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Race, the Academy, and *The Constitution of the War on Drugs*

The Constitution of the War on Drugs

BY DAVID POZEN

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ABSTRACT. The war on drugs is widely viewed as a policy failure. Despite massive government intrusions on personal liberty, drug addiction, overdoses, and drug-related violence have only increased since the war was declared in 1971. David Pozen's new book, *The Constitution of the War on Drugs*, reveals a constitutional failure as well. Pozen chronicles a host of constitutional arguments that American litigants deployed to protect a "right" to use drugs with surprising, if fleeting, success. Pozen asks what might have been, exploring why the courts backtracked and effectively removed the Constitution as a meaningful obstacle to drug prohibitions.

This Review highlights, supplements, and critiques Pozen's important contribution to our understanding of the war on drugs. We begin with a look in the mirror, acknowledging the legal academy's own role in enabling the drug war. Next, we introduce alternate explanations for the judicial passivity that Pozen criticizes. Chief among these is race-making: the drug war helped its proponents shape the evolving meaning of race.

We also challenge Pozen's nuanced explanations for judicial resistance to substantive constitutional challenges. The constitutional terrain where litigants most frequently challenged the drug war was procedural: the Fourth Amendment. And in those battles, the Supreme Court proved to be an eager drug warrior, not an ambivalent conscript. The same pattern repeats itself throughout federal and state courts and across the broader "war on crime." Our critiques do not take away from Pozen's contribution—the unearthing of a forgotten history of early battles in the drug war where litigants and judges briefly pushed back on the now widely accepted notion that drug use and possession could be criminalized. But we situate his findings within a broad backdrop of race, crime, and, above all, the judiciary's eagerness to just say "yes" to the war on drugs.

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