# Paradoxes of Court-Centered Legal History: Some Values of Historical Understanding for a Practical Legal Education

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Today legal education is under scrutiny and law schools under assault. Social, economic, and political developments have combined with major structural changes in the market for legal services to create acute difficulties, and voices across the country are understandably calling for lower-cost programs and "practice-ready" graduates.[1] The challenge for law schools is to address those issues while maintaining the highest standards of professional excellence and truly *educating* students for future legal careers.

Unfortunately, many commentators fail to discuss either the substantive requirements of a quality legal education or the professional capacities necessary for lawyers to meet the demands of a changing profession in a changing world. Many, too, offer ideas and suggestions that reflect unduly narrow and quite shortsighted views of both law and education. Urging students to take only "bread-and-butter courses," for example, Justice Antonin Scalia scorned as "frill" all classes involving "law and" titles—dismissing in particular courses on "law and women" and "law and poverty"; his advice was sweeping and absolute: "do not take 'law and anything.'"[2] Such comments

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1. *E.g.*, *Task Force on the Future of Legal Education*, (A.B.A., Working Paper, August 1, 2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/taskforcecomments/aba_task_force_working_paper_august_2013.authcheckdam.pdf. The nature and significance of "practice-ready," however, may be far more complicated than many suppose. *See* Deborah J. Merritt, *An Employment Puzzle*, Law School Café (June 18, 2013, 10:24 PM), http://www.lawschoolcafe.org/thread/an-employment-puzzle/. For an emphasis on the continued need for law schools to promote social justice, *see* Edgar Cahn, *Choosing the Right Law School*, The Huffington Post (Feb. 11, 2014, 11:01 AM), http://www.huffingtonpost.com/edgar-cahn/choosing-the-right-law-sc_b_4763820.html.

2. "The only time you're going to have an opportunity to study a whole area of the law

suggest that the only valuable courses are those devoted to ostensibly pure and self-contained "legal" subjects with little or no relationship to pressing practical problems, disputed cultural understandings, or overarching social contexts. Such a crabbed understanding of both law and education contrasts sharply with deeper understandings that recognize that law must continually confront shifting real-world conditions and that a full legal *education* must illuminate the complex and dynamic interrelations between "the law" and all that surrounds and shapes it. More than a century ago Oliver Wendell Holmes, Jr., captured the fundamental insight that inspires such deeper understandings. "To be master of any branch of knowledge," he explained, "you must master those which lie next to it…."[3]

That penetrating truth shines as a guiding beacon for all quality legal education and, indeed, for all true education in any area. One cannot thoroughly understand any subject unless one understands the varied forces and factors that constitute and condition it. For lawyers and judges, understanding the social complexities and practical contingencies that shape the law and drive its operations is essential. Such an understanding requires an education that reaches far beyond doctrine and technique, an education that illuminates the profound interrelationships that exist between the world of law and the world of life.

Legal history is an invaluable component of such an education.

## I. The Utility of Legal History

Legal history explores a vast, complex, and ever-changing subject that is both inherently practical and inherently theoretical. It demands inquiry into issues that range from those involving the most refined distinctions of logic to the most enduring puzzles of philosophy, from the most individualized and personal of human motivations to the most sweeping and compelling of social forces, and from the noblest ideals of politics and morals to the most pragmatic, shrewd, and even ruthless techniques that mark the practice of able lawyers. As then-Judge Benjamin N. Cardozo explained, the "endless variety" of the law's challenges presents "a source of never-ceasing wonder."[4] Law and its history are subjects in which little or nothing of true significance—if

systematically is in law school … You should not waste that opportunity. Take the bread-and-butter courses. Do not take 'law and women,' do not take 'law and poverty,' do not take 'law and anything'." Kyle Roerink, *U.S. Supreme Court Justice Scalia Warns Against 'Living' Constitution*, Casper Star-Tribune (Oct. 26, 2012, 8:00am), http://trib.com/news/state-and-regional/u-s-supreme-court-justice-scalia-warns-against-living-constitution/article_b0a197f2-20f5-5634-bd30-7ed1f4b705de.html (Supreme Court Justice Antonin Scalia, during a speaking engagement at the University of Wyoming Law School, advising students that they should avoid "frill courses" during their time in school).

3. Oliver Wendell Holmes, Jr., *The Profession of the Law, in* Collected Legal Papers 29, 30 (1920).

4. Benjamin N. Cardozo, The Paradoxes of Legal Science 76 (1928). The "mystery of the legal process … is its lure." *Id.* at 134.

probed deeply enough—proves simple or one-dimensional.[5] Most immediately relevant, legal history teaches the varying ways in which law and legal systems have operated in practice, the reasons they have changed over time, and the more likely directions and limits of their future development. There "can be no constancy in law," Cardozo explained, because the "kinetic forces are too strong for us."[6] Thus, it is essential to consult "the revealing light of history."[7]

Indeed, the "revealing light of history" shows that those "kinetic forces" arise not just from myriad social pressures external to law and the judicial process but also from the law's own internal processes of reasoning and decision-making. It is often said that the structure and content of the law have been built up case by case and "brick by brick" over the centuries by successive generations of judges. Legal history shows us that those judicial precedents, however inspiring and time-honored they may be, are hardly bricks. It shows, rather, that they are tiny sculptures produced by individual craft and marked by their own special indentations, protrusions, and curvatures. It also shows that they are made not of granite but of clay and that thin flakes have worn away, tiny pieces chipped off, and patches and additions fitted to them with a variety of materials. Indeed, when we ourselves handle those delicate sculptures for study, we recognize that the faint warmth and slight pressure of our fingers threaten to alter them yet again.

Scholars have sought to identify the most general insights that legal history offers, and most would likely agree with those identified by Professor Jim Phillips of the University of Toronto. First, legal history leads to a better understanding not only of the "nature" of law itself but also—more particularly and practically—of the critical "limitations of law."[8] Second, it shows the contingency of law, the ways in which the law changes over time and the extent to which extralegal social factors shape its evolution. Third, legal history teaches the relative autonomy of the judicial process, the complex lesson that the judicial process operates with varying degrees of independence from those extralegal social forces and that legal rules often direct or at least

5. Gordon S. Wood, The Purpose of the Past: Reflections on the Uses of History 10-12 (2008). Such complexity means that legal historians disagree about a wide range of issues, including both methods and goals. For a well-known exchange, *see* Robert W. Gordon & William Nelson, *An Exchange on Critical Legal Studies Between Robert W. Gordon and William Nelson,* 6 Law & Hist. Rev. 139 (1988).

6. Cardozo, *supra* note 4, at 11. "We take a false and one-sided view of history when we ignore its dynamic aspects." Benjamin N. Cardozo, The Growth of the Law 104 (1924). For a discussion of Cardozo's writings on law and the judicial process, *see* Andrew L. Kaufman, Cardozo 203-22 (1998), and for Cardozo's effort to reconcile his own views with the emergent "legal realism" of the early 1930s, *see id.* at 456-61.

7. Cardozo, *supra* note 4, at 67. During the past half-century legal history has expanded rapidly as a field and begun to explore law's past in a nearly infinite range of areas and subjects. *Compare* the works cited in notes 25, 79-81, and 83 *infra* with a discussion of the field as it existed in 1967. Calvin Woodard, *History, Legal History, and Legal Education*, 53 Va. L. Rev. 89 (1967).

8. Jim Phillips, *Why Legal History Matters*, 41 Victoria U. Wellington L. Rev. 293, 294 (2010).

channel its results.[9] Finally, legal history liberates students and practitioners by showing that what they "think of as the law today" has "in fact not always predominated."[10] It thereby enables them to imagine "other worlds, other ways of doing things."[11] Professor John McLaren of the University of Victoria put much of the matter succinctly. Legal history, he explained, teaches "the contingent nature and ideological quality of law making."[12]

Many commentators, especially those outside the field, might minimize the importance of those contributions or even reject them entirely. Some might believe that showing "the contingent nature and ideological quality" of law is undesirable, dangerous, or even nihilistic. Legal history's lessons might be unwelcome, for example, to those "originalists" who purport to discern the Constitution's true and unchanging meaning and thereby proclaim themselves its authoritative expositors.[13] Others might discount the proffered contributions of legal history because they believe that law schools should minimize or abandon "frill" courses and concentrate on clinics, "practice-based" courses, and methodical "skills" training. Such commentators might believe that legal history can contribute little or nothing to the training of "practice-ready" graduates.[14]

In response to the former group, legal historians can do little more than continue what they have been doing. They can only continue to show, for ever-expanding numbers of issues and with ever-swelling amounts of evidence, that "originalism" is an inadequate, unreliable, and easily manipulable methodology.[15] Indeed, they can continue to show that "originalism," at least

9. *Id.*, at 295, 302.

10. *Id.*, at 308.

11. *Id.*, at 305.

12. John McLaren, *The Legal Historian, Masochist or Missionary? A Canadian's Reflections*, 5 Legal Educ. Rev. 67, 83 (1994).

13. Commitment to "originalist" contentions may explain why Justice Scalia endorsed a relatively narrow and socially desiccated type of legal education. *See supra* text accompanying note 2. Some who consider themselves originalists recognize the severe limitations of the approach. "Very often, particularly in areas where things have changed so much," Justice Samuel Alito acknowledged, "identifying the [originalist] principle doesn't really decide the case." Joan Biskupic, American Original: The Life and Constitution of Supreme Court Justice Antonin Scalia 352 (2009).

14. In the legal academy itself, few if any clinicians or "practice-oriented" faculty members would likely consider legal history a "frill" subject, and few if any legal historians would deny the value and necessity of clinics, skills training, practice-oriented courses, and professional internships.

15. Originalist sources and methods can usually be adapted to justify a wide range of diverse and conflicting contemporary policies. *See, e.g.*, Jack M. Balkin, Living Originalism (2011). Scholarly and historical critiques of "originalism" have proliferated. *See, e.g.*, Edward A. Purcell, Jr., Originalism, Federalism, and the American Constitutional Enterprise (2007); Dennis J. Golford, The American Constitution and the Debate Over Originalism (2005); Daniel A. Farber and Suzanna Sherry, Desperately Seeking Certainty: The Misguided Quest For Constitutional Foundations (2002); H.

in some of its particularly strident contemporary forms, itself constitutes a paradigmatic example of law's "contingent nature and ideological quality."[16] As no less a staunch and self-proclaimed originalist as Robert Bork admitted, using the past to justify normative legal conclusions readily allows judgments that are subjective, arbitrary, and self serving. "History and tradition are very capacious suitcases," he explained, "and a judge may find a good deal pleasing to himself packed into them, if only because he has packed the bags himself."[17]

In response to the latter group, legal historians could stand with Holmes and simply reject the idea that legal education should be so predominantly practical. "I do not consider the student of the history of legal doctrine bound to have a practical end in view," Holmes declared. "It is perfectly proper to regard and study the law simply as a great anthropological document."[18] Whatever the intellectual merits of that claim, however, it seems unavailing in light of the present circumstances that law schools confront. The fact that "anthropological" learning is valuable does not mean that it should be taught in law schools instead of anthropology, social science, or history departments. To the immediate point, Holmes' claim ignores the pressing contemporary educational questions: Does legal history contribute to a full, sound, and truly practical legal education? If so, how?

Legal historians have offered a number of suggestions.[19] Professor McLaren, for example, points to a vital connection between the study of legal history and the demands of legal practice. The "mere fact that a lawyer has an understanding of the history of the law, legal institutions and legal ideology," he explained, is likely "to produce a more reflective, intelligent and less dogmatic approach to what she or he does in legal practice."[20] Others have suggested that practicing

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Jefferson Powell, A Community Built on Words: The Constitution in History and Politics (2002); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204 (1980). For a detailed recent consideration of one specific "originalist" argument, *see, e.g.*, Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 Colum. L. Rev. 731 (2010).

16. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570 (2008), and *compare* Reva Siegel, Comment, *Dead or Alive: Originalism as Popular Constitutionalism*, 122 Harv. L. Rev. 191 (2008); Robert Leider, *Our Non-Original Right to Bear Arms: How Public Opinion Has Shaped the Second Amendment*, 89 Ind. L. J. 1587 (2014).

17. Robert H. Bork, The Tempting of America: The Political Seduction of the Law 119 (1990).

18. Oliver Wendell Holmes, Jr., *Law in Science and Science in Law*, *in* Collected Legal Papers, *supra* note 3, at 212.

19. For a growing interest among legal historians in the question of their field's practical uses, *see, e.g.*, Sally Gordon, *On the Market*, Legal History Blog (Aug. 8, 2013, 1:01 PM), http://legalhistoryblog.blogspot.com/2013/08/on-market.html; Roman Hoyos, *Legal Historians, Law Schools, and "Utility"*, The Faculty Lounge, Aug. 10, 2013, http://www.thefacultylounge.org/2013/08/legal-historians-utility-and-law-schools.html; Albert Brophy, *Introducing Applied Legal History*, 31 L. & Hist. Rev. 233 (2013) and entries on the Legal History Blog, *e.g.*, Aug. 1, 2009, July 25, 2012, and Oct. 19, 2012, *available at* http://legalhistoryblog.blogspot.com/2012/10/legal-history-as-skills-training.html.

20. McLaren, *supra* note 12, at 83.

lawyers cannot hope to effectively distinguish or defend the legal authorities bearing on their cases without a clear understanding of the historical contexts and purposes that produced them.[21] More specifically, Professor William E. Nelson of New York University maintained that legal history is "an excellent vehicle" for teaching some of the most critical skills that lawyers need to become successful practitioners.[22] The study of legal history, he argued, teaches law students how to develop comprehensive and well-grounded "narratives" and how to shape those narratives in the most persuasive manner possible "to advance the causes of their clients."[23]

In line with those efforts, this essay explores the question of legal history's practical value, and it does so by considering in greater detail what we can learn from but one of its many diverse sub-fields.

## II. Court-Centered Legal History

Court-centered legal history focuses on courts, judges, judge-made law, and the processes of judicial decision-making.[24] It does not seek to examine legislative actions, administrative operations, executive enforcement efforts, or the social, political, cultural, and economic forces that shape forms and patterns of "legal" and legally related behavior. Studies in all those areas have their own distinctive values and teach their own distinctive lessons.[25] Although

21. Robert M. Jarvis et al., *Contextual Thinking: Why Law Students (and Lawyers) Need to Know History*, 42 Wayne L. Rev. 1603 (1996).

22. William E. Nelson, *Why the Study of History Matters: Especially in Law School*, 2 (draft article)(on file with author).

23. *Id.* at 18.

24. Since the path-breaking work of Willard Hurst, American legal history has moved away from narrow court-centered studies to pursue far wider and more varied approaches that explore the complex interrelationships between "legal" phenomena broadly considered and "non-legal" social, political, economic, and cultural forces. For Hurst's contributions, *see, e.g.*, James Willard Hurst, Law and Social Order in the United States (1977); James Willard Hurst, Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915 (1964); James Willard Hurst, The Growth of American Law: The Law Makers (1950), [hereinafter Growth of American Law]. For discussions of Hurst's impact on the field, *see, e.g.*, Daniel R. Ernst, *Engaging Willard Hurst: A Symposium*, 18 Law & Hist. Rev. 1 (2000); Robert W. Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 Law & Soc'y Rev. 9 (1975); and Harry N. Scheiber, *At the Borderland of Law and Economic History: The Contributions of Willard Hurst*, 75 Am. Hist. Rev. 744 (1969). For a discussion of the ways that legal history's "social" inquiries have expanded beyond the primarily economic and market/regulatory issues that Hurst emphasized to give greater attention to such fundamental social factors as race, class, gender, and sexuality, *see e.g.*, Barbara Y. Welke, *Willard Hurst and the Archipelago of American Legal Historiography*, 18 Law & Hist. Rev. 197 (2000).

25. Thus, the values and uses of legal history are far broader and more numerous than those discussed in this essay. *See, e.g.*, Stephen M. Griffin, Long Wars and the Constitution (2013); Noel Maurer, The Empire Trap: The Rise and Fall of U.S. Intervention to Protect American Property Overseas, 1893-2013 (2013); Jonathan Levy, Freaks of Fortune: The Emerging World of Capitalism and Risk in America (2012); Jerry L. Mashaw, Creating the Administrative Constitution: The Lost One Hundred Years

court-centered legal history must draw heavily on available scholarship in all of those areas as well as in all other fields of relevant scholarly inquiry,[26] it retains its own primary focus on courts, judges, and judicial decision-making.

Within its delimited field, moreover, court-centered legal history does not seek to produce normative conclusions. Thus, it does not include what has been called "law office" or "forensic" history, the use of historical materials to support predetermined and result-driven legal conclusions. Nor does it include those varieties of "originalism" that seek to use historical materials to establish the pedigree and authority of currently useful constitutional propositions. Nor, finally, does it include technical studies of legal doctrines that use historical materials simply to trace technical changes in the formal content of legal rules.

Instead, court-centered legal history asks and attempts to answer strictly "historical" questions about certain matters classified as "legal." Its goal is only to understand and explain what occurred, when it occurred, why it occurred, and what consequences the examined actions or events helped bring about. This type of legal history aims not to win lawsuits, identify "correct" legal rules, or establish normative propositions. It seeks only to understand and explain, and its goal—in the language of much social science literature—is "positive" rather than "normative."[27]

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of American Administrative Law (2012); Brian Balogh, A Government Out of Sight: The Mystery of National Authority in Nineteenth-Century America (2009); Pippa Holloway, Sexuality, Politics, and Social Control in Virginia, 1920-1945 (2006); James M. Bamford, A Pretext for War: 9/11, Iraq, and the Abuse of America's Intelligence Agencies (2005); Stephanie Coontz, The Way We Never Were: American Families and the Nostalgia Trap (1992). For recent general considerations of the relationship between law and history, *see* Hendrik Hartog, *Introduction to Symposium on Gordon's "Critical Legal Histories": Robert W. Gordon. 1984. Critical Legal Histories*, *Stan. L. Rev. 36:57-125*, 37 Law & Soc. Inquiry 147 (2012); "*Law As….": Theory and Method in Legal History*, 1 U.C. Irvine L. Rev. 519 (2011); Robert W. Gordon, *Critical Legal Histories* 36 Stan. L. Rev. 57 (1984); and for a measured and somewhat skeptical assessment of history's contributions to law, *see* Christopher Tomlins, *Review Essay—The Consumption of History in the Legal Academy: Science and Synthesis, Perils and Prospects*, 61 J. Legal Ed. 139 (2011).

26. Court-centered legal history must be informed by all relevant kinds of legal, historical, and social scientific studies that cast light on the work of courts and the processes of judicial reasoning and decision-making. *E.g.*, Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 Nw. U. L. Rev. 251 (1997) (importance of political science "attitudinal" studies in understanding judicial behavior). Its practitioners must always bear in mind Hurst's warning to "beware the subtle bias which arbitrarily truncates its proper subject matter by identifying it simply with the products of courts and lawsuits." James Willard Hurst, Justice Holmes on Legal History 93 (1964). The work of courts and judges can be fully and most fruitfully understood only when placed in its full and proper social context. *E.g.*, Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. Pa. L. Rev. 927 (2006) (influence of broad social movements on legal developments).

27. The fact that this type of court-centered legal history disclaims normative goals does not mean that it purports to be wholly "objective." It readily acknowledges the frailties of human reason, the complexities of judicial behavior, the inadequacies of historical sources and methods, and the fact that personal factors may influence the interpretations of its

The non-normative nature of this kind of legal history unavoidably raises—indeed, spotlights—another more specific question that legal educators must also ask. What is the utility of such court-centered history? What is the practical value of such a field when—by definition—its analyses and conclusions fail to claim normative authority? This essay attempts to answer that question by exploring the idea that this type of legal history is a paradoxical enterprise and that recognizing its paradoxical nature illuminates the substantial contributions it makes to our understanding of law and the actual work of courts and lawyers, contributions that establish its essential place in a full and sound legal education.[28]

## III. Paradoxes of Court-Centered Legal History

Cardozo puzzled over the "unending paradoxes"[29] he found in the law's function of resolving human conflicts and accommodating society's need for both stability and change.[30] His paradoxes, however, reflected the inherently normative function of law and the judicial process,[31] and consequently his paradoxes cannot be the paradoxes of a non-normative legal history. Those quite different paradoxes arise from legal history's core inquiry into the complex forces—social and extralegal as well as formal and legal—that explain the actual nature of legal processes, judicial decision-making, and the course of judge-made law.

More particularly, the paradoxes of court-centered legal history arise from two seemingly contradictory facts. The first is that such legal history challenges and rejects the ideal image of judicial decision-making as wholly logical, impersonal, rule-directed, and autonomous.[32] The second is that it

practitioners. *See, e.g.*, Peter Novick, That Noble Dream: The "Objectivity" Question and the American Historical Profession (1988). This type of legal history seeks only to produce the best account possible of events and developments that the full range of historical sources—and the full panoply of available analytical tools—will fairly support. Such "best accounts" can range from those that seem as certain as wholly consistent and substantial amounts of evidence will sometimes permit to those that are—in descending order of relative confidence—quite convincing, or relatively persuasive, or plausible but contested, or only possible and speculative.

28. "Students didn't like the [legal history] course," Hurst noted near the end of his career and after teaching the subject for more than forty years. "It wasn't a law course in their point of view, and yet in later years time and time again the students would come back to me and say, in law school I didn't know what the devil that [course] was all about, but now that they were out and into practice, they thought it was the best one that they had in school." Hendrik Hartog, *Snakes in Ireland: A Conversation with Willard Hurst*, 12 Law & Hist. Rev. 370, 378-79 (1994).

29. Cardozo, *supra* note 4, at 134.

30. *Id.* at 6, 56, 86.

31. "Our concern for the moment is with the work of judges only. … Where doubt enters in, there enters the judicial function." *Id.* at 10.

32. Cardozo surely agreed with that proposition. "[I]f there is anything of reality in my analysis of the judicial process, they [judges] do not stand aloof on these chill and distant heights;

serves as an invaluable guide for understanding, evaluating, and potentially improving legal processes and real-world judicial decision-making. The root of legal history's paradoxical nature, then, lies in the fact that for law and the judicial process it is both acutely subversive and profoundly supportive.

In 1903, W.E.B. DuBois identified what he called the "double-consciousness" of American blacks. To ensure their own safety, blacks had to understand themselves in the prevailing racist terms and roles that the dominant white society imposed. To save their own humanity, they had to understand themselves on their own terms as full and independent human beings. That "double-consciousness," DuBois wrote, created "two warring ideals in one dark body."[33] This essay suggests that the special values of court-centered legal history arise from an analogous "double consciousness"—the field's understanding and integration of two other warring ideals, legal formalism and historical realism. Legal history recognizes that both formal internal constraints and external social pressures shape judicial decision-making, and it shows that those internal and external elements are closely, if complexly and contingently, related.[34] Ultimately, it teaches that the ideal of a wholly neutral, logical, and principled judicial decision-making is beyond human capacity but that the ideal nonetheless possesses incalculable value as an inspiring and partially attainable goal. This "double consciousness" lies at the heart of legal history's paradoxical nature, and it inspires its most enduring insights and practical contributions.

### *A. The Paradox of Method*

The first paradox is one of flat contradiction. Legal history assembles evidence, inspires insights, and supports conclusions that are precisely the kinds of contributions that formal legal reasoning seeks to minimize, ignore, or deny.[35] Claiming to apply pre-existing rules and principles, striving to

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and we shall not help the cause of truth by acting and speaking as if they do. The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by." Benjamin N. Cardozo, The Nature of the Judicial Process 168 (1921).

33. W. E. B. DuBois, The Souls of Black Folk 5 (1903).

34. Legal historians, of course, often disagree over the relative significance of internal and external factors when addressing specific issues at specific times. *E.g.*, Edward A. Purcell, Jr., *National League of Cities: Judicial Decision-making and the Nature of Constitutional Federalism*, 91 Denver U. L. Rev. Online 179 (2014). *Compare, e.g.*, the views in Symposium, *The Debate Over the Constitutional Revolution of 1937*, 110 J. Am. Hist. 1046 (2005); Barry Cushman, Rethinking The New Deal Court: The Structure of a Constitutional Revolution (1998); and two reviews of Cushman's book: Richard D. Friedman, *Taking Decisions Seriously: A Review of Rethinking the New Deal Court: The Structure of a Constitutional Revolution*, 24 J. Sup. Ct. Hist. 314 (1999) and William Lasser, *Justice Roberts and the Constitutional Revolution of 1937—Was There a "Switch in Time?"* 78 Tex. L. Rev. 1347 (2000). *See generally* Christopher Tomlins, *How Autonomous is Law?* 3 Ann. Rev. Law & Soc. Sci. 45 (2007).

35. Legal reasoning and judicial decision-making have commonly paid attention to practical concerns and consequences, *e.g.*, Lawrence M. Friedman, *On Legalistic Reasoning—a Footnote to Weber*, 1966 Wisc. L. Rev. 148, and it may be that the opinions of American judges in the 20th

follow a rigorously logical method, and projecting an aura of certainty and authority, formal legal reasoning minimizes or avoids whenever possible the social, the pragmatic, and the transient.[36] When considering such phenomena, it purports to subordinate them to the controlling authority of strictly "legal" rules and principles. Above all, formal legal reasoning denies the relevance of anything that smacks of the personal, political, subjective, or ideological.[37] Thus, the norms of formal legal reasoning are antithetical to the insights of legal history.

Beyond appealing to bland generalities about past events, formal legal reasoning commonly erases actual historical contexts and ignores their practical significance. John Marshall's constitutional decisions invoked text, structure, and general principles, but his particular conclusions stemmed in large part not from those sources but from the practical lessons he drew from his own frustrating experiences as an officer in the Revolutionary Army and then as a member of the Virginia Legislature. The severe hardships that plagued Washington's army, Marshall came to believe, were the fault of thirteen discordant states with their petty jealousies and selfish policies, a debilitating condition that only a strong central government could remedy.[38]

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and early 21st century have grown more overtly pragmatic and "policy-oriented." *E.g.*, Brian Z. Tamanaha, *How an Instrumental View of Law Corrodes the Rule of Law*, 56 DePaul L. Rev. 469 (2007). The focus in the text, however, is on "formal" or "legalistic" judicial reasoning and on the fact that such reasoning purposely and methodically ignores the possible influence of personal, political, subjective, or ideological factors on the decision-making process. As used here, the term "formal" has a broader meaning than the term "formalistic" as that latter term is often used to describe a style of legal reasoning purportedly typical of the late 19th century. *See, e.g.*, Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 Stan. L. Rev. 787 (1989); Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. Pitt. L. Rev. 1 (1983).

36. A strictly "legalist theory of judging" is "the judiciary's 'official' theory of judicial behavior." Richard A. Posner, How Judges Think 41 (2008). "[M]ost judges are cagey, even coy, in discussing what they do. They tend to parrot an official line about the judicial process (how rule bound it is), and often to believe it, though it does not describe their actual practices." *Id.* at 2.

37. Consider, *e.g.*, two Supreme Court decisions dealing with an ostensibly technical procedural issue, the standard for granting summary judgment. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970), adopted a standard that made it relatively difficult for defendants to obtain summary judgment, while sixteen years later *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), set forth a standard that made summary judgment easier to obtain. The standards the two cases applied were inconsistent. As a matter of history, *Adickes* and *Celotex* are quite different cases, presenting different issues, arising in different contexts, and decided by ideologically different Courts. *Adickes* can be fully understood only as the product of a liberal Court sensitive to civil rights cases from the South in the 1960s, while *Celotex* can be fully understood only as the product of a conservative Court seeking in the 1980s to expand the ability of defendants to obtain summary judgment. As a matter of "law," however, the Court has officially pronounced the two cases consistent. *Adickes*, the *Celotex* Court declared, was correctly decided. *Celotex*, 477 U.S. at 325. The Court banished both the social context and the animating individual factors that shaped the decisions in both cases in order to affirm a nonexistent consistency, uniformity, and principled neutrality in "the law."

38. R. Kent Newmyer, John Marshall and the Heroic Age of the Supreme Court 28-29 (2001).

Roger B. Taney's opinion in *Dred Scott* claimed its foundation in the original intention of the Founders, but his views were shaped by his personal embrace of racism, slavery, and the plantation system of the South.[39] The Court's late-19th-century decisions validating the post-Reconstruction settlement invoked the Fourteenth Amendment and a variety of other legal and constitutional "principles," but they were animated by the political and racial beliefs that the Justices shared with most of the nation's white population.[40] The desegregation decisions of the Warren Court were based on the Equal Protection Clause, but they were inspired by demographic movements, changing views about race, and the Cold War demands of American foreign policy.[41]

Legal history's incompatibility with formal legal reasoning is apparent even in relatively technical areas. In *Railroad Commission of Texas v. Pullman Co.*, for example, the Supreme Court established a "doctrine of abstention" supported by a variety of arguments based on principles of federalism and equity jurisprudence.[42] Subsequently, the federal courts cited and applied that doctrine in light of those principles, even though historical materials suggest quite clearly that the decision was driven by unmentioned practical considerations rather than logical conclusions from legal principles. In fact, the Court in *Pullman* confected an ostensibly "principled" rationale in order to avoid making a decision that would either disregard constitutional principles of racial equality or infuriate the South and possibly divide the nation on the eve of American entry into World War II.[43] The decision and its doctrine were the product of two powerful social considerations: first, an intensely felt need

39. Christopher I. Eisgruber, *Dred Again: Originalism's Forgotten Past*, 10 Const. Comment. 37 (1993). As one legal historian put it with delicacy, Taney's "most controversial judicial opinions, beginning with *Dred Scott*, were influenced by his southern heritage." James F. Simon, Lincoln and Chief Justice Taney: Slavery, Secession, and the President's War Powers 271 (2006).

40. *See, e.g.*, Edward A. Purcell, Jr., *The Particularly Dubious Case of Hans v. Louisiana: An Essay on Law, Race, History, and 'Federal Courts'*, 81 N. C. L. Rev. 1927, 1981-2038 (2003).

41. *E.g.*, Mary L. Dudziak, Cold War Civil Rights: Race and the Image of American Democracy 12-17 (2000).

42. Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 501 (1941).

43. The action involved an effort by the Pullman Company and a number of railroads to enjoin enforcement of an order of the Texas Railroad Commission that required a "conductor" (all of whom were white) to be aboard every sleeping car where a "porter" (all of whom were black) was working. Thus, the order ensured that there would be a white man on every car where a black man was present and a white woman was sleeping. The companies sought to cut their costs; the conductors intervened to support increased jobs; and the porters intervened to protest racial discrimination. A judgment on the merits would either reject the claim of racial discrimination or invalidate the commission's order. The Court's opinion was brief, but it nonetheless hinted obliquely at the informing context. It acknowledged that the porters presented a "more than substantial" constitutional issue, noted that the case "touches a sensitive area of social policy," and backed away from addressing the state-law issue presented by characterizing the members of the Court with the label that Southerners used to de-legitimate Northerners who "intruded" into Southern racial matters. The Justices, *Pullman* explained, were "outsiders" to Texas law. 312 U.S. at 498, 499.

to maintain national unity in the face of a frightening and ever-nearing world war and, second, an acute wariness over the divisive nature and explosive potential of a decision invalidating a law deeply rooted in racial antipathy and in what W. J. Cash termed the South's obsessive interracial "rape complex.[44] The Court's opinion—and hence its formal "doctrine of abstention"—gave only the most oblique hints about the actual grounds of its decision, and subsequent legal arguments and judicial opinions never mention the historical factors that gave birth to "the *Pullman* doctrine." As a matter of "law" and formal legal reasoning, its historical origins are not only irrelevant but embarrassing.

Consider another example drawn from an even more arcane area. In *Guaranty Trust Co. v. York*[45] the Court applied an "outcome determination" test and held that, in contested "procedural" choice-of-law issues under the *Erie* doctrine,[46] state law should be applied if the application of federal law could alter the outcome of a case. For twenty years thereafter the Court applied that test and gave broad sway to state law.[47] Subsequently, when the Court decided in *Hanna v. Plumer* to abandon "outcome determination" and apply a different test that would drastically shrink the sway of state law, it blandly reinterpreted *York's* progeny and claimed that those cases had been decided consistently with the new and different test.[48] After that, proper legal analysis necessarily tracked the Court's formulations in *Hanna* and accepted the proposition that the cases decided under *York* were fully consistent with the new approach.[49] To do so, lawyers and judges were compelled to elide the explicit reasoning in those earlier *York*-based cases. To acknowledge their actual reasoning would serve

44. W. J. Cash, The Mind of the South 114-17 (Vintage 1991)(1941)(quote at 115 & 117). The fear of a coming war within the Court—especially the fear of Pullman's author, Justice Felix Frankfurter—is described in Shawn Francis Peters, Judging Jehovah's Witnesses: Religious Persecution and the Dawn of the Rights Revolution Ch. 2 (2000). Archival materials support the conclusion that the majority opinion was a compromise and suggests, at a minimum, that Chief Justice Hughes had serious doubts about abstention and that Justices Reed and perhaps Douglas joined the opinion with some reluctance. *See* Charles Evans Hughes to Felix Frankfurter, Feb. 20, 1941, Felix Frankfurter Papers (Harvard Law School), Part I, reel 2; Hughes' "return" ("I acquiesce"), *id.*; Reed's "return" ("I agree with a half-suffused regret that the formula might not be more precise"), *id.*; and Douglas' "return" ("I am not so clear in the point as others"), *id.* Further, Douglas' return suggests that he was aware that the Court was finessing a delicate social and political matter. "I think the opinion puts us into safe waters with clear sailing." *Id. See generally* Lauren Robel, *Riding the Color Line: The Story of Railroad Commission of Texas v. Pullman Co.*, in Federal Court Stories (Vicki C. Jackson & Judith Resnik eds., 2010), 163-89.

45. 326 U.S. 99 (1945).

46. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

47. Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949); Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949); Woods v. Interstate Realty Co., 337 U.S. 535 (1949); Bernhardt v. Polygraphic Co. of America, Inc., 350 U.S. 198 (1956).

48. Hanna v. Plumer, 380 U.S. 460 (1965); Walker v. Armco Steel Corp., 446 U.S. 740 (1980).

49. Interestingly, the law in this area may be changing once again. *Compare* Hanna v. Plumer, 380 U.S. 460 *with* Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996) and Shady Grove Orthopedic Associates v. Allstate Insurance Co., 559 U.S. 393 (2010).

no useful "legal" purpose and would only confuse and clutter the minds of lawyers and judges.

Formal legal reasoning, then, commonly allows little or no role for the actual historical forces that informed and often determined legal decisions and their doctrinal formulations. Indeed, in one recent case, five Justices excoriated a dissenter for even raising such historical evidence in questioning the weight and significance of allegedly controlling precedents. Such an "undocumented and highly speculative extralegal explanation," Chief Justice William Rehnquist wrote for a majority, was "a disservice to the Court's traditional method of adjudication."[50]

For legal reasoning and judicial decision-making, then, legal history serves as an unwanted and disruptive intruder. It is Banquo's Ghost at MacBeth's banquet. Its virtue, nonetheless, remains, for it shows that legal reasoning does not necessarily explain judicial decision-making, and that far different and more important forces may lie behind any case or doctrine. Indeed, Banquo's Ghost was unwelcome for compelling reasons: It evidenced both a well-deserved guilty conscience and the decisive importance of matters occurring far beyond the banquet room. Thus, in challenging the relatively closed world of formal legal reasoning, legal history may generate useful new insights into the actual weight and potential flexibility of legal doctrines, insights that may deepen understanding of their purposes, implicit limits, and possible creative applications in the future.

### *B. The Paradox of Understanding*

The second paradox is that court-centered legal history undermines the ideal images of constitutionalism and "the rule of law" while at the same time it inspires a sounder appreciation of the true qualities and possibilities of both.[51] Consider in their American setting the counterpoised and conflicting contributions that court-centered legal history makes to those cognate concepts.

In terms of the ideal images, court-centered legal history is destructive. While recognizing that the Constitution created an elaborate structure of government and ordained the primacy of certain fundamental values, it demonstrates that the Constitution's textual generalities, ambiguities, and lacunae provided little or no direction for "correct" resolutions to countless numbers of live controversies that arose over the years. It shows that from the nation's beginning constitutional interpretations were shaped not only

50. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 68-69 (1996). The target was Justice Souter, writing for himself and Justices Ginsburg and Breyer, who argued that an understanding of the historical background of the Court's late-19th-century decisions construing the Eleventh Amendment provided a reason to construe those decisions narrowly. *Id.* at 116-23 (Souter, J., dissenting).

51. For a discussion of the various meanings attributed to the concept of "rule of law," *see* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1 (1997).

by textual provisions and shared values but by evolving social conditions, changing practical challenges, sharply conflicting interests, realigning political coalitions, and shifting ideological currents.[52] It shows, more particularly, that the Supreme Court frequently invented or remolded the meaning of constitutional provisions and that its Justices were commonly influenced and sometimes driven by their personal views and values.[53] It shows how and why American law has over time expanded judicial discretion and thus opened up more areas where such personal views and values might influence the law and judicial decision-making.[54] It shows, too, that both constitutionalist and "rule-of-law" ideas have sometimes served dubious and unjust purposes and that order and regularity have not necessarily meant fairness, benevolence, or genuine legal equality.[55] Indeed, it shows that a "rule of law" may be a social and cultural phenomenon only tangentially or even oppositionally related to formal legal rules and institutions.[56] Legal history thus shows that the substance

52. *See, e.g.*, Sarah Barringer Gordon, The Spirit of the Law: Religious Voices and the Constitution in Modern America (2010); Purcell, *supra* note 15; Gordon S. Wood, The Creation of the American Republic, 1776-1787 (Univ. of N.C. Press, 1998)(1969); Jack N. Rakove, Original Meanings: Politics and Ideas in the Making Of the Constitution (1996); Maeva Marcus & Natalie Wexler, *The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation?* in Origins of the Federal Judiciary: Essays on the Judiciary Act of 1789, 13-39 (Maeva Marcus ed., 1992). For studies of the origins of judicial review, *see, e.g.*, Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less*, 56 Wash. & Lee L. Rev. 787 (1999); Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 Stan. L. Rev. 1031 (1997).

53. *See, e.g.*, Barry Friedman, The Will of the People: How Public Opinion has Influenced The Supreme Court and Shaped the Meaning of the Constitution (2009) (influence of public opinion on the Court); Edward A. Purcell, Jr., *Understanding* Curtiss-Wright, 31 Law & Hist. Rev. 653 (2013) (influence of personal views and values on major constitutional decision). Social science studies confirm these conclusions. *See, e.g.*, Lee Epstein et al., The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice (2013); Cass R. Sunstein et al., Are Judges Political? An Empirical Analysis of the Federal Judiciary (2006); Jeffrey A. Segal and Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited (2002).

54. *E.g.*, William E. Nelson, Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830 (1975); Stephen N. Subrin, *How Equity Conquered the Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909 (1987).

55. *E.g.*, Peters, *supra* note 44; Charles A. Lofgren, The Plessy Case: A Legal-Historical Interpretation (1987); Robert M. Cover, Justice Accused: Antislavary and the Judicial Process (1975). On the varied and shifting social consequences of constitutionalism and the "rule of law," *see, e.g.*, Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 Yale L. J. 561 (1976) and Sanford Levinson and Jack M. Balkin, *Morton Horwitz Wrestles with the Rule of Law*, in 2 Transformations in American Legal History: Law, Ideology, and Methods, Esssays in Honor of Morton J. Horwitz 483-99 (Daniel W. Hamilton & Alfred L. Brophy eds., 2010)[hereinafter Transformations].

56. For a striking example of the social and cultural bases of law, *see* Laura F. Edwards, The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South (2009); Laura F. Edwards, *The Peace: The Meaning and Production of Law in the Post-Revolutionary United States*, 1 U.C. Irvine L. Rev. 565 (2011).

of the nation's constitutionalism and its operative "rule of law" evolved over time, fell well short of the ideal, and changed with social pressures, political conflicts, and the shifting and subjective value judgments of its judges.[57] It shows, in other words, that the ideals are partial and misconceived, that they do not necessarily equate to justice and equality, and that they cannot mean the automatic, predetermined, and essentially "logical" application of clear, known, and established rules.[58]

Conversely, by revealing the practical conditions and social complexities that underlie those ideals, court-centered legal history is constructive. It shows that a vital and regularized constitutionalism and "rule of law" existed in the United States, that legal rules and principles channeled and often directed judicial decision-making, and that the nation's legal system brought many beneficial results to American society. It shows, too, how and in what ways constitutionalism and a "rule of law" were enabled by complex social, political, cultural, economic, and institutional underpinnings that gave different levels of support and helped produce different degrees of order, justice, equality, and predictability. Legal history, in other words, helps us to think critically and intelligently about what is possible in terms of implementing constitutionalist and "rule-of-law" ideals and consequently how those ideals can be more fully and effectively achieved in practice.

Further, court-centered legal history helps clarify our thinking by showing that there is no single or absolute "rule of law" but many different kinds of "rules of law" that may be relatively acceptable and legitimate. All require such basic elements as fairness, neutrality, consistency, and generality,[59] but the nature of their rules, the extent of their predictability, and the relative propriety of their administration varies with the nature of the practical and interpretive tasks that various lawmakers and decision–makers confront.[60] Regulating automobile traffic and arranging intestate succession give rise to different operative "rules of law," as do honoring private agreements and enforcing criminal laws. More fundamentally, all of those diverse areas give rise to "rules of law" different from the "rules of law" that exist when the Supreme Court applies the Constitution. There are different constitutional "rules of law"

57. "The spirit of the age, as it is revealed to each of us, is too often only the spirit of the group in which the accidents of birth or education or occupation or fellowship have given us a place." Cardozo, *supra* note 32, at 174-75. For examples of such changes by a supposedly highly "formalistic" and "principled" judge, Justice George Sutherland, *see* Stephen A. Siegel, *The Constitution on Trial: Article III's Jury Trial Provision, Originalism, and the Problem of Motivated Reasoning*, 52 Santa Clara L. Rev. 373 (2012); Purcell, *supra* note 53, at 679-86.

58. "The rule of law," then, cannot mean "the law of rules." *Compare* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989). At least for judgments made by multi-judge courts, public choice theory supports this conclusion as a matter of logical necessity. *See, e.g.*, Leo Katz, Why the Law is so Perverse (2011) (exploring legal implications of Arrow's Theorem and public choice theory for decisions involving "multicriterial" considerations).

59. Such as, for example, the characteristics outlined in Lon L. Fuller, The Morality of Law 33-94 (1969).

60. *See, e.g.*, Hurst, Growth of American Law, *supra* note 24.

depending on the nature of the constitutional values and provisions at issue. Those values and provisions can range from the relatively clear or specific to the general and open-ended; from those whose applications are relatively new, fluid, or uncertain to those whose applications are largely circumscribed by long-standing legal precedents, institutional conditions, or ingrained social practices; and from those whose interpretations seem sound and satisfactory to those whose interpretations must be reshaped to meet newly arising challenges or radically altered social conditions and demands.[61]

Indeed, legal history shows that there are even different operative "rules of law" on the same issues and in the same legal system.[62] Trial judges and judicial districts differ in many ways, and their rulings in "like" cases may differ in treatment and result.[63] Inconsistent rulings or results often stand because appellate courts have limited capacities and often apply deferential standards of review.[64] Creating even more diversity, trial court decisions on "preliminary" issues unrelated to the "merits" often determine that cases will settle and fix their general settlement value, and such "preliminary" rulings are seldom reviewed by higher courts.[65] Similarly, intermediate appellate courts have their own realms of discretion, in significant part because the chance that their decisions will be reviewed—especially in the federal system—is

61. Consider, for example, the contrasting roles the Supreme Court has taken in construing the Constitution's provisions concerning private property and its provisions concerning the foreign-affairs powers of the executive. The former has inspired a multitude of decisions providing authoritative precedents and detailed rules; the latter but a scattering of cautious and largely inconclusive opinions. *See, e.g.*, Mariah Zeisberg, War Powers: The Politics of Constitutional Authority (2013); Louis Henkin, Foreign Affairs and the United States Constitution 2-5 (1996). Most extreme, the Court has in effect declared some parts of the Constitution judicially unenforceable. *E.g.*, Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974) (Incompatibility Clause of Art. I); United States v. Richardson, 418 U.S. 166 (1974) (Statements and Accounts Clause of Art. I).

62. *See, e.g.*, C. K. Rowland & Robert A. Carp, Politics and Judgments in Federal District Courts 154 (1996); Edward A. Purcell, Jr., *Rethinking the Frankfurterian Paradigm: Reflections on Histories of Lower Federal Courts*, 24 L. & Soc. Inquiry 679, 716-19, 722-26, 733-34 (1999); Frank B. Cross and Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 Yale L. J. 2155 (1998).

63. *See, e.g.*, Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?* 6 J. Empirical Legal Stud. 111 (2009) (significant differences in settlement rates in four categories of cases between two federal districts, one in Pennsylvania and one in Georgia).

64. *See e.g.*, Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 Harv. L. & Pol'y Rev. 103 (2009); Kevin M. Clermont, *Litigation Realities Renewed*, in Empirical Studies of Judicial Systems: 2008 35, 98-99 (Kuo-Chang Huang, ed., 2009); Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. Ill. L. Rev. 947 (2003); and Kevin M. Clermont & Theodore Eisenberg, *Appeal from Jury or Judge Trial: Defendants' Advantage*, 3 Am. L. & Econ. Rev. 125 (2001). *But see* Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. Legal Stud. 257 (1995).

65. *E.g.*, Laura Beth Nielsen et al., *Individual Justice or Collective Legal Mobilization?* Employment Discrimination Litigation in the Post Civil Rights United States, 7 J. Empirical Legal Stud. 175, 194-96 (2010).

slight.[66] Finally, state supreme courts—and most especially the United States Supreme Court—have greater control over their dockets, deal with more open-ended questions, and are often able to change the law or reorient its social consequences through a wide variety of largely discretionary doctrinal tools.[67] Thus, a somewhat different "rule of law" may control "like" cases in the same legal system depending on the nature of their respective trial judges, whether the cases settle or go to final judgment, whether they are heard by an appellate court, and ultimately whether they reviewed by a state supreme court or the United States Supreme Court. Understanding that such variations, contingencies, and inconsistencies exist in the legal system—and learning how to use them to best advantage—is absolutely essential to the work of practicing lawyers.

Most generally, court-centered legal history also teaches how Americans managed—and sometimes failed to manage—the structural tensions the Constitution established for balancing power with power, stability with adaptability, and principles with pragmatism. It highlights the crucial issues and institutional danger points that threatened and may continue to threaten the system's stability, security, and even legitimacy.[68] In this sense its paradoxes are the paradoxes of American constitutionalism itself.[69]

By showing that a desirable and working constitutionalism and "rule of law" have not ultimately depended on pre-existing rules and authorities, court-centered legal history joins with other types of legal history to teach

66. At the beginning of the 21st century the federal circuit courts were divided on more than a thousand issues of federal law, while the Supreme Court reviewed far less than one percent of their decisions. Purcell, *supra* note 15, at 132. *Compare, e.g.*, *In re* Nassau County Strip Search Cases, 461 F.3d 219 (2d Cir. 2006) with Castano v. The American Tobacco Co., 84 F.3d 734 (5th Cir. 1996) (applying substantially different interpretations of Rule 23, Fed. R. Civ. P.). In the federal system "so few court of appeals decisions are reviewed by the Supreme Court (currently less than 1 percent) that the threat of reversal cannot be much of a constraint…" Posner, *supra* note 36, at 143. See Doni Gewirtzman, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System*, 61 Am. U. L. Rev. 457 (2012).

67. "The higher levels of the judiciary, culminating in the Supreme Court, are where a great deal of law is made, to be administered (albeit with imperfect fidelity) in mostly legalist fashion by the lower courts." Posner, *supra* note 36, at 45. *See, e.g.*, Frank Cross, *Appellate Court Adherence to Precedent*, 2 J. Empirical Legal Stud. 369 (2005).

68. Andrew Rudalevige, The New Imperial Presidency: Renewing Presidential Power After Watergate (2006); James L. Sundquist, The Decline and Resurgence of Congress (1981); Arthur M. Schlesinger, Jr., The Imperial Presidency (1973). The judicial structure and evolving practices under the Foreign Intelligence Surveillance Act raise serious questions in this regard. *See, e.g.*, Charlie Savage, *Roberts's Picks Reshaping Secret Surveillance Court*, N.Y. Times, July 26, 2013, at A-1; Eric Lichtblau, *In Secret, Court Vastly Broadens Powers of N.S.A.*, N.Y. Times, July 7, 2013, at A-1.

69. The practice of judicial review, for example, has seemed paradoxical to many. *See, e.g.*, Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 Yale L. J. 153 (2002); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. Rev. 333 (1998). *See generally* Philip Hamburger, Law and Judicial Duty (2008).

a hard but invaluable lesson.[70] They teach lawyers—and all Americans—their ultimate challenge as citizens: first, that they cannot rely on institutional structures, constitutional text, or general principles to ensure the satisfactory operation of their legal and political system; and, second, that they must address their differences and make their public choices with decency, forbearance, and mutual understanding. Ultimately, legal history suggests that tolerance, basic fairness, and the willingness to compromise are essential to maintain the nation's democratic constitutionalism, while at the same time it acknowledges that compromise is an art that can be onerous, wrenching, and sometimes excruciating to practice.[71] Thus, legal history shows that the American constitutional system—however much its institutions and values may channel and guide—rests ultimately on an enduring existential challenge, and it counsels the ultimate wisdom of democratic constitutionalism: that citizens must define themselves—and then act—in ways that promote an inclusive, ordered, decent, and just governmental system that allows all to participate and all to benefit.

Such a teaching may be disappointing or disturbing, sharply doubted or flatly rejected. It surely fails to provide any specific normative direction and equally surely fails to resolve any particular legal controversy. Most unnerving, it casts off all assurances, certainties, and guarantees.[72] It is, nonetheless, essential for understanding and maintaining the nation's "rules of law" and its democratic constitutionalism. The teaching fully, if sadly, confirms the lesson that both Madison and Hamilton drew from the founding, the painful recognition that making constitutional self-government work successfully is truly an "arduous" enterprise.[73]

### *C. The Paradox of Normativity*

The third paradox is that court-centered legal history, though claiming no capacity to justify normative rules and doctrines, can nonetheless aid normative

70. One scholar has drawn a similar lesson from the history of the relationship between democratic theory and scientific inquiry. The significance of science for democratic government is a matter of interpretation and "its present political impact remains up to us." Andrew Jewett, Science, Democracy, and the American University: From the Civil War to the Cold War 374 (2012).

71. On the ambiguities and complexities of compromise in American constitutionalism, *see, e.g.*, Cover, *supra* note 55; Lichtblau, *supra* note 69; *Compromise and Constitutionalism: A Symposium Based on Sanford Levinson's 2010 Brandeis Lecture*, 38 Pepp. L. Rev. 813 (2011).

72. Some may believe that these conclusions show that this type of court-centered legal history is solely destructive and ultimately nihilistic. Acceptance of naive and unchastened ideals of constitutionalism and a "rule of law," however, masks the truth and conflicts with the most basic principles of open and reasoned democracy. In the long run it simply saps the vitality of a just and intelligent constitutionalism.

73. The Federalist No. 37, at 228 (Madison) (Edward Mead Earle ed., 1937), (speaking of resolving problems of constitutional federalism); No. 85, at 574 (Hamilton) (speaking of the drafting and ratification of the Constitution).

reasoning in numerous ways.[74] It highlights the importance of changing ideas about the nature and limitations of the judicial role, illuminates the significance of shifts in the allocation of jurisdiction among various decision-making institutions, and identifies the social underpinnings and practical operations of the law's rules and doctrines.[75] It deepens our understanding of what courts and judges can wisely and effectively do in addressing a wide range of diverse issues in an even wider range of social contexts.[76] It helps clear the ground for sound normative judgments by penetrating through abstractions and identifying the social conditions and anticipated consequences that informed judicial decisions. It unearths and offers lessons from a nearly infinite number of prior cases that constitute, in effect, social experiments in which courts sought to resolve practical problems, at least for a time, by articulating seemingly reasonable rules and applying them logically to particular sets of facts.[77] Only when we understand all of the relevant factors in a case and all the consequences that followed its resolution can we soundly determine its relative wisdom in the circumstances of a particular dispute or its desirability as a precedent to be applied to new and contemporary sets of facts.

Further, court-centered legal history highlights an often unrecognized practical danger that lurks in the law's formal reasoning and its method of purifying cases and doctrines by stripping them of their historical contexts. On one hand, the law's purifying method is essential for the development of a rational and ordered system of law based on known precedents and rules. On the other hand, that purifying process can make those rules and precedents so general and abstract that over time they become ever more vulnerable to reinterpretation, redefinition, and manipulation.[78] Whether courts intended changes or simply failed to recognize the changes their decisions entailed, they frequently decided cases and articulated doctrines in ways that altered the

74. Most thoughtful biographies of Supreme Court Justices teach the complexities of constitutional issues, the often subtle role of personal values, and the ultimate importance of wise practical judgment. *See, e.g.*, Melvin I. Urofsky, Louis D. Brandeis: A Life (2009); John C. Jeffries, Jr., Justice Lewis F. Powell, Jr.: A Biography (2001); Newmyer, *supra* note 37; Kaufman, Cardozo, *supra* note 6; Roger K. Newman, Hugo Black: A Biography (1994); G. Edward White, The American Judicial Tradition: Profiles of Leading American Judges (1976); Alpheus Thomas Mason, Harlan Fiske Stone: Pillar of the Law (1946).

75. *See, e.g.*, Alfred S. Konefsky, *Simon Greenleaf*, B*oston Elites, and the Social Meaning and Construction of the Charles River Bridge Case*, in Transformations, *supra* note 55, at 165-95.

76. *See, e.g.*, Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality (2004); Richard Kluger, Simple Justice: The History of *Brown v. Board of Education* and Black America's Struggle for Equality (1977).

77. Consider, for example, the disruptive and ultimately unsuccessful efforts of the courts to control labor activities by issuing injunctions. *See* William E. Forbath, Law and the Shaping of the American Labor Movement (1991).

78. *See, e.g.*, Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 Stan. L. Rev. 1111 (1997).

practical significance of many legal rules and placed the law in service to new and different social purposes.[79] Thus, the law's purifying method of securing coherence and stability sometimes invited interpretative conflict, enabled doctrinal change, and obscured new and sometimes radical changes in the law's social consequences. Legal history illuminates that process and opens those changes to closer and more informed professional and public scrutiny.

By recognizing society's infinitely varied complexities, moreover, legal history uncovers surprising developments and connections. It can reveal hidden biases—submerged assumptions about such human characteristics as race, class, age, gender, ethnicity, and sexual orientation—that have been embedded in legal concepts and categories.[80] It can show not only how legal rules and doctrines changed over the years but also the practical impact of those changes: first, the extent to which doctrinal changes altered—or failed to alter—relevant social practices, patterns, and values; and, second, the extent to which changed social conditions in turn altered the practical consequences that flowed or were expected to flow from those doctrinal changes.[81] Indeed,

79. *E.g.*, Ian R. Macneil, American Arbitration Law: Reformation, Nationalization, Internationalization (1992) (Supreme Court decisions between 1967 and 1991 "constitute a transformation of the [meaning of the United States Arbitration Act] worthy of the best of medieval alchemists," at 148, and the doctrinal result was "a product of the dynamics of the legal system rather than of conscious judicial legislation," at 173).

80. *E.g.*, Peter Charles Hoffer, Nation of Laws: America's Imperfect Pursuit of Justice (2010); Ariela J. Gross, What Blood Won't Tell: A History of Race on Trial in America (2008); Joana Schoen, Choice and Coercion: Birth Control, Sterilization, and Abortion in Public Health and Welfare (2005); Martha Gardner, The Qualities of a Citizen: Women, Immigration, and Citizenship, 1870-1965 (2005); Stephanie Coontz, Marriage: A History (2005); Alice Kessler-Harris, In Pursuit of Equity: Women, Men, and the Quest for Economic Citizenship in 20th-Century America (2001); Hendrik Hartog, Man & Wife in America: A History (2000); Nancy Isenberg, Sex and Citizenship in Antebellum America (1998); Linda K. Kerber, No Constitutional Right to be Ladies: Women and the Obligations of Citizenship (1998); Amy Dru Stanley, From Bondage to Contract: Wage Labor, Marriage and the Market in the Age of Slave Emancipation (1998); Ian Haney Lopez, White by Law: The Legal Construction of Race (1996); Michael Grossberg, A Judgment for Solomon: The D'hautevelle Case and Legal Experience in Antebellum America (1996); George Chauncey, Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940 (1995); Peter W. Bardaglio, Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South (1995); Richard H. Chused, Private Acts in Public Places: A Social History of Divorce in the Formative Era of American Family Law (1994); Christopher Tomlins, Law, Labor, and Ideology in the Early American Republic (1993); N. E.H. Hull, Female Felons (1987); Marylynn Salmon, Women and the Law of Property in Early America (1986); Michael Grossberg, Governing the Hearth: Law and the Family in Nineteenth-Century America (1985); James B. Atleson, Values and Assumptions in American Labor Law (1983).

81. *E.g.*, Pamela Brandwein, Rethinking the Judicial Settlement of Reconstruction (2011); Risa L. Goluboff, The Lost Promise of Civil Rights (2007) There is a massive literature exploring the social "impact" of judicial decisions. *E.g.*, Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? (1991); Stephen L. Wasby, The Impact of the United States Supreme Court: Some Perspectives (1970). Many studies also examine the extent to which lower courts follow and implement the rules

legal history can show how rules and doctrines sometimes brought practical results that were entirely unexpected or even contrary to the law's formal goals.[82]

Finally, court-centered legal history calls attention to a major—and usually unmentioned or flatly denied—challenge that the law's normative principles confront, the fact that the social characteristics of parties often influence or even determine the way that the law resolves disputes. Courts seldom discuss such characteristics because they properly have no bearing on the way judges should apply the law. Yet, as every good lawyer knows, the nature and characteristics of the parties in any dispute can be of immense and often decisive significance. The parties' social characteristics can determine whether or not an action is even brought [83] and, if it is, whether the party is represented by counsel, what other parties are joined, where the action is filed, how it is litigated, whether it is settled and if so on what terms, and sometimes—if it ends in a judicial judgment—which party wins.[84] In spite of the law's ideal of "blind" justice, the

laid down by higher courts. J.W. Peltason, Fifty-Eight Lonely Men: Southern Federal Judges and School Desegregation (1961); Diana Kapiszewski and Matthew M. Taylor, *Compliance: Conceptualizing, Measuring, and Explaining Adherence to Judicial Rulings*, 38 Law & Soc. Inquiry 803 (2013).

82. Catherine R. Albiston, Institutional Inequality and the Mobilization of the Family and Medical Leave Act: Rights on Leave (2010); Gordon, *supra* note 53; Ira Katznelson, When Affirmative Action was White (2005); Anna-Maria Marshall, Confronting Sexual Harassment: The Law and Politics of Everyday Life (2005); William E. Nelson, The Legalist Reformation: Law, Politics, and Ideology in New York, 1920-1980 (2001); Lucy Salyer, Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law (1995); Vivien Hart, Bound by Our Constitution: Women, Workers, and the Minimum Wage (1994); Martha Davis, Brutal Need: Lawyers and the Welfare Rights Movement, 1960-1973 (1993); Edward A. Purcell, Jr., Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870-1958 Ch. 4 (1992); Macneil, *supra* note 80; John D'Emilio, Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970 (1983); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 Cal. L. Rev. 1323 (2006); Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 Yale L. J. 2117 (1996).

83. The overwhelming majority of injured individuals, for example, never take their claims to court. *E.g.*, Frank A. Sloan et al. Suing for Medical Malpractice (1993); David M. Engel, *Perception and Decision at the Threshold of Tort Law: Explaining the Infrequency of Claims*, 62 DePaul L. Rev. 293 (2013); William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 Law & Soc'y Rev. 631 (1980-81).

84. *See, e.g.*, Mark Peffley & Jon Hurwitz, Justice in America: The Separate Realities of Blacks and Whites (2010); David M. Engel & Frank W. Munger, Rights of Inclusion: Law and Identity in the Life Stories of Americans with Disabilities, esp. 245-49 (2003); Kristin Bumiller, The Civil Rights Society: The Social Construction of Victims (1988); Ellen Berrey et al., *Situated Justice: A Contextual Analysis of Fairness and Inequality in Employment Discrimination Litigation*, 46 Law & Soc'y Rev. 1 (2012); Rachel Kahn Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 Law & Soc'y Rev. 991 (2011); Anna-Maria Marshall, *Idle Rights: Employees' Rights Consciousness and the Construction of Sexual Harassment Policies,* 39 Law & Soc'y Rev. 83 (2005); Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. Contemp. Legal Issues 701 (2001); Carol Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results*

social character of the parties frequently determines the resolution of disputes. Legal history illuminates and documents that troubling fact, and—under the law's own proclaimed norms—demands a remedy.

Thus, court-centered legal history provides bases for better evaluating the wisdom of the law's rules, the quality of its judicial decisions, and the likely practical significance of proposed legal reforms. In spite of its non-normative nature, it can serve as an invaluable means of testing the law's relative successes and failures in achieving its proclaimed goals and honoring its heralded ideals. Nourishing critical inquiries into the law's past and present operations, it functions as a gadfly to the law's conscience, identifying its shortcomings and inspiring its improvement. Its comprehensive examination of social and political contexts, moreover, is particularly suited to the norms of constitutional democracies with their commitment to the values of an informed citizenry and the need for transparency in lawmaking processes. It is thus not only useful but essential for practicing attorneys who seek to fulfill their professional obligations to improve the law and the legal system.

### *D. The Paradox of Subjectivity*

The fourth paradox is that court-centered legal history, by illuminating the subjectivity inherent in the judicial process, may help make that process relatively less subjective and, hence, more faithful to the law's formal principles, purposes, and values. Further, by identifying areas of broad judicial discretion and spotlighting the implicit value choices that animated judges and courts, it may also help make judicial decisionmaking more transparent and less likely to be covertly guided by subjective values.

Court-centered legal history shows that judges possess a significant range of interpretive discretion, especially in construing legal authorities that are vague, incomplete, or conflicting. It is precisely in exercising such discretion—often in highly controversial and especially important cases—where the influence of personal values may prove most compelling in shaping judicial reasoning yet least apparent to judicial introspection. By highlighting the role of such personal values in decisionmaking, legal history can serve an enlightening prophylactic function.[85]

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*of a Randomized Experiment*, 35 Law & Soc. Rev. 419 (2001); Catherine R. Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, 33 Law & Soc'y Rev. 869 (1999); Cheryl Harris, Finding Sojourner's Truth: Race, Gender and the Institution of Property, 18 Cardozo L. Rev. 309 (1996); Virginia Wei, *Asian Women and Employment Discrimination: Using Intersectionality Theory to Address Title VII Claims Based on Combined Factors of Race, Gender and National Origin*, 37 B.C. L. Rev. 771 (1996); Edward A. Purcell, Jr., *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court*, 40 U.C.L.A. L. Rev. 423, 440-59 (1992); Samuel R. Gross, *Expert Evidence*, 1991 Wis. L. Rev. 1113, 1119-20.

85. Statistical studies of lower federal courts show that the ideology and personal values of judges seem to influence cases only sometimes and that their impact is varied. *See, e.g.*, Denise M. Keele et al., *An Analysis of Ideological Effects in Published Versus Unpublished Opinions*, 6 J. Empirical Legal Stud. 213 (2009) (ideological effects notable in courts of appeals opinions but not in district court opinions); Max M. Schanzenbach & Emerson H. Tiller, *Reviewing*

Consider how legal history's contextual approach illuminates the salience of the conflicting principles presented to the Court in *Shelby County v. Holder,*[86] a constitutional challenge to the Voting Rights Act of 1965.[87] The act was a landmark of the Civil Rights Movement that helped ensure that minorities and other disadvantaged groups were finally able to vote and then able to continue to vote. The groups that benefited from the act's protections tended to favor Democratic candidates, and Republicans in a number of states began working to cement their party in power by seeking to enact a variety of seemingly neutral electoral devices that would, in practice, disproportionally discourage Democratic voters or effectively deny them access to the polls.[88] These were precisely the kinds of laws that the Voting Rights Act was designed to prevent. When Republican-controlled Shelby County in Alabama—a state with a long history of racial discrimination—challenged the act, the paramount practical significance of its action was apparent to all.[89] Upholding the Act would deter, limit, or defeat many Republican voter suppression efforts; voiding the Act

*the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform*, 75 U. Chi. L. Rev. 715, 734 (2008) (ideological effects in criminal cases).

86. 133 S. Ct. 2612 (2013).

87. For the history of the act and its historical and contemporary importance, *see* Gary May, Bending Toward Justice: The Voting Rights Act and the Transformation of American Democracy (2013); Tova Andrea Wang, The Politics of Voter Suppression: Defending and Expanding Americans' Right to Vote (2012).

88. The Republican rationale is that they are trying to prevent voter fraud, an alleged problem for which there is almost no evidence. Before the 2012 election, for example, Florida's Republican governor undertook a campaign purportedly directed at voter fraud. He identified by name 182,000 possible non-citizen voters who should be struck from the voting rolls. Subsequent investigations forced him to drop almost 180,000 of those names, cutting the list to 2,600, only .014 percent of the total on his initial list. Then, further investigation showed that most of those remaining were also citizens. Ultimately, the state identified only 198 possible non-citizen voters, of whom fewer than 40 had actually voted illegally, an infinitesimal .0002 percent of those originally named. Lizette Alvarez, *Ruling Revives Florida Efforts to Police Voters*, N.Y. Times, Aug. 8, 2013, at A-14. Similarly, attempting to support a law requiring a photo ID to vote, Indiana could produce evidence of only one case of attempted fraudulent voting, an attempt that had been prevented without the photo ID law. Further, it could produce evidence of only nine suspected attempts—not one of which occurred in Indiana—out of 400 million votes cast across the country in general elections since 2000. Justin Levitt, Analysis of Alleged Voter Fraud in Briefs Supporting Crawford Respondents (Brennan Center for Justice, New York, 2007) 1. For a careful examination of the issue of "voter fraud," *see* Justin Levitt, The Truth About Voter Fraud (Brennan Center for Justice, New York, 2007). For repeated Republican efforts to harass black elected officials from the adoption of the act to the first decade of the 21st century, see George Derek Musgrove, Rumor, Repression & Racial Politics: How the Harassment of Black Elected Officials Shaped Post-Civil Rights America (2012).

89. Luke Johnson, *Mike Turzai, Pennsylvania GOP House Majority Leader: Voter ID Will Allow Mitt Romney to Win State*, Huffington Post (June 25, 2012, 5:31 PM), http://www.huffingtonpost.com/2012/06/25/mike-turzai-voter-id_n_1625646.html. *See, e.g.*, Wendy Weiser & Diana Kasdan, Voting Law Changes: Election Update (Brennan Center for Justice, New York, 2012); Wendy R. Weiser & Lawrence Norden, Voting Law Changes in 2012 (Brennan Center for Justice, New York, 2011); May, *supra* note 87, at 241-54.

would open the door to those efforts and encourage similar tactics in other Republican-controlled states.[90]

In voiding the Act, the Court's five conservative Justices made a free and decisive choice between two constitutional principles that the social and political context placed in de facto conflict, either of which could be used to "logically" justify a decision in the case.[91] They selected the principle capable of voiding the Act, the principle that states are "equal" and should be treated equally.[92] They rejected the principle that would uphold the Act, the principle that all citizens have a fundamental right to vote and that government should protect rather than burden or deny that right. In an imaginary world without social context or consequence—a world incapable of producing legal history—the decision was "logical" and "principled." In the real world of early 21st century America—in the world where legal history is made—the decision was a device that promised to open the floodgates for Republican voter suppression laws and serve as a potentially powerful tool of party entrenchment. Neither

90. A month after the Court's decision in Shelby County, *The New York Times* reported that "State officials across the South are aggressively moving ahead with new laws requiring voters to show photo identification at the polls after the Supreme Court decision striking down a portion of the Voting Rights Act." It continued: "The Republicans who control state legislatures throughout the region say such laws are needed to prevent voter fraud. But such fraud is extremely rare, and Democrats are concerned that the proposed changes will make it harder for many poor voters and members of minorities—who tend to vote Democratic—to cast their ballots in states that once discriminated against black voters with poll taxes and literacy tests." Michael Cooper, *After Ruling, States Rush to Enact Voting Laws*, N.Y. Times, July 6, 2013, at A-9. By March of 2014 nine states had passed new laws adopting a variety of techniques to make it more difficult to vote. Steven Yaccino and Lizette Alvarez, *New G.O.P. Bid To Limit Voting in Swing States*, N.Y. Times, March 30, 2014, at A-1, 16. *See* Trip Gabriel, *Pennsylvania Defends Law on ID for Voters*, N.Y. Times, July 16, 2013, at A-10; Adam Liptak, *U.S. Asks Court to Limit Texas On Ballot Rules*, N.Y. Times, July 26, 2013, at A-1. That Republicans intend such laws to limit Democratic voter turnout seems confirmed by their parallel efforts to weaken Democratic voting strength by methodical gerrymandering. After their victories in the 2010 election, Republican-controlled state legislatures carefully redrew state electoral districts to ensure maximum possible control of the U.S. House of Representatives. They were quite successful. "Pennsylvania is an apt example. In 2012, Obama carried the state, and the Democratic candidates for the state's eighteen House seats got a de facto majority—50.3 percent. Yet despite that margin, they secured only five seats to Republicans' thirteen." Andrew Hacker, 2014: *Another Democratic Debacle?* 61 N.Y. Rev. Books 32, 33 (Jan. 9, 2014). Similarly, in 2012 Barack Obama won Ohio with 51 percent of the vote but gerrymandering gave the Republicans 75 percent of the state's delegation in the House. Elizabeth Drew, *The Stranglehold on Our Politics*, 60 N.Y. Rev. Books 61 (Sept. 26, 2013). *See* Michael Barone, Chuck McCutcheon et al., The Almanac of American Politics 2014 (2014).

91. For the influence of personal factors on the contemporary Court, *see* Marcia Coyle, The Roberts Court: The Struggle for the Constitution (2013); Jan Crawford Greenburg, Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court (2007); and Jeffrey Toobin, The Nine: Inside the Secret World of the Supreme Court (2007).

92. Shelby County v. Holder, 133 S. Ct. 2612, 2622-24 (2013).

"logic" nor "principle" required the majority's choice.[93] As Cardozo so incisively pointed out, in judicial decision-making the decisive issue is not the quality of the logic set forth but "why and how the choice was made between one logic and another."[94] By showing the ways in which subjective choices

93. Indeed, to even make the principle of state equality "logically applicable" in the first place, the majority had to reinterpret it and expand its reach substantially. The majority stretched the principle from one that covered only "*the terms upon which States are admitted to the Union*" to one that reached the far different issue of the constitutional power of Congress to create "remedies for local evils which have subsequently appeared" in the states. Shelby County, 133 S.C. at 2648 (Ginsburg, J., dissenting, citing *South Carolina v. Katzenbach*, 383 U.S. 301, 328-29 (1966) (emphasis added in *Shelby County*).

94. Cardozo, *supra* note 32, at 41. The dismissive attitude of the conservative Justices toward the fundamental right to vote in *Shelby County* stands in stark contrast to the Court's earlier commitment to the principle that the right to vote is "fundamental" and that devices possibly impairing it are consequently subject to strict scrutiny. Harper v. Virginia Board of Elections, 383 U.S. 663, 670 (1966). That dismissive attitude stands in even starker contrast to the fervently solicitous attitude toward voting rights that three of the same Justices displayed in *Bush v. Gore*, 531 U.S. 98 (2000).

It is hard to avoid the conclusion that *Shelby County*, like the Court's decisions in the late-19th-century sanctioning the post-Reconstruction Settlement, was based ultimately on the majority's substantive political and social values. Indeed, at the oral argument Justice Scalia echoed Justice Joseph Bradley's sentiments more than a century earlier in the *Civil Rights Cases*, 109 U.S. 3 (1883). There, Bradley had declared:

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he take the rank of a mere citizen, and ceases to be the special favorite of the law, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.

109 U.S. at 25.

Adopting a similar view, Justice Scalia charged that the congressional renewal of the Voting Rights Act was "attributable to a phenomenon that is called perpetuation of racial entitlement." Transcript of Oral Argument at 47, Shelby County v. Holder (Feb. 27, 2013).

Justice Scalia's willingness to invalidate the Voting Rights Act in Shelby County contrasts with his unwillingness the very next day to invalidate a statute bearing very different political and social significance, the Defense of Marriage Act. There, in *United States v. Windsor*, 133 S. Ct. 2675 (2013), he dissented and declared on highly technical and questionable grounds that the Court had no authority to rule. *Id.* at 2697. In contrast, in Shelby County he joined the five-Justice majority in ignoring an analogous technical point that would have prevented the Court from ruling as it did. *Shelby County*, 133 S. Ct. at 2644-48 (Ginsburg, J., dissenting, pointing out that the Court would normally not hear such a "facial" challenge to a statute brought by a party in the position of the Georgia county). More telling was his heated rhetoric in *Windsor*. Rejecting invalidation there, he castigated the majority and insisted that the case was "about the power of our people to govern themselves." The Court's decision, he charged, sprang from the "diseased root" of the majority's "exalted conception of the role of this institution in America." *Windsor*, 133 S. Ct. at 2698. In contrast, supporting invalidation in *Shelby County*, he was prepared to dismiss the fact that the Voting Rights Act had been previously upheld by the Court, repeatedly re-enacted by Congress, and most recently extended once again by overwhelming majorities in both the House and the Senate. To justify that dismissal, he was prepared to denigrate the popular political considerations that he saw driving congressional passage of the act,

have shaped the law and the judicial process, court-centered legal history can more fully sensitize the public—and perhaps the judges themselves—to the role that personal views and values play in judicial decision-making.[95] Greater public awareness may work to restrain judges in giving way to such subjective influences, and greater judicial awareness may nudge some judges—those without dominating ideological goals—toward greater self-scrutiny and actual self-restraint.[96] Such greater awareness will focus attention on the driving social reasons judges chose one "logic" rather than another. That, in turn, may focus attention more closely on the anticipated practical consequences of the choices they make. As Judge Richard A. Posner suggests, in cases involving substantial judicial discretion, it would influence "judicial decisions for the good" if advocates were encouraged to emphasize "the practical stakes in their cases and how the stakes would be affected by the court's deciding those cases one way rather than another."[97] Together, greater public and judicial sensitivity to historical contexts and consequences could reduce the likelihood that judicial decision-making would rest comfortably on undisclosed personal considerations and unacknowledged social consequences.

Whether and to what extent legal history can actually contribute significantly to such a goal is uncertain and perhaps doubtful.[98] Regardless

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Transcript of Oral Argument at 16-17, 46-47, Shelby County v. Holder (Feb. 27, 2013) and to ignore the central fact that the act was designed to protect the right of citizens to vote and thereby to "govern themselves." *See* John Paul Stevens, *The Court & the Right to Vote: A Dissent*, 60 N. Y. Rev. Books 37, 39 (August 15, 2013).

95. Legal history tends to show the influence of personal factors in particular cases and for individual judges, while empirical and statistical studies by social scientists and other students of judicial behavior show the influence of those factors more generally and comprehensively. *See, e.g.*, Lee Epstein & Jack Knight, The Choices Justices Make (1998); H. W. Perry, Jr., Deciding to Decide: Agenda Setting in the United States Supreme Court (1994); Rob Robinson, *Executive Branch Socialization and Deference on the U.S. Supreme Court*, 46 Law & Soc'y Rev. 889 (2012); William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study*, 1 J. Legal Analysis 775 (2009); and sources cited in notes 54, 86, 92 *supra*.

96. While court-centered legal history requires a "double consciousness," *see supra* text accompanying note 33, wise and informed judicial decision-making contains its own similar requirement. "Either one recognizes one's moral impulses and their bearing upon one's conceptions, or one does not. In neither case do they disappear." Judith N. Shklar, Legalism 224 (1964). Many, perhaps most, judges are well aware of those impulses. *See generally* David M. O'Brien, ed., Judges on Judging: Views from the Bench; Charles E. Clark & David M. Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 Yale L. J. 255 (1961).

97. Posner, *supra* note 36, at 119. Posner, however, doubts that judges could accept such an open recognition of the personal views that influence their decision-making. *Id*. at 289. For a recent critique of Posner's work and a defense of the values of "formalism," *see* Jeremy Waldron, *Unfettered Judge Posner*, 61 N.Y. Rev. Books 34 (March 20, 2014) (reviewing Richard A. Posner, Reflections on Judging (2013).

98. "[O]ne cannot preach introspection with much success. Nor is introspection the same thing as self-knowledge. We use introspection to acquit ourselves of accusations of bias, while using realistic notions of human behavior to identify bias in others." Posner, *supra* note 36,

of its actual day-to-day impact, however, legal history remains for judges a source of wise counsel and a salubrious prod to greater self-awareness, just as it remains for both lawyers and the general public a useful tool for evaluating judicial behavior and understanding the operation of the nation's legal system.[99] Few contributions are more important for the informed operation of a constitutional democracy, and few understandings more important for a full and sound legal education.

## IV. Conclusion

Understanding the paradoxical nature of court-centered legal history leads to a deeper appreciation of its special educational values. Most basically, it illuminates the real-world workings of the law: its contingency and complexity, its malleable and evolving content, its interconnections with the world around it, and its ultimate roots in human values and choices. It sharpens our insights into legal methods, judicial processes, and the varieties of "rules of law." Further, it may contribute to sounder and less personal judicial decision-making and inspire more informed public evaluation of judicial actions and their consequences. To those who would pay close heed, moreover, it suggests both the need for situation-specific prudence in addressing legal problems and the weighty public responsibilities that fall on citizens in the United States and other constitutional democracies.

For lawyers in particular, court-centered legal history teaches how to contribute wisely and effectively to the successful operation of democratic constitutionalism.[100] All lawyers, no matter the nature of their widely varied practices, act in light of culturally based perspectives on life, law, and their chosen profession, and those perspectives influence their work and seep—often imperceptibly—into their professional behavior. By illuminating those culturally based perspectives, court-centered legal history can add depth and insight to the work of lawyers in any kind of practice. Moreover, because all lawyers have an ethical duty to support and improve the law, court-centered legal history can inform their understanding of those obligations and help channel their efforts to meet them. Equally important, because lawyers are not merely professionals but also citizens who act in a wide range of public capacities and contexts, those broader perspectives can aid them in those varied roles.[101] Indeed, all citizens acting in the public sphere could profit

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at 121.

99. "A residuum will be left [in judicial decision-making] where the personality of the judge, his taste, his training or his bent of mind, may prove the controlling factor." Cardozo, *supra* note 32, at 53.

100. *See, e.g.*, Rebecca Roiphe, *A History of Professionalism: Lawyers' Independence in Context* (draft article) (on file with author).

101. Bar associations, for example, are frequently called on to examine and evaluate proposed legislation. To intelligently accomplish that task, lawyers must understand not only how the formal law stands at the moment but why it developed as it did, how it currently functions, and what impact proposed changes would have on its future operations and consequences.

from legal history's "double consciousness," its informed understanding that welcomes the most penetrating critiques of the law's shortcomings and failures while nourishing a deep appreciation of the law's noble ideals and incalculable values. Thus, court-centered legal history serves the broadest and most fundamental purposes of a true *education* in the law.

Further, legal history also serves more specific practical purposes. An understanding of the complex, shifting, and contingent interactions between "legal" and "non-legal" forces is a *sine qua non* for truly incisive legal analysis and ultimately for effective legal action. Understanding the relationship between enveloping social context, the practical significance of legal disputes, the nature and positions of adverse parties, the discretion available to both advocates and judges in interpreting potentially applicable legal rules, and the particular characteristics of relevant courts, judges, and parties is acutely valuable in designing legal tactics and crafting winning arguments.[102] Indeed, such an understanding highlights the vast difference between knowing how to construct a proper legal argument and recognizing—in the specific circumstances of a particular case—the actual *weight and bite* of potentially applicable legal authorities. Such an understanding also highlights the equally vast and particularly critical difference between, on the one hand, knowing how to construct a proper legal argument and, on the other hand, knowing how to actually persuade a court to adopt that argument. Thus, a deeply informed understanding of legal processes and judicial decision-making is essential for lawyers to master their professional roles and perform high-quality legal work for the diverse kinds of clients they represent.

Finally, and most immediately relevant for the present and future, court-centered legal history is essential for those who would successfully adapt to the changing demands of an ever more rapidly changing world.[103] In "illuminating the past," the study of history "illuminates the present," Cardozo noted, "and in illuminating the present, illuminates the future."[104] Indeed, the four paradoxes of legal history point to a fifth, the overarching paradox that confronts all American lawyers today: that in the contemporary world of the early 21st century the study of the law's past has become more valuable than ever before. Precisely because the contemporary world is changing so rapidly and so radically, it is essential that lawyers and judges understand the ineluctable processes of historical change and the ways in which those processes challenge and shape the legal system's doctrines, practices, and institutions.

Newly minted lawyers entering practice during the coming decades will witness over the course of their careers sweeping and sometimes astonishing changes in almost every aspect of legal practice. To be adequately prepared

102. Early in his career Hurst stressed history's usefulness for legal practice in informing lawyers of "what motives may move judges." William J. Novak, *Law, Capitalism, and the Liberal State: The Historical Sociology of James Willard Hurst*, 18 Law & Hist. Rev. 97, 103 (2000).

103. *See, e.g.*, Alfred S. Konefsky & Barry Sullivan, *There's More to the Law than "Practice-Ready,"* Chron. Higher Ed. Oct. 28, 2011, at A30.

104. Cardozo, *supra* note 32, at 53.

for their profession they must know far more than specific techniques and currently prevailing forms, rules, and practices. They must also understand how and why the world and its legal systems interact and change. Thus, in the years and decades ahead, an understanding of the dynamics of social change, the impact of evolving social contexts on formal legal processes, and the salience of shifting and contingent institutional interrelationships in the legal system will prove of inestimable practical value. In those coming years and decades both lawyers and judges will be forced repeatedly to grapple with—and make critical choices about—a multitude of novel, complex, and wholly unanticipated challenges that will arise in that unknowable but surely dynamic and different future.