Law & Constitution

Reviews of select recent works in legal history

***American Contagions: Epidemics and the Law from Smallpox to Covid-19.* By John Fabian Witt. (New Haven: Yale University Press, 2020. Pp. 184. paper $20)**

Quarantines. Mask mandates. Vaccines. Amid a worldwide pandemic, most Americans have had the occasion to think about the role of government in monitoring public health. But how did we get to that point? Covid is by no means the first health crisis the country has faced. In a well-timed book, John Witt demonstrates that neither dangerous diseases nor government intervention to mitigate public risk is anything new. While this is a meticulously researched work, Witt did not intend it primarily for an academic audience. Rather, the book is meant to be "a citizen's guide to the ways in which American law has shaped and responded to the experience of contagion" (1). Witt succeeds in building an accessible history of the American response to contagious diseases, as well as an overview of how states across the globe have responded to infectious crises.

The first half of the book explains historical American responses to epidemics, with Witt arguing that the country has often employed both restrictive ("quarantinist") policies, such as lockdowns and control over its citizens, and liberal ("sanitationist") policies to eliminate the environments that contribute to the spread of disease (8). From the Colonial period to the dawn of the 20th century, he explains, federal public health authority was weak, and the power to regulate most aspects of public health lay with the states and local governments. Moreover, in contrast to today, virtually all local regulations designed to stop an epidemic were upheld by the courts, giving governments more power to manage epidemics. Today's anti-vaxxers and anti-maskers will likely be incredulous as to local courts' willingness to accommodate local governments in the 1800s; the restrictions put in place during the Covid-19 epidemic seem meek in comparison. Entire neighborhoods were often targeted when an outbreak occurred, forcing residents to quarantine in their homes, with citizens expected to report on their neighbors. For example, under Michigan law in the 1830s, family members had a "general obligation . . . to report smallpox cases among relatives. Failure to do so could result in a $100 fine" (18). The rise of federal power to regulate public

health did not begin until the early 20th century, helped in part by the push by Progressive reformers, as well as a more formalized federal immigration system. For example, by 1921, Congress had taken the power of quarantines from every state, although the fear of "'loathsome diseases of the flesh" did not subside, and neither did exclusion based on race and ethnicity (55). The quarantine power would not remain at the federal level, however, as Witt demonstrates in his discussion of Covid.

The second part of the book traces the evolving thoughts on how government should best handle mass outbreaks. The AIDS crisis of the 1980s saw a public debate between the need to protect the public and also the need to preserve personal liberties; led by public health officials, The same questions would arise with the Ebola crisis in the early 21st century, but this time, the balance would tip in favor of protecting individual liberties.

Witt concludes by examining America's response to Covid, arguing that while both laws and history matter, similar patterns emerged in the early days of Covid as during the outbreaks of smallpox in both the 18th and 19th centuries and yellow fever outbreaks from the 1700s to the 1900s. States have retained their role as regulators on the frontlines of public health crises, although the restrictions enacted varied greatly by the circumstances of partisan control. In contrast, the federal government played "an awkward and sometimes bumbling role" in responding to the COVID crisis (108).

Witt closes on a theme that runs throughout the book: that epidemics offer "a vantage from which to see deep into basic structures of inequality and injustice in the American legal order" (140). Writing in 2020, Witt notes that America will continue to grapple with how to address such inequities, brought about by discrimination in race and class, and impacting lives in occupations and housing conditions. But once again, Covid demonstrated the back-and-forth tensions between state and federal regulations, brought on in part by the Centers for Disease Control and Prevention's botched response in the early days, insufficient and inadequate actions by the White House, and an ineffective travel ban. The steps that the federal government did take, particularly in the early days, focused the wrong scapegoats, requiring state governments to fill the void.

— Kathryn Birks Harvey

***Until Justice Be Done: America's First Civil Rights Movement, from the Revolution to Reconstruction*. By Kate Masur. (New York: W.W. Norton, 2021. Pp. 456. $32, Cloth; $20, paper.)**

In *Until Justice Be Done*, Professor Kate Masur, provides a new way of thinking about the long history of civil rights activism through her understanding of the first civil rights movement—from the Revolution to Reconstruction. Masur argues that the struggle against racist, anti-Black laws in the first 80 years of the country's history shaped "new ideas about citizenship, individual rights, and the proper scope of state power, and their arguments informed the remarkable congressional debates of the 1860s" (xiii). Masur demonstrates how anti-Black laws passed in the border states, including Ohio and Virginia, meant to stem the tide of migrants and escaped slaves from the deep South, spread to northern states like Illinois, Indiana, and Pennsylvania. Motivated by racism, but also fears of poverty and vagrancy, northern states justified deceptively racist legislation by claiming that they were protecting their communities from an influx of Blacks who would simply live off the relief rolls.

A coalition of both Black and white activists mobilized against these laws to fight for the equal protection of Blacks in northern states, including their right to testify in court, to sue others, and to move freely within the state once they arrived—rights that later would be encapsulated by the privileges and immunities clause of the 14th Amendment. Relying on the principles of the American Declaration of Independence, activists argued that the deprivation of these rights "violated fundamental rights to which all persons were entitled" (122).

The work of the activists brought these discussions to the sectionalist forefront, increasing, by the 1840s, the number of whites who would support the idea of civil rights for Black people. This, then, was the charged environment in which *Dred Scott v. Sanford* was decided in 1857, landing in a "nation deeply divided along sectional and partisan lines," leading some northern states to take action to protect free Blacks within their borders (260). Several New England states passed laws declaring that African Americans were citizens. Alongside Chief Justice Taney's opinion, these developments set the stage for Abraham Lincoln and Stephen Douglas to battle for the Illinois Senate seat in 1858. Lincoln's victory in the state's popular vote for the Senate and then election to the presidency, with his calls to overturn the Fugitive Slave Act, were thus the culmination of decades of work by activists for the government to recognize the equal protection of Black people. The greatest victory

of this first civil rights movement would come several years later with the passage of the 14th Amendment in 1868, overturning the Black Codes and other anti-Black laws. However, those successes would be weakened shortly thereafter with the Slaughterhouse Cases of 1873, bringing back the state police power that had enabled the Black Codes in the first place and curtailing the protections of the privileges and immunities clause of the 14th Amendment through judicial interpretation. The end of Reconstruction in 1877 would lead to more discriminatory laws, as the Southern states would be left to their own devices once again.

While the first civil rights movement documented by Masur was of mixed success, it made possible the 14th Amendment and ultimately set the stage for what Jacquelyn Dowd Hall has called the "Long Civil Rights Movement" of the 20th century and the continued activism for racial equality that we see today.[1]

— Kathryn Birks Harvey

Christopher W. Schmidt, "Brown, History, and the Fourteenth Amendment," *Notre Dame Law Review* 97, no. 4 (2022): 1477–1510

In his article "Brown, History, and the Fourteenth Amendment," law professor and legal historian Christopher Schmidt traces the historic deliberations behind the Supreme Court's *Brown* v. *Board of Education* (1954) decision. The issue before the Court was the applicability of the 14th Amendment's guarantees of due process and "equal protection of the laws" to the desegregation of public schools. Originally argued in 1952 before the Vinson Court, the justices took the unusual step of scheduling the case for reargument with a narrowed focus: Did the framers of the 14th Amendment in 1868 intend it to apply to equality in education? Schmidt examines the landmark ruling, authored by the Court's new Chief Justice, Earl Warren, which largely eschewed the historical debate that the justices had invited in favor of a moral foundation for its ruling that segregation had no place in the field of education. Through his analysis of the dynamics of the proceedings and argumentation Schmidt offers valuable insights into the limits of originalism and the imperfect but essential use of historical argumentation for jurisprudence.

Schmidt relies on a bevy of archival documents, including the unpublished opinion of Justice Robert H. Jackson, personal notes and letters of Justice Felix Frankfurter,

[1] Jacquelyn Dowd Hall, "The Long Civil Rights Movement and the Political Uses of the Past," *Journal of American History* 91, no. 4 (2005): 1233–63.

transcripts of interviews with the justices' clerks, and internal communications of the NAACP during their preparations for the case. He also examines the views of notable historians enlisted by the NAACP in compiling its arguments, and how performing "objective historical scholarship" intersected with providing the "legal advocacy" to support an outcome that the historians believed morally correct (1490).

NAACP lawyers and historical consultants argued from a positive, revisionist view that Reconstruction was an era of social and political reform akin to a second founding, and that the 14th Amendment was intended to promote school integration in its general guarantees of racial justice and equality. NAACP lawyers, he finds, "presented a bold (if often tendentious) revisionist history of the Fourteenth Amendment that advanced an originalist justification for striking down segregation laws" (1478). He finds that NAACP lawyers interpreted an intent in the 14th Amendment that "animated the legal and constitutional achievements of Reconstruction" (1499). The Justice Department's brief to the Court, however, argued that the amendment's history and intentions were "inconclusive" on that point. The majority of justices agreed, and instead formulated the *Brown* decision on a strictly legal basis, on the need to apply due process and equal protection, by arguing that the "separate but equal" standard in the *Plessy* case (1896) led to inherently unequal education.

Schmidt's review of the proceedings helps us understand the bases for legal argumentation and decision making in the *Brown* case and beyond. For lawyers in general, he reasons, "understanding history is a means to an end, the end being to use history to give authority to legal interpretation" (1507). The NAACP lawyers took an originalist approach to find broad intent of due process in the amendment that included guarantees of educational equality. The lawyers as historians (legal advocates of the NAACP) used historical ambiguity to strategically advance an alternative interpretation—and thus to contribute to recrafting the historical understanding of the amendment. However, such definite conclusions about the amendment and its context "constrains" alternate interpretations and diverse views.

Schmidt argues that deep engagement with the past uncovers a "rich, passionate cacophony of voices that hardly produces the determinate facts that can direct future judges" (1509). Historical research and informed interpretations of the past form the most valuable approach for defining law for the present. Yet, Chief Justice Warren "opted to de-emphasize the importance of the historical material" and base the decision on "claims about the damages state-mandated racial segregation inflicts on black children" (1510)—not the most secure of legal justifications.

Schmidt's review provides a valuable look at not only the judicial reasoning in the *Brown* decision, but more broadly into the basic approaches to jurisprudence that are still relevant today. His affirmation of historical interpretation and its complexity in legal decision-making is in the end a belief that reasoned and balanced judgment is the bedrock of justice in a pluralist, democratic society.

— Benjamin Guterman, Kathryn Birks Harvey, Lisa K. Parshall

K-Sue Park, "Self-Deportation Nation,"
***Harvard Law Review* 132, no. 7 (2019): 1878–1941**

Undocumented migrants living in the shadows fear possible raids on workplaces, detention, deportation, and more. These practices create terror and suffering, and lay at the center of the immigration debate in the United States. K-Sue Park finds that harsh treatment of the unwanted has a long history going back to the arrival of the first European colonizers. Colonists and later white Americans used indirect actions and legal measures (not excluding violence) through that long history to control groups but also to encourage self-removal—or self-deportation. Park argues that the approach of making the lives of the unwanted unbearably difficult, and thus encouraging voluntary departure, forms a common thread through American history and is important for understanding the inequities and obstacles to reform in our modern immigration system.[2]

Park defines self-deportation as a "removal strategy of making life so unbearable for a group that its members will leave a place" (1879). Self-deportation in its broadest, but most devastating, sense includes the decimation of Native populations by diseases brought by European settlers. Also, tribes removed to new areas to escape settler advances. Settler encroachment was less violent than raids or war, and considerably less expensive, although skirmishes, war, and land cessions through treaties added to displacement.

In the 18th and 19th centuries, states and localities passed laws and ordinances to discourage the migration and settlement of free Blacks—to mandate their self-

[2] See the roundtable on Adam Goodman's *The Deportation Machine: America's Long History of Expelling Immigrants* (Princeton, NJ: Princeton University Press, 2020) in this issue. Goodman documents the extensive use of voluntary deportation, in which an immigrant agrees to leave and forgo the opportunity for a formal deportation hearing. Voluntary deportations were less costly and far outnumbered formal deportations.

deportation. In the antebellum period, Southern states passed Black Codes that "targeted every aspect of black people's lives to differentiate them from whites" (1907). Various plans for colonization of Blacks (a form of self-deportation) generally failed. Black codes, often backed by violence, continued through the Jim Crow era, and included poll taxes and barring of access to the courts, parks, schools, and other public facilities (1907).

Park traces the increasing assertion of federal authority over deportation and immigration procedures. In *Worcester* v. *Georgia* (1832) the Supreme Court ruled that the federal government, not the states, held the power to protect due process under the 14th Amendment, a doctrine that she calls "preemption." That prerogative applied to the removal (deportation) of the Cherokees from Georgia. But, in a policy that Park calls "subordination," the state could "continue recruiting settlers who would engage in hostilities and discrimination on the ground . . . " as the federal government "continued to delegate the work of subordination to the private sphere" (1903).

Nonenforcement of the Civil Rights Act of 1866 and the 14th Amendment during Reconstruction allowed harsh local tactics and even violence against those "not desired as a part of the nation's polity," in order to encourage them to leave on their own. This devolution of authority to the subfederal and private spheres continued through the following decades, Consequently, Park states, "the government's capacity expands by making other entities into agents of self- deportation" (1932). The delegation of police authority allowed the subversion of due process in countless instances, including Los Angeles's relief agencies partnering with the Southern Pacific Railroad to ship groups of Mexicans to Mexico City in 1933.

Park emphasizes how changing labor needs in the post–Civil War era gave rise to our modern immigration regime. In the South, most freedpeople remained on the land, and landowners and state leaders created new forms of peonage soon known as Jim Crow. In the industrializing North, business leaders and legislators encouraged immigration from Europe to meet labor needs. But racial discrimination, especially in the West, led to denial of entry for Chinese workers through the Chinese Exclusion Act of 1882. Federal oversight expanded with the Immigration Act of 1891, which led to creation of the U.S. Bureau of Immigration and the Ellis Island inspection station in 1892. The new federal regime increasingly used individual deportation but continued to allow nonfederal entities to control and punish immigrant groups in ways that often promoted self-deportation. Deterrence through deportation continued, especially against ethnic Mexicans during the Great Depression, and in later decades.

Park demonstrates the deep historical continuity of ethnocentric social and political practices that encourage self-deportation. Those patterns help explain our current immigration dilemma. The continued bureaucratic priority of self-deportation for the undocumented, accompanied by repressive measures, she finds, prevents rational and just resolution of immigration issues. It creates an illogical stasis wherein the undocumented can either leave or remain and "submit to subordination and vulnerability to exploitation . . . [so that] the presence of these individuals may be tolerable or even desirable, as long as they remain compliant with the policy." (1936). Acceptance of the inherent ambiguity of that approach does not allow clear discussion or solutions. The federal government continues to refine definitions of "illegal" status, expand "the grounds of deportability," and impose more controls without solutions for reducing the undocumented population in the United States. That population has grown to an estimated 11 million, prohibiting full deportation. Some localities in "sanctuary" states have resisted federal pressures to help control those communities. By convincingly tracing the reliance on self-deportation and its connections to racism and repressive immigration policies, Park has produced a valuable legal study that shows "the dynamics of immigration law and policy as a whole" (1879). This study allows us to look inward more clearly, to know ourselves as a nation and find lasting solutions for a more equitable and productive society.

— Benjamin Guterman, Kathryn Birks Harvey, Lisa K. Parshall