The Taft Court: Making Law for a Divided Nation

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[00:00:00] Tanaya Tauber: Welcome to Live at the National Constitution Center, the podcast sharing live constitutional conversations and debates hosted by the center in person and online. I'm Tanaya Tauber, the senior director of Town Hall Programs. In this episode, Robert Post of Yale Law School delves into his highly anticipated new volume of the Holmes device entitled The Taft Court: Making Law for a Divided Nation. Post explores the history of the Taft Court and the contrasting constitutional approaches among its justices, including Louis Brandeis and Oliver Wendell Holmes Jr. Jeffrey Rosen, President and CEO of the National Constitution Center, moderates. This program was streamed live on December 11th, 2023. Here's Jeff to get the conversation started.

[00:00:55] Jeffrey Rosen: Hello friends. Welcome to the National Constitution Center and to today's convening of America's Town Hall. I'm Jeffrey Rosen, the president and CEO of this wonderful institution. And before we start, let's inspire ourselves, as always, for the conversation ahead by reciting together the National Constitution Center's mission statement.

[00:01:14] Jeffrey Rosen: Here we go. The National Constitution Center is the only institution in America chartered by Congress to increase awareness and understanding of the U.S. Constitution among the American people on a nonpartisan basis. Friends, I'm so excited and honored tonight to convene a great scholar of constitutional law to celebrate a great achievement in American constitutional law. And that is the publication of the Holmes Devised volume. And it's called the Taft Court: Making Law for a Divided Nation. It's written by Robert Post, a sterling Professor of Law at Yale Law School, where he also served as Yale's Dean, with great distinction.

[00:01:59] Jeffrey Rosen: Robert Post has written and edited many path breaking books, which I warmly recommend to you, including Citizens Divided: A Constitutional Theory of Campaign Finance Reform. Democracy, Expertise, and Academic Freedom, such a relevant book right now. First Amendment Jurisprudence for the Modern State. For the Common Good: Principles of American Academic Freedom. And Prejudicial Appearance as the Logic of American Anti-Discrimination Law.

[00:02:26] Jeffrey Rosen: And since 1988, he has been working on the volume that we're here to discuss today, which is the result of a bequest by Justice Oliver Wendell Holmes to the federal government. Holmes was such a patriot that he entrusted his legacy to the government which decided to create a series of volumes on the history of the court. This one, like most, has been a long time in the making. It's just a path breaking work. It is so exciting to read. And I was telling Robert Post how, how thrilled I was to learn about the Taft Court from 1921 to 1930 in a new light.

[00:03:06] Jeffrey Rosen: And it's just wonderful to be able to be in conversation with Robert. Robert Post, I'm going to begin, first, by congratulating you on this great achievement and then asking you, what is it about the Holmes device? It's America's greatest scholars of constitutional law have been given this daunting homework assignment. Some have died, others have gone mad. Others have given it up and passed on the baton to another scholar. But you persevered. You've been working on it since 1988. Tell us about the Holmes device. And what it was like to complete this one?

[00:03:39] Robert Post: Well, I was really the last person over the finish line. This volume, which I completed, which is on the Taft court, when William Howard Taft was Chief Justice from 1921 to 1930. It was originally given to a great constitutional scholar, Alexander Bickel in 1958. And he worked on it for many, many, many years, and then he died. He didn't finish it. And then it was given to another great constitutional scholar, Robert Cover who was my teacher. And Robert Cover worked on it for many years and then he died. And then it was offered to me and I tripled my life insurance and I took it on. And I mean, I must say when I, when I took this volume, I thought Holmes devised histories are portioned by Chief Justice period. And they're given to you. You don't pick your chief justice. And I thought when I had drawn the Taft Court, I had drawn the short straw. Because in modern times, very few people know many decisions from the 1920s from the Taft Court.

[00:04:45] Robert Post: And it took me many, many, many years to sort of get into it and to learn about it. It has a plethora of archival sources. Taft himself has 600,000 letters in the Library of Congress. He would, every week, write, 30, 40, 50 letters. And so it's a wonderful historical source. It's an overwhelming historical source. And then of course, one has the writings and the letters of Brandeis and Holmes and Harlan Stone, great figures in the history of the court.

[00:05:15] Robert Post: But I must say it took the Trump presidency really to spur me to finish this book because there are many, many similarities between the Supreme Court now and the Supreme Court in the 1920s. When Harding became president in 1920 he was elected on a platform of restoring the country to normalcy after the innovations of World War I. And that meant turning it to the right. And he conceived the project of changing the court to packing the court, basically, to turn it to the right.

[00:05:49] Robert Post: So in 15 months, he appoints four justices, decisively changing the nature of the Supreme Court. And these justices had an agenda. And the agenda was to return the court to what the jurisprudence had been before World War I. And they had to do this in the context of the decade, which was intensely polarized. The 1920s was the time, you might remember, of Prohibition. Prohibition was extremely controversial. It was a time of lawlessness and divisiveness. It was so divisive that in 1920 the Congress for the one and only time in the history of the country did not reapportion itself based on a census.

[00:06:29] Robert Post: And they didn't do that because the census would have given power to the cities and the cities were wet. And the dry powers that predominated in Congress, the prohibitionists didn't want to give any power to the wet. So the division between dry and wet was the decisive division in the 1920s. And so, the challenge before the court was how do you articulate law in a way that's legitimate in a country that is intensely polarized? And that's very similar to what we have today.

[00:06:58] Jeffrey Rosen: Superb. What a, a relevant and, and gripping introduction to the similarities and differences with today. And as you say, the archival research is amazing. You sat and you found a locked trunk in the Supreme Court that had the, the, the decisional records that were supposed to have been destroyed, and you bring them to life in such a remarkable way.

[00:07:18] Jeffrey Rosen: Well, in your preface, which is so clear and galvanizing, you set out four distinct narratives about the nature and purpose of constitutional law visible within the Taft Court. It's so clear. You associate each one with a different justice. And I'll just put them on the table and ask you to expand by laying them on the table and then we'll dig into each one.

[00:07:38] Jeffrey Rosen: You say one narrative sought to ground the authority of the Constitution in shared social customs and traditions. You associate that with James McReynolds. A second and a common commitment to material prosperity, that's Chief Justice Taft. The third in the collective political project of perfecting democracy, that's our mutual hero, Justice Brandeis, who's behind me here now. And the fourth asserted the authority of the law, including constitutional law arising from society's need to establish the orderly processes of adjustment among groups engaged in an almost existential competition for survival. That's Justice Holmes. Tell us a little more about those narratives.

[00:08:16] Robert Post: The challenge of the court was how do you articulate a form of law that's legitimate? And law acquires its legitimacy by being packed into a narrative. And the narrative is what appeals to people. And when your decisions unfold a narrative with which they can identify, that's what gives law its legitimacy. And today we have different forms of narratives, but in many of these narratives go back to the 1920s.

[00:08:43] Robert Post: So the most important narrative, and the one that's almost invisible to many lawyers today, and most people today was to understand constitutional law as the product of custom and tradition. So the meaning of the constitution was the same as the meaning of what we would call the common law. It was what people were used to. It was what people expected. And today you see that kind of law in, for example, Tort law. So Tort law will say, my privacy is protected and you can't disclose documents that would be unreasonably offensive.

[00:09:19] Robert Post: So when the law uses terms like unreasonably, what it's appealing to is people's instinctive sense of what's right and wrong, what's customary, what a jury would find in common sense to be right and wrong. And that was what constitutional law grounded itself in. And judges were conceived to be the experts of the customs of the people. This is where Harlan Stone began. And this was the dominant jurisprudence in the United States, say, in the 1890s, the customs and usages of the people.

[00:09:47] Robert Post: And this was profoundly anti-legislative. So Congress or state legislatures would pass laws and courts would say, "Well, this contradicts custom in the following way." And dress that up as interpreting the constitution. And so it put the judge in a position of superiority over legislation. And the judge who was, I would say, the most consistently loyal to this jurisprudence was already by the '20s was becoming a little archaic a

little old-fashioned was James R. McReynolds, who is known today as you know, one of the great bigots on the history of the Supreme Court.

[00:10:23] Robert Post: Came from the South. But he deplored almost everything that was a change in existing customs and traditions. And the opposite of that view was Oliver Wendell Holmes. Oliver Wendell Holmes had gone through the Civil War and been wounded three times. And he understood that at the basis of society was not a unified custom, were not unified views and beliefs, but rather division and polarization and struggle. That's what he understood to be at the basis of American society.

[00:10:56] Robert Post: And he confirmed that at the time they called the industrial wars between labor and capital. There were huge strikes throughout the late 19th century, all the way up through the 1930s. Where labor and capital were at war with each other and Holmes looked at that and says, "That's the essence of society. It's a struggle versus for survival. It's very Darwinian." And what is the function of law in that? The function of law was to, to the extent possible, pepper over these fundamental divisions by providing for orderly processes of change.

[00:11:29] Robert Post: And the only orderly organ of change that Holmes regarded as the mouthpiece, this was his word, the mouthpiece of the state, was the legislature. Because you could vote, and as the dominant, what he called the dominant opinion changed, so should the law. And therefore, the loyalty of the judge lay to legislation, not to custom and tradition. Because there was no unifying custom and tradition in Holmes's account of America. So between Holmes and McReynolds, you have this polar opposite views of what American society was leads to a polar opposite set of jurisprudence.

[00:12:04] Robert Post: And of course Holmes invents what we now call positivism, which is the basis of a good deal of modern jurisprudence. Modern originalism, for example, stems directly from Holmesian positivism. It's a form of the, what Larry Solem calls the fixation thesis that laws fact and that it was settled by these orderly processes and you could know it. Between these two poles, there were two other much more normative accounts of what American society was about.

[00:12:31] Robert Post: One was embodied by Chief Justice Taft. I would say justices like Pierce Butler and George Sutherland also participated very strongly in this. It was common sense really in the period, and the idea was that the function of the American constitution was to create prosperity for the American people. That the constitution was there to protect the property rights, which allowed for the accumulation of capital, which was the meaning of civilization.

[00:12:59] Robert Post: Many critics have said about Holmes and his court that it was formalistic, that they were involved in abstract rules, that nothing could be further from the truth. What they did was like the law and economics movement. They privileged economics over politics. And they said the function of constitutional law is to protect those rights which allow us to be prosperous. And in the 1920s, the dizzy '20s where everyone is competing to make money in the stock market, this was a very attractive philosophy.

[00:13:32] Robert Post: And it allowed them to strike down many forms of regulation because in their view, it interfered with the incentives which were necessary to create capital. Prosperity rested on entrepreneurial activity, which required what's called freedom of contract. And so the Taft court, from this point of view, revived what is known as Lochnerism. Lochnerism says that one's freedom in the market is to be protected constitutionally and judges could second guess any legislation which imposed register-controls on social and economic life.

[00:14:07] Robert Post: So, that was a third point of view. And the last point of view was articulated only by the man over your right shoulder Louis Brandeis. And Brandeis had a view. He said, "What is America? America is not about prosperity, and America is not about custom and tradition. America is about democracy. America is about the project of governing ourselves. And therefore when you see legislation, it's to be respected." Like Holmes said, legislation was to be respected, but it was not to be respected simply because it was the dominant opinion. It was to be respected because it was the product of self-governance of the people themselves. So legislation was to be respected because democracy was to be respected.

[00:14:53] Robert Post: And we take that for granted now. Almost all constitutional lawyers think of the presumption of constitutionality, which legislation should have as stemming from its democratic warrant. That really didn't exist as a rationale until Brandeis invents it during his time on the court and most especially during the 1920s. And this is different than Holmes because in a very famous case called Myers versus Nebraska, this is a case in which Nebraska banned the teaching of German. It was a product of the World War I opposition to the Germans.

[00:15:25] Robert Post: America's went kind of crazy during World War I. They were 100% Americanism. So they had to ban German because they were at war with Germany. And the court has to consider the constitutionality of this. Holmes, a good progressive, says we have to defer to the legislature because we have to create national unity. So he dissents and the majority's opinion is written by McReynolds, who is often viewed as the extreme right wing of the court. But like Brandeis, he believed that it was customary to learn German so the legislature really had no business interfering with the independence of Americans who wanted to learn it.

[00:16:03] Robert Post: And Brandeis dissents, Brandeis joins McReynolds and differs from Holmes because he believes that the right to an education is necessary for democracy. So he does it for an entirely different reason and a reason that would be very sympathetic to moderns. So different from Holmes and like Taft, he believed in property, but he didn't believe that the purpose of property was to create material prosperity. He thought that the purpose of property was to create democratic citizens. So the regulations of property always had to be judged against what it did for your independence as a democratic citizen, which is a very different test than that employed by Sutherland and Taft.

[00:16:43] Jeffrey Rosen: Superb. What a riveting account of the four strains on the Taft Court. And let's now delve into each of them a bit more. So let's start with the first, the traditional conservative constitutionalist view that you associated with Justice McReynolds. The idea is that constitutional law is customary, it's common law. In some ways, this is the hardest for modern audiences to grasp because as you just told us, it both includes an

allegiance to libertarian ideas of the right to teach your kids as you please which cases that led up to Roe v. Wade and which attracted Justice Brandeis.

[00:17:24] Jeffrey Rosen: But also led, as you put it, to a splintering of judicial conservatism on the court during this period where the McReynolds bloc, along with Justices Sutherland and Butler, during Prohibition thinks their obligation is to maintain legal legitimacy by you know, ameliorating the law of Prohibition by acknowledging customary social values. Whereas the Taft wing believes the defiance of Prohibition threatens the legal order and has to be overridden by law enforcement. So help us understand that first win of customary conservatism as associated with James McReynolds.

[00:17:58] Robert Post: So we think of Prohibition as flappers and people going into speakeasies and sneaking drinks and like that. Prohibition was this enormous, enormous crisis in, in the American state. It was the first great federal intervention into people's lives since reconstruction. So the project of the federal government suddenly is to stop everybody in the country from drinking and manufacturing and consuming alcohol.

[00:18:26] Robert Post: And they had no equipment to do this at all. And Prohibition ran against the customs of everybody in big cities. And you remember in Babbitt Sinclair Lewis, he's making Babbitt is making drinks for his friends. Does anyone want to break the law? The law-breaking was pervasive. Prohibition turned ethnic working classes against the Republican party. It would prepare the way for Franklin Roosevelt.

[00:18:54] Robert Post: It was, and as, it's a wonderful observation to the, those who enshrine Prohibition in the constitution thought that they would make Prohibition as strong as the constitution. But what it did is it made the constitution as weak as Prohibition. So Prohibition is an act of positive law. It's enshrined in the constitution. It's passed more quickly than any amendment in the history of the constitution. More solidly, you know? And all of a sudden no one obeys it.

[00:19:25] Robert Post: And they say, "We're going to nullify Prohibition." And the Prohibitionists say, "How can you nullify the constitution? We will have no law." To which the response was, "Well, you in the south who promoted Prohibition or nullifying the Fifteenth Amendment, you're not allowing African Americans to vote. What do you mean no one can you can't nullify?" And it promotes this great jurisprudential crisis of what is law.

[00:19:45] Robert Post: Is it law because it's been ratified or is it law because it corresponds with the customs and traditions and what people view as legitimate and reasonable in their lives? And Prohibition creates this enormous controversy over the subject. And, and, and interestingly enough, on the Supreme Court, it divides the conservative block into two halves. So we have people like McReynolds and Butler and Sutherland who deeply are committed to the idea that law to be legitimate has to be reasonable. It has to correspond to what people understand to be legitimate.

[00:20:22] Robert Post: And so they're very anti-Prohibition. If you actually look at the voting patterns, you can see that these conservative justices do not join the court nearly as much on Prohibition cases as they do on non-Prohibition cases. And in fact, Prohibition cases are much more, tend to be much more divided, much more 5:4. The court at this time, you

know, 80, 84% of its decisions are unanimous. So it's a very, it's a court that's following different customs and traditions altogether in terms of its, in terms of dissent, but there were a lot of dissents.

[00:20:53] Robert Post: Only about 73% of its decisions were unanimous in the context of Prohibition. So you get a block of conservatives who are saying, "We have to ameliorate the rigors of Prohibition in order for Prohibition itself to be legitimate." And they are contradicted by Holmes, who's a positivist who says, 'Okay, the people want it to be extreme. I have to be extreme with the people." And Taft thinks that the revolt of the elites against Prohibition undermines the rule of law itself. So the only way to sustain the legal order is to enforce Prohibition with augmented severity.

[00:21:32] Robert Post: So Taft and Vannevar and Sanford they, in the context of Prohibition, author decisions that look just like Holmesian positivism. And in fact, one way to understand what happens in the new deal is the positivism, the nationalism, Prohibition is also national, and it's very contrary to the traditions of American federalism, which is to decentralize decision making about liquor and other regulations of consumption to the states.

[00:22:00] Robert Post: And in this context, these conservatives are nationalists and they're positivists. And this prepares the way for many of the decisions in the new deal when positivism begins to take over as a dominant thing. It's prepared for by these conservatives. And when the Prohibition is repealed conservative positivism dies as a tradition, and it doesn't come back until William Rehnquist.

[00:22:22] Robert Post: William Rehnquist is an example of a modern conservative positivist, as is, for example, Scalia. And it re-emerges, only 50, 60 years later after the repeal of Prohibition on the conservative side. The most interesting figure here, I think, is Brandeis. Brandeis, on the one hand, respects Prohibition and wants to enforce it because the people wanted it. But on the other hand, he has a very strong sense that law, which is perceived to be illegitimate can't really serve as law.

[00:22:53] Robert Post: Prohibition splits progressives in half. Half progressives, like the social workers, support it. And many say, "This is destroying the legitimacy of the federal government, which will never again pass a progressive agenda. So we have to, we have to get rid of Prohibition." So progressives were quite divided, as was Brandeis. And the way in which he, in the end, in a case like Olmsted, in his dissent in Olmsted seeks to ameliorate it. As he says, he says it about the Fourth Amendment, that the Fourth Amendment protects privacy.

[00:23:22] Robert Post: And how do you know privacy? By the very norms of customs and traditions, which the traditionalists were using to limit economic regulations. Brandeis is driven to that position and that form of liberalism that resists positive state regulation in the name of dignity, in the name of traditions. Doesn't re-emerge on the left until decisions like Griswold in the 1960s.

[00:23:51] Jeffrey Rosen: Wow, such a powerful reminder of Brandeis using this common law methodology to gloss the meaning of the Fourth Amendment in an age of new technologies. And all of them unanimously converging around substantive due process rights

in Myers and Pierce, the right to pursue happiness. I must ask this: Justice Thomas in the Dobbs case suggested that substantive due process is completely inconsistent with original understanding. Do the opinions in Myers and Pierce suggest otherwise, that various wings of the Taft court all embraced it?

[00:24:29] Robert Post: I would say everyone in the 1920s embraced one form of it or another. The question is how extreme it had to be. I mean, even his Lochner dissent Holmes leaves room for a form of substantive due process if it, if it is outrageous enough. But the idea of the modern originalist, like Thomas, would have been inconceivable in the '20s. Nobody thought of the Constitution the way Thomas thinks of it now. No one thought of it as a simple fact. They thought of it in terms of these larger narratives. And in terms of the legitimation of law itself, they always thought back to how law was being legitimated rather than some method or another method. That's not what they would think about in the first place.

[00:25:12] Robert Post: And I think it's fair to say that most of the justices in the '20s, Holmes least of all, Holmes was the most positivistic, but with the exception of Holmes they understood that American citizenship had a moral content. And one had to be independent to be moral. And so they strove to create a constitutional law that would protect the independence of Americans in and they differed in what they understood substantively that independence to consist in.

[00:25:43] Robert Post: So for McReynolds it consisted in traditional traditional rights to marry, to raise kids, to be the paterfamilias in your family. For Sutherland and for Taft, it consisted very much in entrepreneurial liberty. None of this is cast as an originalist. It's understanding, what do you need to be in order to be an American citizen? And for Brandeis, it's very much you have to be politically empowered and you can't be politically empowered if you're in need, if you're in necessity, if you're in such want that you have no leisure. If you have no education, if you have no right to speak, etcetera.

[00:26:20] Jeffrey Rosen: The goals of Taft and Brandeis, as you put it, are in the case of Taft, economic prosperity and material well-being and the protection of property rights. And, and Brandeis, the promotion of democracy and the perfection of the individual. Taft's hero is Alexander Hamilton, who he thinks along with James Marshall is the greatest constructive statesman. And Brandeis is, is Jefferson and those goals, economic prosperity as opposed to democracy and individual liberty of art? Sounds like Hamilton and Jefferson. What do you make of the suggestion that the Taft vision is Hamiltonian and Brandeis is Jeffersonian?

[00:27:01] Robert Post: Well, there's something very Hamiltonian about that because they want to construct an economy. But you know, the economy is one dimension. Other dimensions have to do with empowerment, for example. So Brandeis, unlike Jefferson, wanted a positive state. He wanted a state that would empower citizens. Jefferson wanted to leave the state out as much as he could, except for creating state universities. He had some active forms of state, but for the most part, he wanted a state that was minimal, that didn't intervene.

[00:27:30] Robert Post: Whereas Brandeis is saying, "Look, under modern conditions, the state has to intervene to protect the powerless, or they will be oppressed by private economic power. I mean, Brandeis's central image of the United States was you have large trusts who

are oppressing the massive population who are workers. They're destroying the unions by which workers can defend themselves. They are depriving them of a living and of a life, and therefore they're depriving them of the ability to be democratic sovereigns. That was his central image. That would be very alien to Jefferson as an image.

[00:28:05] Jeffrey Rosen: Say more about the national power versus states rights dimension. The Taft wing is generally nationalistic it, it's especially in its approach to Prohibition. And Taft famously dissents in the Atkins vs. Children's hospital case where the majority, in an opinion by Justice Sutherland strikes down Max Limbaugh's laws by the District of Columbia and Taft dissents on federalism grounds and wants to defer to national authority. Is Taft generally nationalistic in his outlook? And how does that square into his willingness to invalidate economic regulations.

[00:28:44] Robert Post: It's so interesting because I mean, nationalism is a very complicated subject in the early years of the 20th century, in the late years of the 19th century. So the Republican Party platform after the civil war is we want to create a national market and we want to protect the national market. So the Supreme Court was traditionally an agent of nationalism. It used dormant, what's called dormant commerce clause doctrine to strike down state regulations, which in the Supreme Court's view im-impinged on the national market.

[00:29:14] Robert Post: And so they created in what's called diversity jurisdiction, that is people can come to federal court if they're citizens of different states and that meant national corporations were always seeking to bring their lawsuits against them into a federal court. And the, the, the federal courts created what's called general federal common law to protect national corporations and the national market. And these differed very much from state law.

[00:29:41] Robert Post: So there was national corporations, which were of course, highly Republican, always wanted federal courts to have more jurisdiction because they created a jurisprudence which was very friendly to the national market. On the other hand, the Democratic Party, which was the party of the South, was very states rights, and it was opposed to nationalism.

[00:30:01] Robert Post: But think of TR as a, you know, characteristic Republican. And then along comes World War I. For World War I it really has not been theorized in the history of American constitutional law, but it had a massive, massive, massive impact on the way in which the court and the way in which the country regarded economic regulation and regarded the federal government in particular.

[00:30:24] Robert Post: So, World War I comes along, it's the country's first encounter, really, with total war with international total war. And in 1912, you know, it was intensely controversial every time Congress passes a regulatory statute because it should be in the states and it's laissez-faire and it was a time of Lochner. And along comes World War I and the federal government takes over the railroads. It takes over the telegraphs. It takes over the telephones. It sets prices for food. It sets prices for energy. It regulates what you can and cannot consume.

[00:30:57] Robert Post: It recognizes unions. It sets labor prices. It creates arbitration for labor disputes. I mean, total control of the economy more than has ever existed since then,

actually. And it's a total shock to everyone. Everyone recognizes that you cannot win a total war in the 20th century, unless the federal government can completely control the economy, because that's what Germany is doing. Because war in the 20th century is a question of national production.

[00:31:26] Robert Post: And the war ends. And as Leuchtenburg, a famous historian, put it, Woodrow Wilson ends his administration in a riot of reaction. He dissolves every federal agency which had been controlling every aspect of the economy, leading to the huge inflation and the huge crisis of 1919. But it's because the country was horrified at what it had done to itself. And that leads to a massive election of Harding and this theme of normalcy. And the court is now to erase the impact of World War I.

[00:31:59] Robert Post: But that had a lot of implications for federalism too. So, the Taft Court is actually quite discombobulated on the question of federalism when it comes to, say, national congressional power. On the one hand it understands, for example it takes the lesson of World War I that the railroads are a national transportation system and they can only be regulated at the national level.

[00:32:23] Robert Post: It had never existed before. Before that, the ICC was there basically to protect shippers farmers in states. And afterwards the ICC, the Interstate Commerce Commission, is tasked with this, with a, a revolutionary statute, the Transportation Act of 1920, with creating an efficient national transportation system. So, antitrust considerations with respect to railroads are put to one side and the function of the ICC is to keep rates high so the railroads have enough capital to create an adequate system. And the whole of the rate structure of the railroad system in the United States is now in the hands of the ICC.

[00:33:02] Robert Post: This couldn't have happened before World War I. Before World War I America did not keep statistics economic statistics with it didn't have enough information to do this form of regulation. Suddenly, in World War I, when it had transformed the economy into a war economy economists flocked to Washington DC. I statisticians were hired by the federal government for the first time. And this is the first time we created a National Statistics Bureau. We created econometric knowledge that would set prices in the United States and direct production to war.

[00:33:35] Robert Post: It's this expertise, which is now applied to the ICC after, after the war. Couldn't have happened. And the Taft court is fully in support of that because they understand that the railroad system is a national system. On the other hand, they pass a statute which bans child labor and they pass a statute which taxes child labor. And the Taft court strikes it down on the grounds that we're a federalist country and this is beyond the taxing power and the interstate commerce power of the federal government. So totally inconsistent views.

[00:34:07] Robert Post: And reconciling these views is actually an interesting project in the book. And it has a lot to do with what sort of property is being regulated and, and things like that. It's speculative. But what you can see is there's really intense confusion about national versus state in the years, in the 1920s as the country is assimilating and responding to and reacting against the extreme nationalism of World War I.

[00:34:35] Jeffrey Rosen: That's so interesting and it helps me understand the complexity of the division among the conservatives on this national versus state power. I must ask, because I'm so eager to understand the answer about a period before you. And that is the post reconstruction era. Why was it that mostly Republican justices after the civil war divided on the states' rights national power question in decisions like the slaughterhouse case. Refused to apply the bill of rights against the states and that only Justice Harlan was the consistent nationalist, but the others are striking down all sorts of federal laws about slavery. I'm trying to understand this intra-Republican division on the Supreme Court for this long period on the question of national power.

[00:35:20] Robert Post: Well, I think that the federal government was not a major player in the lives of people before the civil war. And the federal and the civil war had a similar effect to World War I. It was this massive eruption of national power. And as a result of that, it creates a very confused wake, just like World War I creates a very confused wake. And you see people going in different directions. One consistent theme of the Republican Supreme Court after it is the creation of a national market and the creation of the Dormant Commerce Clause with some exceptions.

[00:35:52] Robert Post: You might call the exception. So for example, the court rules that insurance is not commerce. So the federal government can't regulate insurance and the insurance markets become balkanized in states because there can be no national regulation of them. And it's not until the Taft court that they begin to get access to federal court because it's viewed as commerce, etcetera.

[00:36:17] Robert Post: Taft court brings all of this back in. It completes the project of nationalization. On the other hand, there's reactions, "We don't want too strong a federal government." And that that leads to the well, among other things, the emasculation of the 14th and 15th amendments, and it leads to slaughterhouse and it leads to the court not wanting to create a federal presence and to create a federal judicial presence in the everyday lives, the domestic lives, as opposed to the market.

[00:36:43] Jeffrey Rosen: Fascinating. And that leads me to ask about how the Taft court completed that project of economic nationalization. You say that contrary to the claims of some historians, the Taft court did not seek to use the Fourteenth Amendment to prohibit class legislation. The war had ratified and sanctified the public interest. Constitutional question was not so much whether state regulation was captured for the benefits of particular classes as to whether government management was so intrusive that it compromised the necessary independence of Americans. Tell us more about that vision and how it defined the economic cases.

[00:37:16] Robert Post: Well, you have to understand the way that property was understood in the 1920s. We now make a very sharp distinction between personal rights and property rights. And this is a legacy of the new deal. And of the repudiation of Lochnerism. But in the 1920s and, and before that people would not have sharply distinguished property from personal rights.

[00:37:40] Robert Post: They would consider the right to participate in the market and the right to accumulate property as personal to the person and as necessary to build character in

the person. Property was a form of discipline. There are many Taft court decisions in which they're just the question of Native American property, which could you tax them? Could you not tax them? And it's always theorized in terms of the character building properties of owning property.

[00:38:06] Robert Post: And that's the way it was understood. So it was a fusion of being moral and entrepreneurial, but it was at the intersection of these two things, property. So you get a case like a Meijer or Pierce, which today are substantive due process, and they have to do with dignity and religious rights, free exercise. At that time, you see them cited indiscriminately in economic cases. And in and in what we would now call personal rights cases.

[00:38:33] Robert Post: You see a unanimity among all the Taft court justices in a case like Wolff Packing versus the industrial court of Kansas, which is a massively important case that is totally lost to the modern imagination. So what you had in 1919 were terrific strikes. More people were on strikes in the year 1919 than ever before or since. The whole economy, the whole steel industry was on strike. There was a general strike in Seattle. The Bolshevik Revolution had just happened in Russia. People were terrified of labor unrest.

[00:39:06] Robert Post: And the public begins to say, well, "If there's a strike who's going to protect the public if suddenly people don't have coal because there's a train strike and I can't get coal and I'm going to freeze and I can't cook? Who's going to protect the public when the trains go on strike and when the produce can't get to the cities?"

[00:39:24] Robert Post: So the public becomes the arbiter. It's not, no longer, "Are you regulating for one class or another?" You're regulating in the public interest. And it had to be the public interest. Remember World War I was all this regulation in the public interest. So the opposition is now between the public interest and my ability to, to strike. And so Kansas said, "Enough of this." They had a Rooseveltian governor named Allen. And he said, "We're not going to be at the sufferance of labor and capital. We're going to create a Kansas court of industrial relations and we're going to have forced arbitration. So people have to work for the wages that we adjudicate, but they'll have to pay the wages that we adjudicate."

[00:40:05] Robert Post: And this question of whether you can have forced arbitration where, and labor hated it, capital hated it, Brandeis hated it because he thought it was inconsistent with independent persons to have to work for the state at forced wages. And it was a unanimous decision, striking it down, for example. And it shows what people had in common. The, and now we have to unpack how they differed, but they had this in common, that the public interest had limits.

[00:40:33] Robert Post: When you think about how the Taft court cemented nationalism a case like Taral versus Burke, which we've lost touch with, we now speak about the doctrine of unconstitutional conditions. We say that Congress cannot give a benefit and attach to it as a condition that you waive a constitutional right. The Taft court held, for the first time, that states could not impose on corporations a waiver of the right to go into federal court. So insurance companies, as I said, were not viewed as interstate commerce, and so they were stuck in state court.

[00:41:06] Robert Post: And when a state would allow a foreign insurance company in, they would put as a condition that they waive any right to bring any suit or to remove any suit to federal court. So they didn't get access to this general federal common law. Taft comes in and he says, "The first thing we have to do is to rationalize the national market by expanding general federal common law by saying it's unconstitutional for the states to force this waiver of your constitutional right to have access to federal courts." So the Taft court invents the idea of unconstitutional conditions. It does it to cement the national market.

[00:41:41] Jeffrey Rosen: Wow. All right. Well, that brings us to our hero, Justice Brandeis. And you so powerfully argue that he was distinctive and unique on the court in a vision of perfecting the democratic citizen and his great faith in democracy to improve society and allow people to reach their potential. You'd note that he did not get this from Jefferson. Where might he have gotten it and give us some of the leading cases in which Brandeis spells out this vision of democracy?

[00:42:14] Robert Post: Well, it's very interesting because he writes almost no memorable court opinions during the 1920s. Taft gives him, he creates the rudiments of administrative law. Taft calls him in the intra court correspondence, the Pope of interstate commerce, because he gave them all the ICC cases, very complex. No one knew how to handle this new ICC and how to figure out what the administrative law. There was no administrative law at the time and Brandeis invents it, but it's very rudimentary by modern standards, so we've lost all these decisions, but that's where he chiefly wrote opinions.

[00:42:49] Robert Post: And everything he does is in the dissent. So for example one of the things I should say is that, and a way in which we've lost track of it, the war between labor and capital was central to American identity in the, first 30 years, 40 years of the 20th century and especially in the '20s, because in 1919, it exploded in the worst kind of industrial warfare.

[00:43:15] Robert Post: So people's view of labor and capital was extremely important. And when Taft became chief justice in 1921, he offered four, a quartet of four extremely important decisions that infuriated labor and led labor to make the AFL was all to end judicial review. And before it picks this up in his 1924 campaign, he gets support from the AFL to end a constitutional amendment to end judicial review.

[00:43:44] Robert Post: And these four decisions included striking down the Child Labor Tax Act, and it included decisions about when people can pick it and how they can pick it. And it included decisions about the application of the antitrust law to labor et cetera. But the most interesting of these is a case called Truex. So Arizona, well, I should go back and say, when the Clayton Act was enacted in 1914, the Clayton Act said basically that federal courts couldn't issue injunctions to intervene into labor disputes because the labor injunction was killing strikes.

[00:44:21] Robert Post: Federal courts were very favorable toward capital. And so when there was a strike, they would go into court and they would injure the court. So labor mobilized and under the Wilson administration, which was very friendly to labor, they passed the Clayton Act, which seemed to say that they couldn't issue an injunction. Well it turns out it was very weaselly, the words, and the Supreme Court holds in 1920 that yes actually didn't mean what it says. And they can issue injunctions. And in fact, not only can they issue

injunctions, but they can issue more and better injunctions than they could before the Clayton Act.

[00:44:55] Robert Post: So the scene is set for an explosion of federal injunctions and extreme hostility between the labor movement and the Supreme Court of the United States. And these decisions are exacerbating this tension. So before the Clayton Act, but like the Clayton Act Arizona passes a law saying that its courts cannot issue injunctions. And so they can't intervene in labor disputes to protect the property, meaning the freedom of contract of the employer.

[00:45:28] Robert Post: And this decision comes to the Supreme Court of the United States during Taft's first term. It comes in December. His first term starts in September of '21. This decision is in December of 1921. And Taft holds five, this is a five to four decision. Taft holds that, first of all, it violates due process to ban any remedy for the property of the employer, which is a really interesting decision because it implies that the constitution gives affirmative rights. If you ban all remedy, then you've lost the constitutional rights, what's exactly opposite the modern court, which holds negative rights. You have rights to prevent government from doing something.

[00:46:07] Robert Post: Here, Taft is holding the government has to intervene to protect your right. Otherwise, it's unconstitutional. So it's one of the few decisions that have held that there's an affirmative constitutional right to a remedy to, to have the federal government intervene to protect you. So that's one holding. But then he says, suppose that Arizona only banned injunctions as a remedy. They allowed other remedies like damages. He said that would be a protection of equal protection law because it doesn't treat other disputes between employers and other people the same as it treats disputes between employers and employees.

[00:46:41] Robert Post: It was a very bizarre argument, but actually it kind of anticipates modern narrow tailoring. It basically, basically argued it was under inclusive. No one at the time understood that argument. They viewed it as like this crazy pro-capital decision by a conservative court. Brandeis dissents in that, and it's one of the most profound dissents that he writes ever. And in this dissent, he says, "Well how are we to understand whether it's constitutional or not?" He says the problem with constitutional with constitutionally setting aside of legislation, like, Arizona's legislation is you're setting aside the results of democratic deliberation.

[00:47:25] Robert Post: And when you have democratic deliberation to intervene in the market, you're always trading off values. The value of, for example allowing labor to make a living versus versus the right of the entrepreneur. "This is a balance. This is a matter of judgment," says Brandeis. And in matters of judgment, we have to trust the people themselves because judgments always have many solutions. Judgments, John Rawls would now call that the burden of judgment.

[00:47:52] Robert Post: And Brandeis is articulating this idea that you never really know an answer, so you have to trust the people in doing it. And, to know that, you have to have respect for the outcome of the democratic process. And you have to have experimentation, you have to allow them to try different things. Otherwise, we'll never know what the solution to this is. This is a very profound understanding of the role of judicial review, which I think

most moderns just take that for granted, what I just said to you. No one had ever said it before, Brandeis, in this dissent.

[00:48:25] Jeffrey Rosen: Remarkable. All right. Well we have just seven minutes left and it's time to talk about free speech. Holmes and Brandeis is, is well known write some of the great free speech dissents of American history in this period. Help us understand, first of all, where Brandeis got his famous test in Whitney. That speech can only be banned if it's intended to and likely to cause imminent violence.

[00:48:51] Jeffrey Rosen: Jefferson had flagged it in the Virginia Declaration, but Brandeis refines it more explicitly than anyone else. And because it's in the news and our listeners would like to know, I'm sure, did the college presidents get it right in their testimony before Congress when they said that the calls for genocide would have to be evaluated on a contextual basis in order to meet Brandeis' Whitney standard or not?

[00:49:16] Robert Post: So the first thing we should say about the presidents is that they were articulating a test. I'm sure they're not articulating the Whitney test. They were articulating a test of a case called Brandenburg versus Ohio. And Brandenburg versus Ohio says, "You cannot penalize the advocacy of illegal conduct, like genocide, unless it's imminently likely to happen, and you intend for it imminently likely to happen." And so the president was saying it's contextual in exactly the way that the First Amendment requires it to be understood to be contextual.

[00:49:48] Robert Post: Yyou cannot penalize the advocacy of genocide if you're in public discourse, if you're in a newspaper, if you're on a street corner et cetera. And the irony of what just happened to those presidents is that conservatives in Congress have been calling upon universities to comply strictly with the First Amendment. First Amendment rights, free speech rights. And that's exactly what the presidents were doing when they gave those answers.

[00:50:15] Robert Post: And now you see the same politicians ragging on them for not complying with the first for complying with the First Amendment. And they shouldn't, they should have a different standard in a university. Now, I myself believe that universities are not governed by the First Amendment. They're governed by academic freedom because universities are communities and in no sense can a community survive if you have the rigorous standards of the First Amendment.

[00:50:41] Robert Post: So an easy way to see that is there's a young, crazy professor in the astronomy department. And he writes an article saying the moon is made of blue cheese. And he writes that and the government can't penalize him for that, even though it's wrong, but the university can deny him tenure. Universities make content-based judgments all the time. They make it for students, that's called examinations. They make it for professors, that's called tenure and hiring and grant giving.

[00:51:11] Robert Post: We govern ourselves according to a very different logic than the First Amendment. And all along, we do that. And so, that is the irony of what happened to those poor presidents. But Brandeis and Whitney are extremely clear that free speech is a product of governance. It's about citizens governing themselves. So it pertains to speech

about what, in that opinion, he calls political truth. It's about how we should govern ourselves.

[00:51:40] Robert Post: It's not about all speech. It's about the speech in which we attempt to make government responsive to us. And this test of imminency which he got which he articulates in there, he actually gets from a Holmes dissent in a case called Abrams, which was in November of 1919. So the imminency requirement comes from Holmes, but what's distinctive about Brandeis in that opinion, Holmes had taught epistemologically about the marketplace of ideas about, "We can never get to truth unless we allow everything."

[00:52:12] Robert Post: And that's the wrong idea. That truth is what everybody believes. The last place you'd look for truth is the internet to know whether vaccines cause you to have an implant in your brain. You'll glow in the dark. You would not look to what everybody believes. That's not a good criterion of truth, but that's what Holmes says. Brandeis modifies Holmes and says, "It's not about truth. It's about politics. It's about how we live in a democracy where we have to govern ourselves and we're responsible for governing ourselves. And therefore speech," he says, "is an obligation."

[00:52:45] Robert Post: So what forms of speech are an obligation? The forms of speech in which we participate in the governance of ourselves. And that's not every form of speech, there's only some forms of speech. When I go to my doctor, I'm not participating in self-governance so it's not going to be governed by Brandeisian standards. Thomas presently makes that mistake. He says, "We want to have a marketplace of ideas between physicians and their patients."

[00:53:09] Robert Post: Well, I mean, I hope his doctor doesn't abide by that. I hope his doctor abides by malpractice standards so that he has to say competent medical advice and that is governed by the marketplace of ideas. And Brandeis knew that full well. And he articulates that beautifully in Whitney. By the way, something you might not know. In Whitney, Gitlow, right, before Whitney the court applies the First Amendment to the states for the first time. And when I got access to the docket books of Stone, I discovered, for the first time, it was Van DeVenter in conference who said it should apply to the states. That's where it comes from.

[00:53:45] Jeffrey Rosen: Wow. Those docket books were amazing. It was so exciting to read about that. Well, it's time for closing thoughts in this wonderful discussion. I'm loathed to close, of course, like Lincoln, and please sum up as you think best, but I'll just ask you what the Taft court can teach us about the court today.

[00:54:05] Robert Post: I think the Taft court, for me, became a model of people who really passionately believed in a consistent jurisprudence, arguing with each other. And what I loved about the court, came to really love about these people, even though I disagreed with many of their views, was their integrity. Was their passion. And when you see a clash between people who genuinely believe and have thought through to the bottom what they believe in, that's a remarkable thing. That's an inspiring thing. And I hope our court can live up to that. That it can have the integrity and the depth to have a jurisprudential vision that is coherent all the way down to the ground and articulate that and inspire us with different visions of the constitution.

[00:54:47] Jeffrey Rosen: Beautifully said. Professor Robert Post, the Holmes devise is an act of national service. Justice Holmes felt it his duty to the union to leave his treasure to the federal government. And the greatest legal historians in American history have been selected to work on this important project. It is an honor to interview you about your pathbreaking work. Congratulations for having discharged your responsibility so nobly. Thank you for educating us.

[00:55:20] Jeffrey Rosen: And friends, thank you for joining in. You're so lucky to hear Robert Post talk about his great Holmes device, and now, of course, I want you to continue your education by reading the book. Order it as soon as it's out, and read, and learn, and grow together. Robert, thank you so much for a wonderful discussion.

[00:55:36] Robert Post: Thank you, Jeff.

[00:55:44] Tanaya Tauber: This episode was produced by Lana Ulrich, Bill Pollock, and me, Tanaya Tauber. It was engineered by Kevin Kilbourn and Bill Pollock. Research was provided by Yara Daraiseh, Cooper Smith, Samson Mostashari, and Lana Ulrich. Check out our full lineup of exciting programs and register to join us virtually at constitutioncenter.org. As always, we'll publish those programs on the podcast, so stay tuned here as well, or watch the videos. They're available in our media library at constitutioncenter.org/medialibrary. Please rate, review, and subscribe to Live at the National Constitution Center on Apple podcasts, or follow us on Spotify. On behalf of the National Constitution Center, I'm Tanaya Tauber.