contractarian rights-based phenomenon). It is frankly difficult to base federalism and a theory of judicial self-restraint on a rights-based political theory. Perhaps this accounts for the tortuousness of Bickel's analysis and his ultimate reliance on the foggy Burkean notion of tradition.

236. See Tushnet, *Deviant Science in Constitutional Law*, 59 TEX. L. REV. 815, 816 (1981).

237. *Id.*

238. Like Brandeis, Arendt was impressed by Danish cooperatives and by the eighteenth century American device of federalism; see H. ARENDT, *CRISES OF THE REPUBLIC* 216 (1972) (Danish and Israeli cooperatives commended. This is Brandeisian in two respects—(1) Brandeis' interest in Danish cooperatives and his Zionist endeavors, which also included cooperatives; and (2) Arendt's invocation of "experimental" language); H. ARENDT, *ON REVOLUTION* 248-55 (1965) (early American federalism and what Arendt calls the "revolutionary tradition").

239. See 5 LETTERS, *supra* note 11, at 260 (letter to Felix Frankfurter, January 27, 1927).

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state, in this conception, is an essential laboratory producing skilled political practitioners as well as a number of (more or less) successful experiments. At the same time, the structure of American federalism permits excesses in political experimentation to be surgically excised. State political activity in an experimental federalist world is checked only when it no longer conforms—in the sense of bearing a discernible family resemblance—to Anglo-American political traditions.²⁴⁰ This check is preferably internalized in the state political *ethos*. Failing that, the check is to be applied by state courts. Only rarely, in this conception of American federalism, will federal courts properly play any part in checking experimental political processes.²⁴¹

V. *The Reemergence of Experimental Federalism*

A series of recent U.S. Supreme Court opinions confirms the relevance of the *New State Ice* dissent. The line of cases beginning with *Hughes v. Alexandria Scrap Corp.*²⁴² and extending to *White v. Massachusetts Council of Construction Employers, Inc.*,²⁴³ recognizes the power of the states and state political subdivisions to engage in socio-economic experimentation as market participants without being subjected to commerce clause analysis. This development is particularly interesting given the apparent demise of the related doctrine of state sovereignty enunciated by Justice Rehnquist in *National League of Cities v. Usery*.²⁴⁴

In *Hughes v. Alexandria Scrap Corp.*, the Court faced a seemingly unprecedented legal situation²⁴⁵ in which the constitutionality of a Maryland statute creating a market in automobile hulks was challenged by an out-of-state entrepreneur legally unable to participate as fully as could in-state entrepreneurs. The challenge, which was successful in the

240. This check operates as Justice Frankfurter's "fundamental fairness" due process standard did: something would have to be shocking to a well-educated, Anglo-American conscience to be unconstitutional in either conception. See Israel, *supra* note 73, at 322 ("One of the major justifications advanced for the fundamental fairness doctrine is that it pays heed to Justice Brandeis' admonition [in *New State Ice*] by providing ample room for diversity (and thus experimentation).").

241. See Hart, *supra* note 179.

242. 426 U.S. 794 (1976).

243. — U.S. —, 103 S. Ct. 1042 (1983); see also *United Building and Construction Trade Council v. Mayor and Council of Camden*, 52 U.S.L.W. 4187, 4189-91 (U.S. Feb. 21, 1984) (No. 81-210) (affirming market participant immunity doctrine, distinguishing privileges and immunities clause/comity considerations).

244. 426 U.S. 833 (1976); see also Note, *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 70, 70-78 (1983).

245. A purist might argue that the first case in the line was *American Yearbook Co. v. Askew*, 339 F. Supp. 719 (M.D. Fla. 1972), *aff'd mem.*, 409 U.S. 904 (1972) (Florida law requiring all government printing to be done by in-state printers valid).

trial court, was urged on both commerce clause and fourteenth amendment equal protection grounds.²⁴⁶

Writing for a six Justice majority,²⁴⁷ Justice Powell reversed the court below and rejected both challenges to the Maryland statutory scheme. The holding embodying the rejection of the commerce clause argument is particularly pertinent: "Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others."²⁴⁸

Justice Brennan, joined by Justices White and Marshall, dissented with some force. Brennan did not accept the market-participant immunity doctrine fashioned by the majority. He would have applied standard commerce clause analysis—which involves balancing local interest in the challenged regulation or taxing scheme against the burden the statute places, directly or indirectly, on interstate commerce—to the Maryland statute and have found it unconstitutional.²⁴⁹ Professedly unable to find "any articulated principle justifying" the majority holding, Brennan inferred that the "motivating rationale" behind it was the "newly announced 'state sovereignty' doctrine of *National League of Cities v. Usery*,"²⁵⁰ which was decided the same day.

Notwithstanding this assimilatory inference, *Hughes* and *National League of Cities* have led separate lives in markedly different circumstances. The latter case, which held that "Congress may not exercise [its commerce clause] power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made,"²⁵¹ has been heavily (if not always lucidly) criticized by academic commentators,²⁵² eroded as a pre-

246. Brief for Appellee at 62-63, *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) ("Maryland's statutory payment of bounties for all scrap which is processed in local plants, while denying payment for scrap exported for processing, may be a novel form of discrimination . . . Maryland's bounty system, being unique, is without precedent in this Court. But the discriminatory aspect . . . is not immunized by its novelty.").

247. Chief Justice Burger and Justices Stewart, Blackmun, Rehnquist, and Stevens joined in Powell's opinion.

248. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976) (Powell, J.).

249. *Id.* at 817-23 (Brennan, J., dissenting).

250. *Id.* at 822 n.4.

251. See *National League of Cities v. Usery*, 426 U.S. 833, 855 (1976) (Rehnquist, J.) (extension of wage and hour provisions of Fair Labor Standards Act to state and municipal employers constitutes invalid exercise of commerce clause power).

252. See, e.g., Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977); Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165 (1977). For critical assessments of this literature, see Nagle, *Federalism as a Fundamental Value: National League of Cities in Perspective*, 1981 SUP. CT. REV. 81; Deutsch, *Harvard's View of the Supreme Court: A Response*, 57 TEX. L. REV. 1445 (1979).

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cedent by lower federal courts²⁵³ and eviscerated, if not altogether overruled, by the Supreme Court's 1983 decision in *Equal Employment Opportunity Commission v. Wyoming*.²⁵⁴

The basic principles of *Hughes*, on the other hand, have drawn less critical fire from academics²⁵⁵ and, more importantly, have been reaffirmed several times by the Court. A recent reaffirmation may be found in *White v. Massachusetts Council of Construction Employers*,²⁵⁶ decided a mere two days prior to the *Wyoming* case. Perhaps the best indication of *Hughes*' happier fate is the fact that Justice Brennan, who led the dissenters in both *Hughes* and *National League of Cities* and who wrote the plurality opinion limiting the latter case in *Wyoming*, silently concurred in Justice Rehnquist's majority opinion in *White*.

Recourse to market-participant commerce clause immunity has been dictated by the willingness on the part of the Supreme Court to allow the commerce-regulating powers of Congress to validate virtually any federal governmental act. Since *Wickard v. Filburn*,²⁵⁷ the Court has perceived the commerce clause as a positive instrument of nationalization and not, as then Professor Frankfurter put it, as the means by which an "accommodation is achieved between the interacting concerns of states and nations."²⁵⁸ Hence, adherents to creative federalist principles after *Wickard* have been forced to take refuge in enclaves purportedly outside the reach of Congress' commerce clause powers, such as the *Parker v. Brown* /state-action antitrust "immunity"²⁵⁹ and the market-participation doctrine.

Justice Brandeis, as a civic individualist and experimental federalist, would have recognized this legal development, for it was anticipated in

253. See Phillips, *The Fate of National League of Cities* (unpublished manuscript on file with the *Yale Law & Policy Review*).

254. — U.S. —, 103 S. Ct. 1054 (1983) (extension of Age Discrimination in Employment Act to cover state and local governments constitutes valid exercise of commerce clause power).

255. For criticisms of *Hughes*, see Varat, *State "Citizenship" and Interstate Equality*, 48 U. CHI. L. REV. 487, 504-08, 530 and n.175 (1981) (criticizing *Hughes*-market-participant immunity); Wells & Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 VA. L. REV. 1072, 1121-26 (1980); *id.* at 1125 ("To allow the states to Balkanize the national economy through its proprietary activities would be a triumph of form over substance . . .")

256. — U.S. —, 103 S. Ct. 1042 (1983). See also *United Building and Construction Trades Council v. Mayor and Council of Camden*, 52 U.S.L.W. 4187, 4191 (U.S. February 21, 1984) (No. 81-210).

257. 317 U.S. 111 (1942).

258. F. FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* 21 (1937).

259. See *Parker v. Brown*, 317 U.S. 341 (1943). Recent cases have narrowed substantially the protections of this enclave. See *Community Communications, Inc. v. City of Boulder*, 455 U.S. 40 (1982); *California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *City of LaFayette v. Louisiana Power and Light Co.*, 435 U.S. 389 (1976).

his own day. In the 1980's, governmental action by states and localities which can be characterized as "market regulation" may be (and often is) struck down by federal courts employing commerce clause analysis; politically-equivalent governmental concern manifested in legislation or administrative orders which can be characterized as state "market participation" escapes this fate. Similarly, in the 1920's, the heyday of substantive economic due process, government regulation of merchants and markets was often struck down as violative of the commerce clause or, alternatively, of the due process clause of the fourteenth amendment. Government participation as a merchant in municipal markets (then more quaintly called "State & municipal trading"²⁶⁰) was, on the other hand, typically legitimated by federal courts. For example, when the Progressive Republicans who governed North Dakota attempted to regulate the wheat trade in 1919, they were twice rebuffed by a commerce clause-wielding Supreme Court.²⁶¹ However, when these same Progressive Republicans established state-owned wheat mills and grain elevators and a state-owned commercial bank, the relevant legislation was unanimously held to be constitutional by the Supreme Court against a fourteenth amendment due process challenge.²⁶² Indeed, the Supreme Court's self-restraint in the face of state and municipal market action reached a high-water mark in 1927, when Lincoln, Nebraska's operation of non-profit gasoline stations—undertaken to reduce Standard Oil's power in local markets—was summarily approved by the Supreme Court.²⁶³

Brandeis saw in this constitutionally-approved "State & municipal

260. See 5 LETTERS, *supra* note 11, at 315-16 (letter to Felix Frankfurter, December 6, 1925).

261. *Lemke v. Farmers Grain Co.*, 258 U.S. 50 (1922) (Day, J.); *id.* at 61 (Brandeis, Holmes and Clarke, JJ., dissenting). See *Shafer v. Farmers Grain Co.*, 268 U.S. 189 (1925) (Van Devanter, J.); *id.* at 203 (Brandeis, J., dissenting without opinion). While Brandeis dissented from the court's opinion in these two cases, he did recognize some commerce clause (structural) limitations on state experimental politics. See, e.g., *Interstate Transit, Inc., v. Lindsey*, 283 U.S. 183 (1931) (Tennessee state tax on interstate bus company not related to permissible tax purposes; tax held violative of commerce clause); *Buck v. Kuykendall*, 267 U.S. 307 (1925) (application of Washington certificate of convenience and necessity regulatory scheme to purely interstate trucking company intending to use highway constructed with federal dollars violates commerce clause; no relation shown in this instance to permissible state regulatory purposes). However, the limitations Brandeis perceived left ample room for state experimentation, coming into play only when state legislatures directly burdened interstate commerce without being able to advert to permissible regulatory purposes.

262. See *Green v. Frazier*, 253 U.S. 233 (1920) (Day, J.) (legislation which provided for state manufacture and marketing of farm products, provision of housing, creation of state banking system, issuance of bonds and collection of taxes held not violative of fourteenth amendment due process rights of state taxpayers); *Scott v. Frazier*, 253 U.S. 243 (1920) (Day, J.); see also *Jones v. City of Portland*, 245 U.S. 217 (1917) (Day, J.) (Portland, Maine statute establishing a municipal, non-profit wood/fuel yard constitutionally permissible).

263. See *Standard Oil Co. v. City of Lincoln*, 275 U.S. 504 (1927) (*per curiam*).

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trading” a way out of the political box placed over the states and localities by the doctrine of substantive due process.²⁶⁴ Blocked from acting politically in other ways, state citizens were urged by Brandeis to exploit this way out: the door, cracked open, was to be pushed back all the way.²⁶⁵ Given the constraints in other areas of constitutional law on the exercise of civic virtue in state political experimentation, one had to use what was given.

The related themes of Progressive Republicanism, Brandeis’ experimental federalism and market-participation immunity from commerce clause analysis converge in *Reeves, Inc. v. Stake*.²⁶⁶ In 1919, the Progressive Republicans of South Dakota undertook plans to build a state-owned cement plant.²⁶⁷ The plant was built and operated for many years before its policy of supplying in-state customers first was challenged in federal court under the commerce clause. In 1978, Reeves, Inc., a Wyoming corporation, unable to obtain the cement it desired, brought suit to enjoin the cement plant from following the allocative policies which favored in-state residents. The trial court granted the requested injunction; the Eighth Circuit reversed.

Speaking through Justice Blackmun, the Supreme Court affirmed the circuit court. It did so by finding that South Dakota’s cement-allocation policy fit squarely within *Hughes*’ market-participant commerce clause immunity.²⁶⁸ Further, Justice Blackmun invoked the *New State Ice* dissent to suggest that federalism considerations reinforced the Court’s decision to permit South Dakota to experiment politically, even if the results of experimentation were not economically optimal.²⁶⁹

Justice Brandeis would have enjoyed writing the *Reeves* opinion. That this opinion, which responds to and expresses the ineluctable political federalism of American political experience, could be written in 1980, nearly fifty years after the New Deal, is a good indication that experimental federalism is still alive.

VI. Conclusion

The foregoing inquiry has focused on several aspects of Justice Brandeis’ experimental federalism. Brandeis’ *New State Ice* dissent reflects, at least in part, the Justice’s concern over anticipated constitutional chal-

264. See 5 LETTERS, *supra* note 11, at 315-16 n.2 (letter to Felix Frankfurter, December 6, 1927).

265. *Id.* at 315.

266. 447 U.S. 429 (1980).

267. *Id.* at 430-31 (1980).

268. *Id.* at 436-40.

269. *Id.* at 441-42.

lenges to the Wisconsin unemployment insurance legislation. The Justice's vision of states as socio-economic laboratories can be explained by his attraction to the political theories of certain American and British Progressives. More important, his advocacy of federal judicial deference to state socio-economic legislation was the natural consequence of a vision of politics which can be located in the Aristotelian tradition of civic virtue, as opposed to the fundamental rights orientation of classical liberal political theory. Recent Supreme Court decisions, together with the continued cogency of Justice Brandeis' political theories, indicate that the doctrine of experimental federalism will continue to be relevant, and that the *New State Ice* dissent will gain in importance as a constitutional precedent.