Spring 1987

Constitutional Law and Constitutional History

Lewis H. LaRue
Washington and Lee University School of Law, laruel@mac.com

Constitutional Law and Constitutional History

L.H. LaRue*

I. Introduction

Those of us who have been associated with the critical legal studies (CLS) movement differ among ourselves as much as we have differed with the rest of the legal academy. When outsiders are present we have formed our wagons in a circle and shot outward. When the outsiders leave the guns have been turned inward toward the center of the circle.

One of the questions that has provoked my own factional ire is the role of history in CLS scholarship. An examination of the written work of CLS scholars reveals extraordinary differences in the degree to which history is discussed, if at all. In those articles in which history is present, the authors differ in the way that they use it. In spite of these differences, however, there is a definite trend away from the use of history. As Mark Tushnet has written, most of the recent work "is relentlessly ahistorical."[1] This current tendency toward making history irrelevant is disturbing to some of us within the CLS movement, so I am writing to express my disaffection. Within the confines of this article, it would be impossible to discuss the relevance of history to law in general. Consequently, I shall limit myself to constitutional law; the thesis is that constitutional law must be studied in the context of constitutional history.

I propose that the most important fact about any case is its date. The plausibility of this assertion can be demonstrated through the following scenario. Suppose that there are four cases, two of which were decided by the United States Supreme Court in 1935, and two in 1965. Suppose further that for each of the years, one is a commerce clause case and the other a due process clause case. Does the commerce clause case of 1935 have more in common with its parallel case in 1965, or with its contemporaneous 1935 due process case?

---

* Professor of Law, Washington and Lee University. I would like to thank Anthony Chase, Wythe Holt, Toni Marie Massaro, John Henry Schlegel, and Mark Tushnet; their criticisms and encouragement were invaluable.

1. Tushnet, *Critical Legal Studies: An Introduction to its Origins and Underpinnings*, 36 J. Leg. Educ. 505, 512 (1986).

In considering how to examine cases for similarity or dissimilarity, one must start by comparing the general course of decisions in 1935 and 1965. In 1935, the conservative majority on the Supreme Court was waging war against the New Deal. In retrospect, we know that this attack would fail within two years, marking one of the great divides in American constitutional law. In 1965 the Warren Court was at the peak of its liberal activism. However, this too would pass. The civil rights coalition was soon to be ripped apart by powerful inner tensions, and the country as a whole would be riven by political disputes over the Vietnam War. Rather than a sharp demarcation of the kind that occurred in 1937, there was a gradual dissipation of energy throughout the late 1960s. At each of these two very different times, a majority of the Supreme Court had a definite ideology in which it was confident. Although my account is surely incomplete, it is plausible to assert that a 1935 commerce clause case will mesh more closely with a 1935 due process case than with a commerce clause case of 1965. If we ask which is more important—the type of case or its date—I would assert that the date is more significant.

How would one begin to test the hypothesis that the most important fact in any case is its date? And if this hypothesis does prove to be accurate, what will be its consequences for pedagogy? I begin by addressing the first question. I wish to demonstrate that putting cases into their historical context can reveal elements of constitutional law that are otherwise concealed. I shall do this by collocating three cases that are not often brought together.

II. Using History

Since my general thesis is that the most important fact about a case is its date, and thus that comparing cases requires establishing their historical context, Part II of this article shall be devoted to demonstrating how one might execute such a comparison. This demonstration is merely an examplar, not a proof; a rigorous proof would extend beyond the scope of this article. The examplar of how one might compare cases by establishing their historical context will be presented in two steps. First, three cases will be described and questions about their context will be posed. Second, historical facts about the context will be presented, so that the general thesis can be illustrated.

A. *Three Cases*

One of the three cases is well known. *In re* Debs[2] is often a staple in courses in constitutional law and federal jurisdiction. Usually, it is studied for its implications regarding the commerce power and injunctions. *Spies v. Illinois*[3] is well known to a smaller group of scholars. *Spies* is the first case in which counsel argued that the fourteenth amendment made the Bill of Rights applicable to the states. The Court avoided deciding this issue by holding that even if the Bill of Rights were applicable, there would be no error in the particular case. Consequently, most scholars who study the Bill of Rights view the case as marginal to their interests. The last case is truly exotic. In *Presser v. Illinois*[4] the Court placed a restrictive interpretation upon the second amendment's right-to-bear-arms provisions. Since the second amendment is not taken seriously by most scholars, the case is not widely read. It is enlightening to read all three cases in the order in which they came before the Court: first *Presser*, then *Spies*, followed by *Debs*.

Let us begin the collocation by noting the dates: 1886, 1887, and 1895, respectively. The three cases were heard by the Court within nine years of each other. Second, each of the three cases originated in Chicago, Illinois. Finally, the individuals involved—Presser, Spies, and Debs—were all labor union organizers. This occupational identity is not irrelevant, for the background of each of these cases is a labor dispute.

To use Aristotelian terms, the dramas in question have the requisite unities of time, place, and action. In *Presser v. Illinois*, Herman Presser was indicted in the criminal court of Cook County on September 24, 1879 for violating the Military Code of the State of Illinois.[5] Since it is obvious that Presser is a civilian, the first element of the case that might rouse one's curiosity is why the legislators placed the statute that he is charged with violating in Illinois' Military Code. To a modern eye, the substance of the law seems unremarkable: it simply prohibits the organization of private military companies. Few of us today would be surprised by a statute outlawing private armies. The statute provides:

> It shall not be lawful for any body of men whatever, other than the regular organized volunteer militia of this state, and the troops of the United States, to associate themselves together as a military company or organization, or to drill or parade with arms in any city, or town, of this

2. *In re* Debs, 158 U.S. 564 (1895).
3. Spies v. Illinois, 123 U.S. 131 (1887).
4. Presser v. Illinois, 116 U.S. 252 (1886).
5. *Id.* at 253.

> state, without the license of the governor thereof, which license may at any time be revoked.[6]

The statute goes on to enumerate exceptions, including one for "students in educational institutions where military science is a part of the course of instruction." It also provides "that nothing herein contained shall be construed so as to prevent benevolent or social organizations from wearing swords."[7]

To a modern eye, the statute appears unremarkable. However, if read in its historical context, we must ask how it looked to individuals living at the time it was enacted. Was the statute thought to be routine and uncontroversial, or was it perceived as a departure from tradition? What were the historical circumstances that provoked the legislature to enact the statute in the first place? In answering these questions, I am making certain assumptions about legislative behavior. Legislators tend to react rather than plan. It is not often that legislators search out problems and provide solutions for them. Even less frequently do legislators devote themselves to the creative imagination of future problems and the provision of concrete plans to address these problems should they ultimately arise. In short, most legislation is a response to current problems. If this assumption is sound, then an historical reading of the case requires that one ask what circumstances provoked the legislators into passing this particular statute.

The facts of the case are sketchy, set out only by way of a bill of exceptions. We are told that Herman Presser was thirty-one years old, a citizen of the United States, a resident of Illinois, and a voter. The facts then become more interesting. Presser belonged to a society called Lehr-und-Wehr Verein, which is described as a corporation organized under the general incorporation laws of Illinois.[8] Why is the name in German? What might it have meant to those who chose the name? There is a brief quotation from the certificate of association, which states that the corporation was organized "for the purpose of improving the mental and bodily condition of its members, so as to qualify them for the duties of citizens of a republic. Its members shall therefore obtain, in the meetings of the association, a knowledge of our laws and political economy, and shall also be instructed in military and gymnastic exercises."[9] We are also told that Presser marched at the head of a company of four hundred

6. *Id.* at 253-54.
7. *Id.*
8. *Id.* at 254.
9. *Id.*

men in the streets of Chicago. The company was armed with rifles and Presser rode on horseback carrying a cavalry sword. These acts were alleged to be unlawful under Illinois law.[10]

An essential step in any historical reading of a case is an examination of how the legal issues were framed by counsel and addressed by the court. One must be alert to the possibility that the issues in a case were understood differently in their historical context, and may well have different meanings today. Interestingly, defendant's counsel in *Presser* started with a preemption argument.[11] There existed Congressional statutes delineating how the militia should be organized, and counsel pointed out the ways in which the Military Code of Illinois departed from the federal command. In response Justice Woods, speaking for a unanimous bench, conceded the main point but avoided the conclusion. Although the Illinois statute, read as a whole, did not comply with the federal mandate, Justice Woods asserted that the section in question was separable. Thus, its validity did not depend on the legitimacy of the entire code.[12] To the modern reader, this move seems unexceptional although the actual content of Woods' argument is thin. There is no discussion in the opinion of the rationale of the federal statute, or why it was written as it was. Similarly, the opinion is silent on the same questions regarding the Illinois statute. Consequently, Justice Woods' severability argument is rather abstract. It is possible that Woods could be correct, but he offers so little substantive support, that his argument remains unpersuasive.

Counsel's next argument was grounded in the second amendment, but it was structured in an unusual way. Counsel did not argue for a "right to keep and bear arms" as a simple individual right. Instead, the right as argued for by counsel was more corporate than individual. It was asserted that citizens have the right to be part of a militia and that the Illinois statute interfered with that right. The textual hook from which counsel hung the argument was the privileges and immunities clause of the fourteenth amendment, but unlike modern uses of that clause, it did not assert an individual right within our current understanding of that phrase. Justice Woods rejected this argument in conclusory fashion.[13] In particular, he gave no discussion of the historical understandings of the several provisions in the Constitution relating to the militia. The historical sources might have displayed a general perception that participation

10. *Id.*
11. *Id.* at 255-56.
12. *Id.* at 263-64.
13. *Id.* at 266.

in the militia was like participation in the jury: both an obligation and a privilege of citizenship.[14] Instead, Woods seemed to regard the Constitutional provisions as creating no privileges or claims for citizens, but merely as recognizing powers in the state. The historical question is whose argument was more traditional—that of defendant's counsel or that of the Justices?

Counsel for Presser seems to have conceded the state's power to regulate and control, but he argued that this power should not be exercised so as to destroy all citizen privileges. The most interesting feature of Woods' opinion is that counsel's argument led him to write: "To deny the power [to regulate and control] would be to deny the right of the state to disperse assemblages organized for sedition and treason, and the right to suppress armed mobs bent on riot and rapine."[15] This passage raises an interesting historical question: why did Woods think that the threat of "riot and rapine" was relevant to the issue before him?

The next case in the series is *Spies v. Illinois*.[16] On first reading, *Spies* is opaque. A modern reader is not likely to understand it well if limited to the information provided in the *United States Reporter*. For example, the case nowhere identifies the crime with which August Spies is charged. We are told that it is an offense punishable by death and that he has been found guilty,[17] but we know nothing about the precise charges. Moreover, nothing is mentioned regarding evidence tending to prove guilt or innocence. The reported facts deal solely with procedural issues, and offer no information about the substantive context in which they arose.

Another element likely to strike a modern reader as unfamiliar is the procedure that was used. A petition was submitted for a writ of error,[18] a device not commonly used today. Consequently, many contemporary

14. Counsel stated that the historically sanctioned institution of the militia was characterized by "distribution, rotation and lot." Brief for appellant at 18, Presser v. Illinois, 116 U.S. 252 (1886). These terms were explained by counsel as follows: "That is to say, the militia was to be *distributed* over the entire realm, or rather, recruited from every county of the kingdom; the inhabitants were to serve in *rotation*; and the men to be selected by *lot*." *Id.* This description is drawn from Blackstone, as a reading of Chapter 13 of Volume I of his famous "Commentaries on the Laws of England" will make clear. 1 W. BLACKSTONE, COMMENTARIES 412 (1st ed. 1803).

Given this historical understanding, the Illinois scheme was especially objectionable. A voluntary militia force, subject to the Governor's discretion, could be understood as an open invitation to executive usurpation of power.

15. Presser v. Illinois, 116 U.S. at 268.

16. 123 U.S. 131 (1887).

17. *Id.* at 132.

18. *Id.*

readers may not be familiar with its contours or the types of issues that it raises. Additionally, the sequence of particular events in the case seems remarkable. The petition was presented on the 21st of October to Justice Harlan in chambers.[19] Harlan did not act on it, but arranged for the petition to be presented to the entire Court. We are told that counsel presented the petition on the 21st and argued in support of it on that same day.[20] The Court did not rule, but took the petition under advisement. On the 24th of October, the Chief Justice announced that the Court had not determined whether a writ of error should be issued, and requested another argument on that point.[21] On the 27th and 28th of October counsel made oral argument for the second time.[22] On the 2nd of November[23] Chief Justice Waite delivered an opinion in which the Court announced that it would not issue a writ of error to the Supreme Court of Illinois.

The whys and wherefores of this procedure are questions that are unanswered by the report. Furthermore, the content of Chief Justice Waite's opinion is also a puzzle, since it does not seem to respond fairly to counsel's argument. In argument, counsel asserted that the writ of error should issue on the grounds that a question as to whether an individual's rights were denied was established by the record. This question is, of course, distinct from the question of the merits of the case. Furthermore, this distinction was clearly articulated in counsel's argument. The reporter's statement presents Mr. Tucker's argument in the following terms:

> We ask to be heard in order to obtain a reversal. Hearing must precede affirmance or reversal. To discuss the merits in order to show our right to a writ, is not only premature, but a denial of the right of appeal. Here is the record of two millions of words. It is unprinted. Counsel have not read—cannot read it. The Court has not done so—could not have done so. In the dark, we pray an appeal, because we say the Constitution condemns our condemnation. Can we in this condition be expected to prove that the judgement should be reversed, when we only ask to have a chance to print the record and show the injustice done to us, upon which in which injustice we claim the writ? If granted, we will on hearing establish our right to reverse the judgement.[24]

In spite of this eloquent plea, Chief Justice Waite's ruling appears to

19. *Id.* at 142.
20. *Id.* at 143.
21. *Id.*
22. *Id.*
23. *Id.* at 131.
24. *Id.* at 155.

reach the merits. As printed, Waite's opinion is nineteen pages long.[25] The first several pages are routine perfunctory matters that say nothing of substance. Waite then devoted three pages[26] to discussing the Illinois statute that governs challenges for cause on the grounds of prejudice, and he held that the statute was not unconstitutional on its face. He proceeded to discuss the grounds on which two jurors were challenged in order to determine whether the administration of the statute denied constitutional rights. His discussion of these two jurors extends for ten pages[27] and constitutes the bulk of his opinion. In these ten pages, he concluded that rights were not denied. The final three pages of the opinion deal with an issue regarding cross-examination and another minor point in a summary fashion.

One wonders why Chief Justice Waite did in fact reach the merits of the case, and further, why he used disagreement with the merits as grounds for declaring that a writ should not issue in the first place. If Waite was to decide the merits it is curious that the two particular jurors were considered so crucial. Counsel said that the record had not yet been printed and that he had not yet read it all. On the face of it, it seems unfair for Waite to pick out two particular jurors as crucial to the petitioner's claim. Presumably, counsel mentioned these jurors as a "for example" during the course of argument. However, it is at least possible, if not probable, that had counsel been able to present the question of jury prejudice on the basis of a full printed record, then his case would have been stronger.

Aside from the adequacy of Waite's discussion of the jury question, the opinion does not deal with all of the issues pertaining to the writ of error. The reporter's statement of the petition for the writ displays a substantial list of errors.[28] Counsel's argument is limited to only a few of them,[29] and Chief Justice Waite's opinion discusses fewer still. If this were a normal appeal, there would be nothing uncommon about this. We would see the process of moving from the initial filing to the final opinion

25. *Id.* at 163-82.

26. *Id.* at 167-70.

27. *Id.* at 170-80.

28. *Id.* at 134-41. In addition to the points mentioned in the text, the petition alleged prosecutorial misconduct consisting of unsustained charges and vituperation, prosecutorial reference to failure to testify, illegal searches and seizures, an instruction that authorized conviction as an aider and abettor for merely giving a public speech, and that the panel from which the jurors were to be selected was purposefully summoned so as to exclude wage laborers.

29. *Id.* at 143-55. John Randolph Tucker's argument for petitioners focused mainly on the proposition that the privileges and immunities clause of the Fourteenth Amendment made the Bill of Rights applicable to the States.

as one by which the issues were winnowed out and narrowed down. However, given the extremely short time span between presentation of the petition and issuance of the Court's decision, combined with the lack of a printed record, the Court's drastic curtailment of issues addressed can only be regarded as careless practice.

All of this raises the question of the significance of historical context in its sharpest form. Why was there such haste? Why was the record so lengthy? Why did the Court decide the merits without ever granting counsel a chance to argue the merits?

The *Debs*[30] case is probably the easiest of the three for a modern reader to approach, which may explain why it is used in modern casebooks. The reporter's statement of facts summarizes the content of the bill in equity filed by the United States.[31] Since the bill purports to state the facts that justify the issuance of an injunction, a more thorough factual description is provided here than was offered in either *Presser* or *Spies*. More complete, however, does not necessarily mean that it is more adequate. It is possible to read the allegations of the bill and accept them at their face value, in which case there is no need for further historical information. However, a careful historical reading mandates an inquiry into the accuracy of the allegations.

The opinion of Justice Brewer begins on a routine note. The opening of Brewer's opinion is devoted to expounding the powers of the national government over interstate commerce and the post office system.[32] Brewer stated the power in sweeping terms, and it is in precisely such terms that we understand these powers today.

An aspect of the opinion likely to arouse curiosity appears after about five pages when Brewer switches from a discussion of the general nature of the power over commerce and the mails to the issue of the appropriate means for executing these powers. Having established to his satisfaction that Congress has sweeping power over interstate commerce and transportation of the mails, and that this power authorizes the national government to prevent any unlawful or forceable interference with commerce or mail, Justice Brewer proceeded to the topic of appropriate sanctions against acts of obstruction. As Brewer put it:

> Doubtless, it is within the competency of Congress to prescribe by legislation that any interference with these matters shall be offenses against the United States, and prosecuted and punished by indictment in the proper

30. *In re* Debs, 158 U.S. 564 (1895).
31. *Id.* at 565-70.
32. *Id.* at 578-81.

> courts. But is that the only remedy? Have the vast interest of the nation in interstate commerce, and in the transportation of the mails, no other protection than lies in the possible punishment of those who interfere with it?[33]

Brewer thought the answer to this question was clearly "no". Modern readers are apt to agree given, for example, the importance of the regulatory functions of administrative agencies. However, the train of associations that such sentences are likely to generate within us are very different from those elicited within Brewer.

To Brewer, the question of whether Congress was limited to enacting legislation against criminal activity called up the jury trial provisions of article III.[34] He explained the relevance of the provisions as follows:

> If all the inhabitants of a state, or even a great body of them, should combine to obstruct interstate commerce or the transportation of the mails, prosecutions for such offenses had in such a community would be doomed in advance to failure. And if the certainty of such failure was known, and the national government had no other way to enforce the freedom of the interstate commerce and the transportation of the mail than by prosecution and punishment for interference therewith the whole interest of the nation in these respects would be at the absolute mercy of a portion of the inhabitants of that single state.[35]

This proposition is startling not because of its content, but because of its presumed relevance. Why did the historical context of the case provoke such a train of associations?

Brewer then escalated the dispute further:

> But there is no such impotency in the national government. The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the nation, and all its militia are at the service of the nation to compel obedience to its laws.[36]

This rhetorical escalation is historically significant. The question of alternatives to criminal law, which in our day might provoke by train of association the thought of administrative agencies, instead has provoked in Justice Brewer an entirely different set of associations. For him, it led to thoughts of jury nullifications and armed conflict. Justice Brewer tried

33. *Id.* at 581.
34. U.S. CONST. art. III, § 2.
35. *Id.* at 581-82.
36. *Id.* at 582.

to find an alternative to these stark choices. In two rather sweeping rhetorical questions, he asked:

> [I]s there no other alternative than the use of force on the part of the executive authorities whenever obstructions arise to the freedom of interstate commerce or the transportation of the mail? Is the army the only instrument by which rights of the public can be enforced and the peace of the nation preserved?[37]

At this point, the intended negative response to these questions is fairly obvious, and the opinion now marches toward its destination with efficiency. When a judge asks questions like these, one knows what the answer will be, and it is unlikely that the remainder of the opinion will be other than marginally surprising.

What is intriguing about the opinion at this point is its sudden switch to formalism. More precisely, Brewer's oscillation between impassioned rhetorical questions and legal formalism is curious. The first case cited after the rhetorical questions is a Connecticut state court case in which the borough of Stamford asked for an injunction to restrain the Stamford Horse Railroad Company from laying down tracks in the streets.[38] In that case, the court acknowledged that the borough had the right to use self-help remedies and rip up the tracks. However, the Connecticut Supreme Court held that the existence of this self-help right did not bar the borough of Stamford from seeking an injunction. To be sure, one is entitled to an injunction only if there is no adequate remedy at law, but self-help via force is not the sort of adequate legal remedy contemplated by this rule. Brewer's argument is sound, but in this context, it seems droll because of the incongruity of collocating the activities of Stamford Horse Railroad and those of Eugene Debs.

Conceding that the imposition of an injunction was a possible remedy, the question then became whether the United States had "such an interest in the subject-matter as enables it to appear as party plaintiff in this suit."[39] Today, the concept of standing would be used to address this issue, although the answer to the question would still be "yes". Counsel argued that "equity only interferes for the protection of property, and . . . the government has no property interest."[40] Brewer replied straightforwardly that the United States did, indeed, have a property interest in the

37. *Id.*

38. *Id.*

39. *Id.* at 583.

40. *Id.*

mails.[41] Under the strictest view of property law, this is surely true. Under traditional classifications, we would say that the government is a bailee of the mail, and that a right to possession is a property interest.

However, Justice Brewer did not rest upon this ground. He delivered a nine and one-half page disquisition on the relevant law of "public nuisance" versus "private nuisance" and argued that the precedents permit the government to sue.[42] The only thing that would strike a modern reader as curious, one imagines, is that Justice Brewer spent so many pages on it.

Having decided that the available alternative of force does not foreclose equity, and that the United States has standing, Brewer then moved to the "unquestioned" proposition "that it is outside of the jurisdiction of a court of equity to enjoin the commission of crimes."[43] Although he conceded the truth of the proposition, he tried to avoid its relevance through the classic technique of slicing apart the unsliceable. While it is true that the chancellor cannot enjoin a crime, it is also true that the chancellor can protect an interest that is protectable in equity.[44] This will result in what appears to be concurrent jurisdiction, but it is concurrent over different aspects of the same transaction. The criminal courts will be acting with the purpose of punishment, and the civil courts with the purpose of protection.

This distinction, of course, created the appearance that the contempt power of the chancellor was being used to circumvent the jury trial guarantee. Brewer stoutly denied this motive, citing numerous authorities affirming the power of a tribunal to punish for the contempt of its orders. He even cited precedents which prohibited the delegation of the power to punish contempts to another tribunal. Brewer cited[45] *In re* Yates,[46] in which Chief Justice Kent of the New York State Supreme Court of Judicature discussed *In re* Anthony Earl of Shaftsbury.[47] In *Shaftsbury*, the King's Bench held that it could not punish for contempt before the House of Lords as the latter was the sole judge of contempts arising before it. By analogy, Brewer concluded that the chancellor must not defer to a jury. The analogy, at best, is strained.

---

41. *Id.*
42. *Id.* at 581-82.
43. *Id.* at 593.
44. *Id.*
45. *Id.* at 595.
46. *In re* Yates, 4 Johns. 317, 369 (1809).
47. *In re* Earl of Shaftsbury, 6 Howell's State Trials 1269 (29 Charles II 1677).

Brewer next cited that part of counsel's brief which attempted to distinguish all of these cases. Counsel argued:

> No case can be cited where such a bill in behalf of the sovereign has been entertained against riot and mob violence, though occurring on the highway. It is not such fitful and temporary obstruction that constitutes a nuisance. The strong hand of executive power is required to deal with such lawless demonstrations.[48]

In reply Justice Brewer wrote: "We do not perceive that this argument questions the jurisdiction of the court, but only the expediency of the action of the government in applying for its process."[49] Brewer thought the objection could not apply to the jurisdictional question since he did not see how a court could have jurisdiction to enjoin one person, but lose jurisdiction when the obstruction was caused by a hundred persons.[50] In the latter case, however, it is questionable whether "in the excitement of passion a mob will pay heed to processes issued from the courts."[51] Brewer cited with approval a point made by counsel in oral argument "that it would savour somewhat of the puerile and ridiculous to have read a writ of injunction to Lee's army during the late Civil War."[52] Brewer exploited this argument to buttress his conclusion. He asked "[B]ut does not counsel's argument imply too much? Is it to be assumed that these defendants were conducting a rebellion or inaugurating a revolution, and that they and their associates were thus placing themselves beyond the reach of the civil process of the courts?"[53] Justice Brewer thought the answer to this was "no," supporting his contention with testimony given by one of the defendants before the United States strike commission:

> As soon as the employees found that we were arrested, and taken from the scene of action, they became demoralized, and that ended the strike. It was not the soldiers that ended the strike. It was not the old brotherhoods that ended the strike. It was simply the United States courts that ended the strike. Our men were in a position that never would have been shaken, under any circumstances, if we had been permitted to remain upon the field among them. Once we were taken from the scene of action, and restrained

48. *In re* Debs, 158 U.S. at 596.

49. *Id.* at 597.

50. We have proof here, if any is needed, that Justice Brewer would not accept Engels' version of dialectical materialism. The maxim that a difference in quantity can yield a difference in quality is rejected by him here. Of course, there are other reasons for concluding that Justice Brewer is not a partisan of Engels.

51. *In re* Debs, 158 U.S. at 597.

52. *Id.*

53. *Id.*

> from sending telegrams or issuing orders or answering questions, then the minions of the corporations would be put to work. . . . Our headquarters were temporarily demoralized and abandoned, and we could not answer any messages. The men went back to work, and the ranks were broken, and the strike was broken up, . . . not by the army, and not by any other power, but simply and solely by the action of the United States courts in restraining us from discharging our duties as officers and representatives of our employees.[54]

This particular quotation raises a profound question regarding historical context. It is remarkable that Justice Brewer used this excerpt to support the position which he was arguing. He had said that the legal question was merely one of "expediency," and the passage cited established to Brewer's satisfaction that the injunction served this purpose in ending the obstruction to interstate commerce. This part of the opinion displays a bland self-confidence which suggests Brewer believed that the ends justified the means. Or could this passage be read differently? Might the show of confidence conceal an underlying insecurity?

The next quotation does not convey the same sense self-confidence. Indeed, its tone of excess may be construed as evidence of insecurity. Brewer cautions that

> "[it] must be borne in mind that this bill was not simply to enjoin a mob and mob violence. It was not a bill to command a keeping of the peace; much less was its purport to restrain the defendants from abandoning whatever employment they were engaged in. The right of any laborer, or any number of laborers, to quit work was not challenged."[55]

Having explained what the bill was *not* intended to do, Brewer clarified his perception of its purpose by stating that "[t]he scope and purpose of the bill was only to restrain forceable obstructions of the highways along which interstate commerce travels and the mails are carried."[56] Can these statements be accepted at face value?

III. The Historical Context

The setting of our three cases is post-Civil War Chicago, a rapidly growing city well on its way to becoming to a major metropolis.[57] It was also a city of booms and busts. The Great Fire of 1871 was followed by boom times as the city went about the task of rebuilding. But in 1873, the

54. *Id.* at 597-98.

55. *Id.* at 598.

56. *Id.*

57. Nearly any standard history will give the broad outlines. I recommend D. Burner, F. McDonald, & E. Genovese, The American People 318-87, 422-28 (1980).

entire country entered a severe depression that would last for at least five years. The depression caused great hardship. Workers faced wage cuts and layoffs, and many people were starving.[58]

This downturn was not met with quiet despair, however. There emerged a rash of labor union organizing and political agitation. One of the most significant of these events was the Great Strike of 1877.[59] It began on July 16th, when the Baltimore and Ohio Railroad announced a ten percent cut in wages. The strike spread across the country, first paralyzing transportation in the East, then moving to the Midwest and finally reaching the West Coast. Eventually, it went beyond the railroads and became a general strike.

Whether or not the strike posed a serious threat to the security of life and property, there is no doubt that those who were in power were alarmed. The newspapers called for ruthless suppression of the strike, and public officials were more than willing to comply.[60] The police, the state militia, and federal troops were used against the strikers. Much blood was shed, primarily that of the strikers.[61] Eventually the strike was broken, and political positions became polarized. Fear and anger were augmented on both sides, and each faction had members who called for the use of arms.[62] It is against this historical background that *Presser* must be read.

In the aftermath of the Great Strike of 1877, most people were interested in moderate solutions. Nevertheless, in the days after the strike militants gained power that was disproportionate to their number. Both factions were permeated with individuals whose radical proposals gained influence. On the side of labor, the practical manifestation of this was the organization of "self-defense" associations. For example, the militants among German-speaking workers organized the Lehr-und-Wehr Verein, and the Irish organized the Irish Labor Guards.[63] In 1879, the Illinois legislature responded passing the statute that was contested in *Presser*.

In the years between *Presser* and *Spies*, there were intense factional

58. For background on the situation in Chicago at this time, and for a discussion that links the circumstances to the *Spies* case, see P. AVRICH, THE HAYMARKET TRAGEDY 150-59 (1984).

59. For a general account of the strike and its consequences see P. FONER, THE GREAT LABOR UPRISING OF 1877 (1977) (examining labor activities generally, circa 1877).

60. P. AVRICH, *supra* note 58, at 27.

61. *Id.*

62. *Id.* at 34-38.

63. P. AVRICH, *supra* note 58, at 45-46, 161-62 (discussing the formation of self-defense groups). August Spies, who gave his name to the second case in my trilogy, also joined the Lehr- und-Wehr Verein. *Id.* at 122.

splits within the labor movement. It is evident that the defendants in *Spies* were not the architects of the events leading to their trial. The eight defendants in *Spies* were adherents of the so-called Anarchist movement.[64] They proposed a total destruction of the capitalist system, and they scorned the Socialist movement as too authoritarian and as too prone to compromise. However, most of organized labor had begun a program of agitation for an eight-hour day. The anarchists were scornful of this proposal, but it was so popular among the workers that they had to join or risk losing all connection with the majority of industrial workers.[65]

The eight-hour day movement was provoked by the hard times of 1883-86, and spawned widespread labor agitation. One way in which the agitation took shape was through strikes. A strike at the Cyrus McCormick[66] factory led to the *Spies* case. In April of 1885, McCormick was forced to restore a fifteen percent wage cut after a bitter strike. He resolved to break the union, and in February of 1886, declared a general lockout and brought in nonunion labor.[67]

For the next several months pickets and violence were routine at the McCormick plant. Although the anarchists supported the strikers, they did not direct the pickets. However, when the violence became particularly bad on May 3, 1886, the leaders of the anarchists responded with a call for a mass rally to be held the next day at Haymarket Square. Fewer workers participated than had been anticipated, and the rally itself was peaceful. The mayor of Chicago, Carter Harrison, did what he could to ease tensions by appearing at the rally.[68] Speeches began at about 8:30 p.m. By ten o'clock, the mayor was convinced there was no risk of disorder and went home. About fifteen minutes later, Police Inspector Bonfield decided to break up the meeting, and he marched his men into Haymarket Square from a nearby precinct station. When Bonfield demanded that the speaker step down, he complied—but a bomb was thrown into the police ranks.[69]

The casualties were appalling. At least seven policemen died and

64. *See generally id.* (containing a fresh appraisal of the events surrounding the Haymarket Tragedy).

65. *Id.* at 181-85.

66. This enterprise was the predecessor of International Harvester.

67. P. AVRICH, *supra* note 58, at 188.

68. He reportedly made himself conspicuous by striking match after match as though he was relighting his cigar.

69. P. AVRICH, *supra* note 58, at 197-208; *see also* W. ADELMAN, HAYMARKET REVISITED (1976) (a brief and popular account of the Haymarket events).

sixty were wounded, although the evidence indicates that a majority of the police casualties were caused by bullets from police revolvers. The number of civilian casualties were comparable to the those suffered by the law enforcement officers and were entirely caused by police gunshots.[70] The reaction which followed included press hysteria, police repression, and a farcical trial. The individual who actually threw the bomb was never identified. Each of the eight defendants in the *Spies* trial had an airtight alibi. The charge against them was conspiracy. The judge instructed the jury that if they believed the defendants had made speeches or written pamphlets that encouraged terrorist acts, and if they further believed that a murder was committed by someone who was induced to act by this advice, then the defendants were guilty, even if the murderer had never been identified.[71] The verdict of guilty was pronounced on August 20, 1886. On the second day of November, Chief Justice Waite delivered his opinion.

The last case in this triad, *In re* Debs, arose from the Pullman railroad strike of 1894. As was the earlier strike at McCormick's factory, this action was provoked by wage cuts.[72] This time, the strikers' strategy was to broaden the strike within the industry. They wanted to put pressure on Pullman by cutting off his access to the railroads, thereby preventing Pullman cars from earning their customary fees. The Pullman strikers persuaded the railway union not to run trains to which Pullman cars were attached. This cooperation led to widespread sympathy strikes.[73] The Attorney General of the United States secured an injunction against interference with commerce and the mails, and called in troops to enforce it. The presence of the troops outraged the strikers, who reacted with violence. The novel twist in this scenario was that the violence was treated as contempt of court.[74] Justice Brewer sustained the contempt conviction.

An understanding of the historical context in which these cases arose illuminates many points which would otherwise remain obscure. In light of this context, it is understandable why in *Presser* Justice Woods said: "To deny the power [to outlaw the Lehr-und-Wehr Verein] would

70. P. AVRICH, *supra* note 58, at 208-10.

71. *Id.* at 260-93. For a more thorough discussion of the trial see A. DAVID, THE HISTORY OF THE HAYMARKET AFFAIR 236-392 (1958).

72. For a contemporaneous account, see W. CARWARDING, THE PULLMAN STRIKE (1894); *see also* W. ADELMAN, TOURING PULLMAN (1977) (detailing social background of the community).

73. A. LINDSEY, THE PULLMAN STRIKE 133-35 (1964).

74. *See* N. SALVATORE, EUGENE V. DEBS: CITIZEN AND SOCIALIST 126-39 (1982) (detailing Debs' role in the affair).

be to deny the right of the state to disperse assemblages organized for sedition and treason, and the right to suppress armed mobs bent on riot and rapine."[75] We can understand why Chief Justice Waite in *Spies* decided the merits without giving a hearing on the merits.[76] We can understand why Justice Brewer in *Debs* thought in terms of jury nullification and armed conflict.[77] Most of all, the context leads us away from excessive legalism. The history enables us to understand what everyone understood at the time—fundamental questions of social, political and economic power were at stake. Surely the judges understood this fact. As evidence, I offer the following letter, which was written by a Supreme Court Justice to the judge who had held Debs in contempt:

> Justice J.M. Harlan to Judge W.A. Woods
> Washington, D.C.
> May 28, 1895
>
> Dear Judge:
>
> As soon as the opinion in the *Debs* case is printed I will send you a copy. The authority of the Circuit Court to do what it did in the contempt case is fully sustained. The opinion does not discuss the facts, but finds that there was jurisdiction, and jurisdiction existing, the action of the Circuit Court could not, in the matter of contempt, be reviewed on *Habeas Corpus.*
>
> Now, a thought has come into my mind today which I deem important. It is this: The main suit by the Govt. in which the injunction issued was new in all its aspects. Many lawyers, I take it, doubted whether the Govt. had any standing in such a suit to invoke the authority of a court of equity. The jurisdiction of the court has been sustained, and the authority of the U.S. in such matters is hereafter to be recognized as equal to any emergency, involving the freedom of interstate commerce or the unobstructed transportation of the mails. No such disturbance as that raised by Debs is likely to arise again in this country. If Debs and his companions remain in jail during the summer, are they not likely to be regarded as martyrs by a large number of people? Cannot the U.S. afford to say— cannot the U.S. *court* afford to say—as the authority of the Govt. and the courts is fully sustained .. [and] everybody [will know] in advance the peril they will incur, by disobeying the order of court, —that the pending prosecutions may be stopped, and the proceedings for contempt dismissed or set aside. I take it that you could, if you saw proper, set aside the order fining and imprisoning and discharge the parties in contempt. I assume that the attorneys of Debs could so arrange the matter as to justify the court in being liberal. Recent events, as it seems to me, suggest that there may be wisdom in such a course. A construction of the Constitution which so narrows the power of the Genl. Government that, practically, it cannot compel

75. Presser v. Illinois, 116 U.S. 252, 268 (1886).
76. *See* Spies v. Illinois, 123 U.S. 131, 163-82 (1887).
77. *See In re* Debs, 158 U.S. 564, 577-600 (1895).

> rich landlords and the owners of *invested* property, to contribute to the support of the nation, and a construction so broad as that given in the Debs case, will not be understood by vast masses of people. The situation is one that is well calculated to increase the spirit of unrest and discontent in many parts, indeed, throughout all, of the country. I believe the generous action upon the part of the Govt. and the courts, at this time, would be of real service to this country. . . .
>
> Think of this, without consulting any one—for consultation may raise false hopes—and let me know your views. If you do not concur, I will not move in the matter. If you think well of the suggestion, I will bring the matter to the attention of the Attorney-General and ascertain his views. . . .
>
> Altogether you are to be congratulated—all the more because you made your way without any help from the Circuit Justice [Harlan] who, under ordinary circumstances would have been glad to have conferred with you.[78]

The lesson of this letter is the same as that of the cases. However, the letter does reveal something that is not mentioned in the case it discusses. Harlan was astute enough to see that it was unwise to make a martyr of Debs, and we would not expect to see such frank calculations in the *United States Reports*. Harlan also makes clear that the fundamental issue is controlling any "disturbance [such] as that raised by Debs," so that the social order is not disturbed.

IV. IMPLICATIONS

What are the implications of the above? The three cases do not seem to have much to do with each other when they are read for their legal doctrine, but when one reads them in their historical context, they are obviously connected. If we assume that this sort of demonstration could be repeated with other cases, then what follows? I would like to suggest that the implications are great, both for pedagogy and scholarship, and furthermore, that historical analysis should lead one to be suspicious not only of mainstream work but of the work of those associated with CLS. Let me now turn a discussion of what these implications might be.

A. *Pedagogy*

Several lessons can be learned from the three cases discussed. One such lesson concerns pedagogy. The tangible evidence of our pedagogy takes two forms—the preparation of teaching materials and classroom performance. If one takes seriously the lesson of the three cases—that

78. Westin, *The First Justice Harlan: A Self-Portrait From His Private Papers* 46 KY. L. J. 321, 359-60 (1958).

one can only understand cases by putting them in their historical context—then certain changes must be made both in the way teaching materials are constructed and in the manner in which classes are taught.

Consider the casebook, for example. If one is convinced by the argument of this essay, then one would print the cases in a casebook in chronological order. Unless cases are printed in chronological order, it is exceedingly difficult to see a particular case in the context of contemporaneous cases. Many teachers would object on the ground that they prefer to pursue themes. However, one can continue to pursue broad themes even if the cases are presented chronologically simply by flipping back and forth among different sections in the book. After all, the codex form of bookbinding was developed for the specific purpose of enabling the reader to flip back and forth between different sections of the book with ease.[79]

I do not find it difficult to assemble cases in chronological order since I prefer to teach cases chronologically. However, I do not follow this technique slavishly. For particular purposes and in the interest of variety I often transgress chronological lines. However, when I do so, I prefer that the casebook be constructed so that this technique is clear. The student should always be aware which cases occurred before, and which occurred after, the case that is being read.

How can one teach historically in the classroom? All law professors are subject to the pressures and expectations generated within the law school environment, including the practice of colleagues and the expectations of students. Anyone who is too critical, theoretical, or historical, will face opposition. How is it possible to teach historically in the face of these pressures?

My own solution is to focus on the relationship between cases and precedent. For any case, I may ask, "What sort of precedent does this case establish?" For older cases, the questions can be, "Is this case still a good precedent? And if so, for what?" For more recent cases, one can ask, "What does this case do to the prior precedents?" The advantage of focusing on these questions is that it allows the building of a bridge be-

79. Originally, the several leaves of a book were glued together at their edges so as to make a scroll. A scroll can be consulted only by unrolling it, which forces on the reader a sequential search and reading procedure. Once upon a time in the ancient world, someone had the bright idea of assembling the several leaves by way of sewing them together along a single edge, rather than gluing them together into a scroll. This invention is called the codex form of bookbinding, and it permits the random access form of search, as distinguished from the purely sequential form of search. *See generally* C. ROBERTS & T. SKEAT, THE BIRTH OF CODEX (1983) for a recent and thorough monograph on the development of the codex form of bookbinding.

tween the historical and the technical. The historical questions relate to continuity and discontinuity. The history of American constitutional law includes both, and asking what effect recent caselaw has on older precedents is one way of addressing that historical question. At the same time, it has the advantage of being a technical and practical question. The practicing attorney is interested in how caselaw can be used in legal practice. Is it still good law? Can it be relied upon? In other words, the general pressure on law schools to be trade schools should not impede the teaching of constitutional law in an historical manner. The historical questions of continuity and discontinuity overlap nicely with the narrowly professional, trade-oriented question of the precedential value of caselaw.

However, there is another pressure in law school with which the historical method is radically inconsistent. Although law as a trade is no impediment, law as a religion is. There are those who think of law, and particularly constitutional law, as a religion. As a sociological generalization, the place of constitutional law in the "civil religion" of the United States is well documented.[80] Focusing on discontinuity as well as continuity is upsetting to some, although not all, true believers.

B. *Constitutional Law and Critical Legal Studies*

Ironically, the historical method is also disturbingly inconsistent with the actual performance of most of those who are CLS adherents. Many CLS scholars do not see constitutional law as a set of precedents. They share with their mainstream opponents the notion that constitutional law rests on a finite set of principles. They differ in that they see those principles as being indeterminate and contradictory. The principle task of many CLS professors involves reading a set of cases so as to recover their underlying principles, then demonstrating the principles to be indeterminate and contradictory. The historical approach condemns that entire process as irrelevant. For the historicist, one merely has a set of texts including the Constitution itself, certain statutes that have canonical force,[81] a collection of Supreme Court opinions, and perhaps other documents such as the Declaration of Independence, the Lincoln-Douglas debates,[82] or the writings of John Stuart Mill on liberty.[83] In addition

80. *See, e.g.*, R. BELLAH & P. HAMMOND, VARIETIES OF CIVIL RELIGION (1980).

81. Title 28, U.S.C. § 1257 (1982), for example, establishes the Supreme Court's authority to review decisions made by the state judiciaries.

82. *See* H. JAFFA, CRISIS OF THE HOUSE DIVIDED (1959) (interpreting these debates).

83. J.S. MILL, ON LIBERTY (Great Britain 1859).

to these texts, one has a social practice in which the texts are used and construed as precedents. From the historical point of view, constitutional law is a combination of texts and precedents which are used in a complex historical practice, and the debate about determinate and harmonious principles versus indeterminate and contradictory principles is irrelevant.

I do not mean to assert that principles and consistency are nonexistent or unimportant. What I do mean is that they are the *product* of practice, rather than its foundation. More importantly, I think that contradictions among principles ultimately are unimportant. For the most part people are used to living with inconsistency. For intellectuals, theorists, and ideologues, inconsistencies may pose problems. For most individuals, politicians, and judges, inconsistencies are often easily dismissed. Furthermore, it is well established that people can behave in a predictable and coherent fashion, even when acting in a way that a theorist may regard as logically inconsistent.[84] It is important to bear in mind, however, that not all contradictions are equal.

The relativity of contradictions is important. Ideological and psychological contradictions are less important than structural ones. In the three cases that I have discussed, the presence of something far more significant than logical inconsistency among rules and principles is evident. In these cases, we see the structural contradictions of social classes. Furthermore, we see judges struggling with these contradictions and attempting to maintain a social order that is threatened by questions of class. Contradiction among classes is not the only structural contradiction in our polity, but I believe that it is the most fundamental contradiction.

C. *Critical Legal Studies and History*

I would like now to consider the relationship between the views expressed in this Article and other trends that have been associated with the CLS movement. I will take as my starting point a recent article by Mark Tushnet[85] in which he presents a viewpoint against which I will argue. Tushnet notes that social theory, as we have customarily known it, has been rejected by a large number of those who are associated with CLS. He says, "the renunciation of the theoretical dimension of the initial project of CLS helps explain an otherwise curious characteristic of recent legal scholarship. . . . [It] is relentlessly ahistorical."[86] I agree with

84. *See, e.g.*, PASCAL, PENSEES 60, 66, 210 (A. Krailsheimer trans. 1966).
85. *See* Tushnet, *supra* note 1.
86. *Id.* at 512.

Tushnet's description, and I deplore this development.[87]

Tushnet notes that this ahistoricism was not the original position advanced by those connected with CLS. According to Tushnet, "[T]he early position in CLS was that one could say something systematic about the relation between legal rules and power—for example, we can say, though with many qualifications, that the legal system is tilted in favor of capitalism."[88] However, Tushnet asserts that these early views regarding "tilt" have been rejected by the "dominant position" in CLS.[89]

Tushnet identifies three arguments against systematic theoretical statements that "have been particularly effective."[90] Although the arguments may have been "effective," I have doubts as to their validity. An interesting question of social psychology lurks behind the word "effective," and I will address this issue in due course.

The first argument that Tushnet says has been effective is one which builds upon the legal realist's skepticism toward rules. Tushnet phrases the argument as follows: "If decision-makers can in principle reach any conclusion they wish within the legal system, 'the system' cannot be tilted, though of course the decision-makers might be biased."[91] In this argument, the legal system is identified as the sum total of all the legal rules which comprise the system. Given this starting place, together with certain theses about indeterminacy of the rules and contradictions among the rules, Tushnet concludes that the system is not tilted because it is not coherent.

The problem with this first argument is that it assumes that law equals rules. However, most historians and social theorists would reject this assumption, as did the legal realists. At the very least, a legal realist would say that the rules have their meaning via the precedents that apply them. The essence of legal realism is to insist that rules as abstractions are not very helpful. Consequently, the "dominant position," appears to abandon legal realism altogether. Furthermore, the legal realists were in-

87. Tushnet neither praises nor blames. Although the tone of his prose may lead a reader to assume that Tushnet approves of the recent trends in CLS, he nowhere commits himself. He states, "I should probably note my guess that I am in the minority these days on most of the issue I will mention." *Id.* at 510 n.16. However, he does not identify which of the dominant positions he would dissent from.

88. *Id.* at 511.

89. *Id.*

90. *Id.*

91. *Id.* The argument is curious, in that it purports to put any "tilt" or "bias" in the judge, not the system, and thus to offer a psychological explanation that is extrinsic, not intrinsic, to the law. However, the character of the judiciary is not an extrinsic fact. Judicial character should be understood as part of the tradition of judging, which is part of law.

terested in what they called "law in action" which they distinguished sharply from "law in the books." So long as one defines the legal system as the law in action, then the argument that Tushnet reports as having persuaded the majority seems both scholastic and irrelevant.

The second argument is summarized in the following sentence: "No one has shown that any particular aspect of the legal system, or even the legal system as a whole, serves the interest of capitalism better than do obvious alternatives, including wholesale rejection of vast bodies of law."[92] This assertion is grounded in comparative law. A global survey of law indicates that capitalism occurs in many different countries which have widely divergent legal systems. As I interpret this argument, comparative law is being used to refute hypotheses that take the following form: capitalism in the United States has produced the following [*fill in the blank*] legal practices. The refutation is supposed to work by showing that capitalism in France, for example, produced very different types of legal practice.

Tushnet's argument is unpersuasive. Comparative law evidence refutes a particular sort of theory which might be called "perfect functionalism." By a theory of perfect functionalism, a system such as capitalism would necessarily produce only those legal practices which are perfectly functional with reference to it. However, a historical practice that is grounded in social theory need not be wedded to perfect functionalism. Social systems have generated practices and institutions that are pathological, poorly adapted, or merely imperfectly functional. Legal systems have been produced by human action, and the actors produced what they did based upon their own rather limited understanding of what was happening at the time and what was needed to address current problems. Understanding can be distorted by fear, ignorance, desire, and countless other factors. Most theories of history assume that human actors are *not* omniscient, omnipotent, and benevolent. In some forms of theology the deity is assumed to have these qualities. However, there ought to be a distinction between social theory and theology.

On the other hand, the evidence of comparative law can be used to make a different point: capitalism generates widely divergent legal systems so a uniform theoretical explanation is not possible. I cannot accept this form of the argument from divergence because it confuses physical theory with social theory. It would be surprising, indeed, if the capitalist production of a certain chemical yielded a poison in Germany, but a

92. *Id.*

beneficial medicine in England. But it should be no surprise to learn that the development of capitalism led to changes in the legal system of the United States that differ from the changes that occurred in France. In physical theory, variations in time and place are irrelevant. In social theory, time and place are relevant and often crucial. In social theory the environment is always important. Just as the chemist must specify which facts of the physical environment (such as temperature and pressure) will influence a chemical reaction, it is the job of the social theorist to specify those facts in the social environment that are important.

Tushnet's third argument against the tilt is that "the legal system in fact has little direct impact on the maintenance of capitalism."[93] This argument is also a version of functionalism, but it focuses on present utility versus historical genesis. I accept the facts on which this argument is based. The utility of law is limited for the most part to routine problem-solving and the provision of a framework within which bargains can be struck. Given this description, one might ask how an institution with so limited a purpose could have any systematic impact.[94] Although I would not put the query that strongly, it does not follow that the system has no tilt. The underlying premise seems to be that unless the law is totally efficacious in maintaining the system, then it is not important to the system. However, I cannot think of a social theory in which this type of proposition is decisive. It is perfectly plausible to say that powers which are seldom used and have little daily impact can still be strategically important. A perfectly plausible social theory could distinguish between forces which maintain a system on a day-to-day basis and those which maintain in moments of crisis. On a day-to-day basis, the predominant institutions include the family, the school, the media, the factory, and the office. These can be regarded as the frontline troops, with the forces of the law serving as a strategic reserve. The military metaphor illuminates the issue nicely, for battles cannot be won without both.

Another problem with Tushnet's three arguments is that they contradict theses that are part of CLS criticisms of the law and economics movement.[95] Tushnet reports that the CLS critique of law and economics is comprised of a three-pronged attack. Law and economics theorists suppose that distribution is a function of efficiency. CLS criticizes this outlook because legal rules create entitlements which delimit the distribution of wealth. If this is a valid critique, does it not presuppose that the

93. *Id.*
94. *Id.* at 512.
95. *Id.* at 508.

rules have in fact been efficacious by creating entitlements, and thus wealth? If so, does not law have a present utility? A second CLS critique is that the economic models are unrealistic. But does not this presume a considerable historical knowledge about social reality? Finally, the CLS approach rejects the notion that a set of rules can be constructed that reflect individual preferences, for the rules themselves shape preferences. Yet does this not contradict squarely the proposition that legal rules do not help maintain the existing social structure?

Aside from arguing against law and economics, Tushnet reports that the dominant trend in CLS does not believe that the legal realist project of balancing is workable. He states "[i]n our society the class of decision-makers is not representative enough to provide the assurance the realists wanted. Decision-makers are elite, demographically unrepresentative and socialized into a set of beliefs about society and technology that skew the balance that they reach."[96] I accept that description and, in fact, endorse it heartily. [97] However, the assertion seems to rest on a social theory that is rather sweeping. If the members of the dominant position are right in their critique of theory, then both Tushnet and I should be ashamed of uttering such generalizations.

D. *Social Psychology*

Reviewing the arguments in Tushnet's article, the contrast between the CLS critique of law and economics and the critique by the "dominant CLS position" of the "early position" is truly remarkable. This dominant position rests upon arguments that are theoretically absurd. Moreover, they are ignored in practice when the economists are attacked. An explanation for this confusion can be found in the field of social psychology. Through social psychology we can find social facts that explain why people desire to identify law with rules and principles, and further would want to see these rules and principles as infinitely malleable. The common education of these academics is an instructive starting point. The CLS scholars who constitute the dominant position all went to law school, and it is a characteristic of law school instruction to focus on doctrine. Furthermore, in the law school environment one is encouraged to devise arguments for and against, any and every position. The study of law in our law schools is all too often the study of the production of novel arguments. Judging from Tushnet's description, it would seem that

96. *Id.*

97. *See supra* notes 2-78 and accompanying text.

some people have inferred that the law as it is studied in law schools is the same as law as it exists in reality. Since law in the classroom focuses on the production of arguments, then it must follow that the production of arguments is the main component of law as it exists in reality.

However, the power of education should not be overestimated. Surely the facts about family, geography, and social class are more important. Unfortunately, it is bound to seem presumptuous of me to generalize about such matters, since I have not gathered survey data nor followed any of the prescribed research protocols. On the other hand, I do have the evidence of my own experience. Based upon that evidence, I would characterize the scholars in question as white, middle-class, and suburban in their genesis. My own description is corroborated by a customary CLS self-critique. The members of the CLS movement are aware of the limitations in vision that hamper their understanding of the world, and they regularly identify restrictions of race, class, and the lack of heterogeneity in the group as handicapping their insight.

How might this characterization of CLS as predominantly white and middle-class be linked to a desire to view law as malleable, plastic, indeterminate? I think that the middle class vision of the world has customarily characterized it as being without structure. Furthermore, the middle class family also has an image of itself as unstructured. To be sure, there is massive self-deception in all of this ideology but none of us, I think, have escaped its influence.[98] Those who have absorbed an antistructural ideology in their formative years are likely to adhere to it in later years, and if they study law it is likely that they will carry these biases into their vision of the law.

We should inquire into the social psychology that lies behind our most fundamental assumptions. If we do, we can criticize ourselves. If we can understand ourselves as the products of history, then we can understand our law as a product of history.

V. CONCLUSION

I do not advance any broad social theory in this Article. However, I do have a theory about law. Law is a particular way of using texts and

98. I do not exclude myself, of course, but some of my own life experiences have been a partial corrective. I have lived among those who used the phrase "the law" to refer to the sheriff, and when one spoke of the sheriff directly, he was referred to as "the high sheriff." Furthermore, these idioms were not merely metaphorical, but were socially accurate. It was understood, and accurately so, that the high sheriff's word was final on a wide range of matters. I have found it useful to recommend such experience as an antidote to the proposition that the law is comprised of rules and principles.

precedents, and there are many ways of using these tools. It is an empirical rather than a theoretical question as to which techniques of using precedent prevail in any particular historical context. In some contexts, lawyers and judges use texts to generate rules. In other historical contexts, the practice of using texts and precedents yields a process of practical judgments about what is good for social well-being. The determination of which practice actually occurs is a question for historical investigation.

I also have presented some historical judgments. Suppose that during a study of constitutional law one asks: "Which kind of law is it? Is constitutional law the practice of judges using precedents to generate rules and principles, to which they then adhere? Or is constitutional law the practice of judges using precedent to inform (but not control) their practical judgments about what is good?" As an empirical matter, one finds some of both, but the latter predominates. The so-called great cases are examples of practical judgments, not rule-bound reasoning. Consequently, it is uninteresting to prove that the principles of constitutional law are indeterminate and contradictory for the cases rest on a different foundation.

Finally, I assert that we must be alert to changes in law. Tushnet has described his book on the law of slavery as ahistorical because his subject matter did not change significantly during the fifty year period that he surveyed.[99] I concede to Tushnet the right to describe his own book, but I did not read it that way. At any rate, there have been significant changes in constitutional law, and the three cases that I have discussed — *Presser*, *Spies*, and *Debs* — are examples of change in law. Furthermore, the changes in law symbolized by these cases were connected with the other social and political changes that were occurring at that time.

I will close with one example of change embodied in *Presser*. In that case, the Supreme Court endorsed the changes that were underway in other courts in which the right to bear arms was being limited.[100] During these same years, the power of the jury to make final resolutions of a controversy was eliminated.[101] Furthermore, freedom of speech was also sharply restricted.[102] These changes go together if they are viewed in

99. Tushnet, *supra* note 1, at 512 n.21.

100. For a survey of the historical precedents on this issue, see S. HALBROOK, THAT EVERY MAN BE ARMED (1984) and E. KRUSCHKE, THE RIGHT TO KEEP AND BEAR ARMS (1985).

101. *See* LaRue, *A Jury of One's Peers*, 33 WASH. & LEE L. REV. 841, 864-65 (1976); *see also supra* notes 30-56 and accompanying text (discussing *Debs*).

102. *See* Rabban, *The First Amendment in its Forgotten Years*, 90 YALE L. J. 514 (1981); *see also supra* notes 16-29 and accompanying text (discussing *Spies*).

their historical context. The nineteenth century was a time of change. Different classes gained and lost unequally, which led to social unrest. Judges responded to these events by attempting to impose order. In this historical context the disarming of unions, the reduction of jury autonomy, the expansion of the injunction, and the restriction of radical speech form a coherent pattern. We can understand the pattern of these judicial actions as natural human responses. The judges changed law in an attempt to deal with events thought to be serious threats to the social order in which they had a stake and to which they pledged loyalty.