A Response: The Impact of War on Justice in the History of American Law

William E. Nelson
A RESPONSE: THE IMPACT OF WAR ON JUSTICE IN THE HISTORY OF AMERICAN LAW

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The outstanding papers in this symposium have raised a number of interesting questions about my work and have offered me an unusual opportunity, for which I am most grateful, to synthesize what I hope I have accomplished over an almost five-decade-long academic career. But I must be clear at the outset: I now see a conceptual unity in my work that I did not see when I began writing or during the course of my writing over the years.

I think that my lack of awareness about where my scholarship would lead is at least partly inherent in the nature of the discipline of history. Historians write about what actually happened in the past. As a result, until they have completed researching their archival sources, they can only guess at the story they will tell. Moreover, if historians pay attention to their sources, inevitably those sources will modify the story they initially imagined. If an historian writes, as I have done, on widely different time periods, the inability to conceptualize where his or her scholarship will lead will be exacerbated.

Fifty years ago, I knew that I wanted to be a professor at a university. I also knew, upon completing my first student law review note, that I had learned and would learn nothing in law school about how to do scholarship. It seemed clear that I would need to attend graduate school in a subject I enjoyed—history—to learn how to be a scholar.

In the first few weeks of graduate school, my mentor, Bernard Bailyn, taught me a lesson that has influenced my work ever since—that an easy and often fruitful way of doing history is to trace and explain change over time. Bailyn also directed me to get downtown to a treasure trove of court records that no historian had ever read and to see what I could find in them that was interesting.¹ I have been doing both ever since in an effort, first and foremost, to write quality history.

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¹ Specifically, Bailyn told me to go downtown and start reading the court records until I saw something significant changing and then to explain the change.
While I have been writing history, I also have been teaching law. Like many of my colleagues in law teaching during the years I have been a professor, I have sensed that the American legal system reached its apogee sometime in the past (we professors disagree sharply on when that was) and that the direction of legal change has been downhill ever since. For me, American law reached its highest point during the decade of the 1960s, with the Warren Court’s criminal procedure decisions, the expansion of tort liability, the movement for consumer protection, and the 1966 amendments to the Federal Rules of Civil Procedure, among other things. After the 1960s, the value structure underlying these developments fragmented, and law began to evolve in divergent directions, many of them inconsistent with my views of social justice.

I report my sense of the law’s fragmentation and decline because it has, I am now convinced, unconsciously affected my scholarship. It has shaped the topics about which I have chosen to write as well as the manner in which I have written about them. My plan in this essay is to bring to the surface the reasons for my choice of topics and my unconscious assumptions about fragmentation and decline; surfacing my assumptions and reasons will, I believe, assist me in delineating the conceptual unity that I now see in my work.

I. THE HISTORICAL RELATIONSHIP BETWEEN WAR AND LAW

Let me turn first to the historian’s task of tracing change over time. In my first project, the dissertation that eventually became *Americanization of the Common Law* and in two books that are spinoffs from it, *Dispute and Conflict Resolution in Plymouth County, Massachusetts*, and my little book on *Marbury v. Madison*, I made a calculated guess that American law in general, and the law of Massachusetts in particular, must have changed dramatically between the mid-eighteenth century and 1830, the year in which Leonard Levy’s biography of Lemuel Shaw began its intensive analysis of the Commonwealth’s law. As a student of Bernard Bailyn and Gordon Wood, I also hypothesized that the American Revolution and its aftermath must have had something to do with the change. As I worked through the sources and developed my synthesis, what some might call my obsession with the signifi-


cance of war as a force underlying legal change began to emerge. Surely, the main theme of Americanization—what distinguishes it from Morton J. Horwitz’s *Transformation of American Law*\(^6\) and James Willard Hurst’s *Law and the Conditions of Freedom*\(^7\)—is its implicit claim that the institutional, societal, and intellectual changes brought on by American independence had as much impact on legal change over the next half century as the urge to use law to promote prosperity and economic growth. Independence made it clear, for example, that Americans no longer needed to use the common law forms of action or maintain a religious establishment simply because the English did.

My second big hunch, which is so obvious that I am surprised that more legal historians have not written more about it, is that the Civil War led to the transformation of American constitutionalism and especially of American federalism. This hunch produced two books, *The Roots of American Bureaucracy*\(^8\) and *The Fourteenth Amendment*.\(^9\) As Sally Gordon noted many years ago when I was presenting *The Fourteenth Amendment* book to the N.Y.U. Legal History Colloquium and as Gautham Rao has ably and eloquently observed in his discussion of *Roots* in this symposium,\(^10\) the theme of the impact of war and its aftermath on the law is on the surface of both books, as of much of my other historical work.

My third big project was the legal history of twentieth-century New York, which resulted in *The Legalist Reformation*,\(^11\) my biography of Judge Weinfeld,\(^12\) and much of the contents of *Fighting for the City*.\(^13\) My reason for turning to the project, so I then thought, grew out of a legal history elective I taught to first-year students in the early 1980s. The course ended in 1860—a stopping point that left the students unhappy. They wanted a course that covered the twentieth century, but I was unable to produce that course because, as


\(^8\) William E. Nelson, *The Roots of American Bureaucracy*, 1830-1900 (1982). The core claim of this book is that the Civil War substantially reduced the ability of state governments to limit the power of any political majority that controlled both Congress and the presidency; in response, bureaucratic structures were created in Congress and the executive branch, and formalism was augmented in the judiciary, as an alternative way of limiting majoritarian political power.


of the 1980s, no one had written a comprehensive history of twentieth-century American law. There was a gap in the scholarly literature, and I embarked on my third project to fill that gap. As I examined the sources and strove to identify for myself the underlying causes of change, the elephant in the room—the Second World War—kept coming to the fore. In retrospect, I suspect it was that elephant that really had led me to write about the twentieth century.

A common pattern, of which I was unaware but which probably underlay all my writing, existed in all three of these eras of legal transformation about which I have written. War is the starting point of each. Before all three wars—the Revolutionary War, the Civil War, and World War II—Americans were sharply divided over the course the nation should take. There were potential Patriots and Loyalists before the Revolution, Unionists and Secessionists before the Civil War, and anti-fascists and isolationists before World War II. But events on each occasion propelled the nation to war, and by the time each war had ended in victory, fundamental change had occurred. Dissent had been squelched, and those who were—or were labeled as—potential enemy collaborators were driven from their homes, using whatever coercive, often unconstitutional means the circumstances appeared to require, ranging from the exile of Loyalists, to the imprisonment of Secessionists, and the internment of Japanese-Americans.

At the same time, war leaders—the names Adams, Jefferson, Lincoln, and Franklin Roosevelt immediately come to mind—and others working with them articulated ideals of democratic decision making, liberty, and equality that nearly all Americans fighting alongside them accepted, at least in theory if not in full reality, as the justification for war. The wars themselves resulted in significant expenditures of blood and treasure and continually led Americans to ask whether war was worth its costs. Lincoln’s Gettysburg Address gave the paradigmatic answer to that question in reemphasizing the worth of the Civil War’s ideals and in urging rededication to their attainment. As vast numbers of Americans did, in fact, dedicate themselves to attaining the ideals of each of the three wars, they thereby transmuted wartime ideals into part of the American creed.

War also altered the conditions under which America existed in the world community. Changed conditions raised new issues for the legal system, and the new American creed provided a reference point for resolving them. After each of the wars ended, the victors remained in positions of power and continued to use their power to incorporate their ideals gradually into domestic law, thereby bringing the reality of life in America closer to, although never entirely congruent with, the ideals of democracy, liberty, and equality. Over time—some four decades in the case of the Revolution, a single decade for
the Civil War, and some twenty five years for World War II—the victorious coalitions fragmented, efforts to incorporate wartime ideals into domestic law tapered off, and the legal system went into decline. I reported on this pattern most explicitly in the *Legalist Reformation*, although it existed in the Revolutionary and Civil War eras as well.

War remains a force stimulating legal change in my current project, *The Common Law in Colonial America*, although the patterns of legal development are somewhat different. In volume two I argued that the English Civil War and the ultimate compromise restoring Charles II to a penurious throne led to a decision by the crown to govern and control its American colonies by using law and lawyers rather than a bureaucracy that it could not afford—a decision that led to a remarkable growth of the legal profession in colonial America, gave lawyers a preeminence in America that they lacked even in England, and left the United States today as the most overly lawyered society in the world.

In volume three, by contrast, I anticipate arguing that the 1688 ascension of William III to the throne, which committed England to seventy-five years of war with France and Spain in defense of Protestantism and northern European political autonomy, functioned in England and its colonies much as the American Revolution, the American Civil War, and World War II functioned later in the United States. It led to the consolidation of power around William and Mary, Queen Anne, and later Hanoverian monarchs and coercively reduced their Jacobite rivals to political irrelevance. It also led to the articulation of why it mattered to be English and Protestant rather than French or Spanish and Roman Catholic: the English, as they saw it, enjoyed liberty and self-government, whereas the French and Spanish lived under arbitrary, hierarchical government. As this ideology of English freedom spread to England’s colonies, the ideology put an effective end to the crown’s efforts under Charles and James to control the colonies from above and allowed American law to develop in a decentralized fashion grounded on the power of local juries and an independent, local judiciary.

Finally, volume four will show how Britain’s victory in the Seven Years War led English authorities to think that they could solve problems arising from war by taxing and legislating for America, without appreciating that Americans would fight to preserve the decentralized legal system they had developed and that their fight would impede the enforcement of Parliamentary

legislation, paralyze central government, and ultimately force Britain to turn to war. American legal and political institutions remain strikingly decentralized to this day—a decentralization that continues to affect the nation’s politics profoundly. 16

I have a strong personal stake in my understanding that war and its aftermath are powerful forces underlying legal change. Although I was not fully aware of the stake until I wrote The Legalist Reformation, that stake, I suspect, led me to conceptualize the project in the fashion that I did. I was born in 1940, as the child of an ethnic mother, and grew up in the aftermath of America’s World War II rejection of Nazism and acceptance of ideals of liberty and ethnic equality. The nation’s rejection of Nazism and commitment to liberty and equality may be the most important intellectual facts of my life. I remember how I spent the summer of 1952, as a twelve-year old adolescent, reading Winston Churchill’s six-volume history of World War II. Churchill’s six volumes taught me more than sixty years ago what was at stake in World War II and how that war had transformed the world: they taught me that the war had been fought to make me and others like me full-fledged, equal members of society, while changes spawned by the war that had occurred at least in New York City’s suburbs had, in fact, produced that result. Somehow, I have always understood that my freedom to strive for a better life than the one that had been available to my ethnic mother was a legacy from those who had fought to obliterate racist Nazi beliefs.

My understanding of America’s World War II acceptance of ethnic equality and rejection of Nazi racism has always determined my own politics. I always have understood that I would be guilty of hypocrisy if I argued that I should be treated equally but failed to support claims for equal treatment on behalf of others. Deep down I feared that, if racists succeeded in denying equality to those whom I might perceive as beneath me, those same racists sooner or later would strive to deny equality to me. I appreciated, that is, the precarious nature of my equality. I knew that, if I was to enjoy equal liberty in America, every other American had to enjoy the same equal liberty with me. The alternative would be government by a privileged few, and I always grasped that I would not be one of the privileged.

16. I appreciate the suggestion of Laurie Benton and Kathryn Walker that my work on colonial British American law could be broadened to include analysis of legal development in the Dutch, French, Portuguese, and Spanish empires as well. Lauren Benton & Kathryn Walker, Law of the Empire: The Common Law in Colonial America and the Problem of Legal Diversity, 89 Chi.-Kent L. Rev. 973 (2014). I am pleased to see it considered in that broader perspective. Unfortunately, I doubt that I will have the longevity and know that I lack the skills to do any of the broader analysis myself.
II. JUDICIAL ACCEPTANCE OF THE WARTIME IDEOLOGY

For at least forty of the last fifty years, since the time I first wrote an article about how Judge Edward Weinfeld decided cases, my commitment to America’s wartime ideals of liberty and equality has led me to advocate judicial enforcement of the liberty and equality principles. A key foundation of my analysis has been to distinguish law, which elaborates those principles, from politics, which gives coercive force to the will of transient interest groups. Thus, I argued in my early article about Weinfeld that he consistently reached liberal results by applying traditional principles of law to carefully sculpted facts. In subsequent work, I wrote that Chief Justice John Marshall similarly decided cases on the basis of existing law and avoided excursions into politics and that judges, as a general matter, should decide cases on the basis of historically validated, neutral legal principles. Likewise, in my book on The Fourteenth Amendment, which is subtitled From Political Principle to Judicial Doctrine, I discussed the amendment’s drafting and ratification in a fashion that “tied . . . history” to politics, but followed up that political analysis with “a lawyerly . . . analysis of the Court’s decisions . . . disconnected from politics and history” that sought “to explain the Court on its own terms.” Most recently, I have urged that it is important “to put an end to

18. See id.
19. See NELSON, IN PURSUIT OF RIGHT AND JUSTICE, supra note 12, at 4-5, 224-225.
20. See NELSON, MARBURY V. MADISON, supra note 4, at 59-71.
22. Paul Finkelman, Original Intent and the Fourteenth Amendment: Into the Black Hole of Constitutional Law, 89 Chi.-Kent L. Rev. 1019, 1031 (2014). For two reasons, I totally reject Finkelman’s suggestion that I should have considered the Slaughterhouse Cases, 83 U.S. 36 (1873), and subsequent Supreme Court decisions from a more political perspective. The first reason is that, despite Finkelman’s lengthy argument, I remain convinced that the justices were striving to put politics aside and decide the cases on legal grounds. Like Finkelman, I do not from my presentist perspective agree with many of the results the Court reached, but my disagreement does not facilitate conscientious historical analysis of the Court’s work product nor did it lead me to speculate, as it did Finkelman, about possible political motivations on the part of the justices. I continue to take at face value Justice Joseph Bradley’s statement that in deciding cases he and the Court were “rather in the condition of seeking for truth, than of dogmatically laying down opinions” about the Fourteenth Amendment’s meaning. Joseph P. Bradley to Frederick T. Frelinghuysen, July 19, 1874, in Joseph P. Bradley Papers, New Jersey Historical Society, Newark, N.J.

The second reason is that my understanding of what it means to judge rests on faith that law can be distinguished from politics. I understand that Congress and the state legislatures had a policymaking role in framing and ratifying the Fourteenth Amendment but that the Supreme Court had a nonoriginalist legal role in subsequently interpreting it. The whole point of the book is to examine how the justices as lawyers dealt with the ambiguities that politics and policymaking had implanted in the amendment. The book offers no judgment whether they dealt with the ambiguities badly or well, but the book would be a pointless exercise if I believed the justices were simply another set of politicians revising what earlier politicians in Congress and the state legislatures had done.
political polarization on the Supreme Court and . . . return the Court to the task of enforcing a rule of generally accepted law. . . .”

I articulated my position most clearly in a 2004 article written to commemorate the fiftieth anniversary of Brown v. Board of Education—for me, the grandest moment in the history of American law. The article recognized that “legal realists have dominated the jurisprudential landscape of America since the 1930s.” Like nearly everyone else writing legal history today, I share a realist understanding that law is a product of the political, economic, and societal context in which the judges and lawyers who administer the law do their work. Law is not in its nature intrinsically autonomous and independent of its context: judges cannot derive results deductively from neutral, objective, and unchanging sources of law, but must have recourse to emerging societal values in determining the law’s meaning. The “common law,” as I have noted, always has grown and changed and must continue to grow and change “to meet the demands of society.”

But I also understand that the legal profession and the polity can for political reasons properly decide that they want their legal system to be as independent of and autonomous from politics as possible and can strive to make it more rather than less so. Indeed, The Roots of American Bureaucracy argued that the profession for good reasons made precisely that decision in the aftermath of the Civil War, and my various writings about Chief Justice Marshall and Judge Weinfeld elaborate how judges can choose to function independently of politics. I am convinced that this idea that a polity can decide for realist reasons that it wants its judicial system to be to a significant degree formalist—by which I mean that a polity can reject judicial decision making based on judges choosing between politically disputed policy perspectives and can seek instead to have judges envision themselves as resolving discrete cases by applying preexisting law to facts—is an important insight that should command significant attention, even though almost everyone today in the legal academy, on the bench, and in politics is ignoring it.

25. Id. at 798.
26. Id. at 805.
27. See NELSON, ROOTS OF AMERICAN BUREAUCRACY, supra note 8, at 82-112, 133-148.
28. See NELSON, MARBURY V. MADISON, supra note 4, at 54-71.
29. See NELSON, IN PURSUIT OF RIGHT AND JUSTICE, supra note 12, at 133-156; Nelson, Judge Weinfeld and the Adjudicatory Process, supra note 17.
Accordingly, I argued in my article on Brown\textsuperscript{30} that realism is not a single, unitary phenomenon, but at least two separate, distinctive ones—the one highly political, and the other apolitical. Realist judges can extract law not only from their personal policy preferences but from the unfolding of social change as well. In the Brown article, I drew a sharp, analytical distinction. One the one hand, a judge might see herself as an agent of society who is under a duty to make law conform to the wishes of society. If such a judge thinks of society as a train, the law will appear as the caboose at the end of the train, and the judge’s job will be to keep the caboose on the same track as the train. On the other hand, a judge might see himself as society’s commander. Looking upon society as a train, law will emerge as the engine, and the judge as the engineer who must determine the direction that the train ultimately will take.\textsuperscript{31}

I made clear my agreement with the view that judges should sit in the caboose to make sure the caboose remains on the same track as the train. In contrast, by quoting among other things the wisdom of Justice Felix Frankfurter that a judge is “not justified in writing [his] private notions of policy into the Constitution, no matter how deeply [he] may cherish them or how mischievous [he] may deem their disregard,”\textsuperscript{32} I expressed doubts about judges assuming the role of societal commander.

There are four objections to judges assuming a commanding role. First, it has been argued that judges who turn to personal policy preferences in deciding cases violate principles of separation of powers that leave issues of policy to the more democratic branches of government.\textsuperscript{33} Second, judges who adopt particular policy positions abandon their role as impartial, neutral arbiters of disputes who enter upon the decision of cases without prejudging them; the judges tend to become policy advocates instead.\textsuperscript{34} Third, although some judges who decide cases based on their personal policy views will reach progressive results that liberals will like, other judges will be reactionaries striving to impose eighteenth- or nineteenth-century values on the nation.\textsuperscript{35} Fourth, citizens who already agree with particular results will applaud opinions that announce them, but those who have different views will find opinions unpersuasive. Insofar as persuasiveness constitutes the foundation of judicial

\begin{itemize}
\item \textsuperscript{30} See Nelson, The Jurisprudence of Legal Realism, supra note 24, at 799.
\item \textsuperscript{31} Id.
\item \textsuperscript{33} See Nelson, The Jurisprudence of Legal Realism, supra note 24, at 825-26.
\item \textsuperscript{34} Federal judges, for example, take an oath to “administer justice without respect to persons, and do equal right to the poor and to the rich.” 28 U.S.C. § 453 (2012).
\end{itemize}
power, the judiciary will be weakened by what some observers will find un-
persuasive about some of its opinions.36

Not everyone, of course, will find all or any of these four concerns meri-
torious. In particular, I think that religious advocates who want to turn the
nation into a theocracy like eighteenth-century Massachusetts, theorists who
care more about economic efficiency and profit making than equality and
democratic lawmaking, and utopians who imagine that, if empowered, they
actually could create a compassionate welfare state, might reject all four.
Those who have lost all faith in the capacity of the political process to govern
also might want to transform judges into authoritative political actors rather
than mere arbiters of disputes.

But for anyone who pays heed to some or all of the objections to judicial
activism mentioned above, my historical work will point toward the conclu-
sion that judges are obligated to enforce principles of democracy, liberty, and
equality. As I now look back over my writing about the role of judges in con-
junction with my historical writing, I see connections that clarify my argu-
ment about how judges should perform their job of deciding cases.

The foundation of my argument, as already noted, is that judges should
not assume the role of directing the course of social change. They should not,
that is, strive to enact their policy preferences into law. The only policies that
judges can properly translate into law are ones that society as an entity has
already overwhelmingly adopted or is in the process of adopting. By what
means, however, can judges derive law from what society has already done or
is engaged in doing? Not from doctrines that have come down to them from
some distantly shrouded past. Nor, as I argued in my book on The Fourteenth
Amendment, can judges find law in the intentions of democratic lawmakers
who either failed to grasp future issues or papered over their differences by
delegating to future judges authority to decide the hard questions about which
the lawmakers could not agree.37 How can judges know what society wants
when that knowledge is not contained in past precedents or in the products of
democratic lawmaking?

Here I need to return to my article on Brown v. Board of Education,38
where I discussed at some length two important books that are very much in
point to my analysis—Benjamin Cardozo’s The Nature of the Judicial Pro-
cess39 and Ronald Dworkin’s Law’s Empire.40

36. See Nelson et al., The Liberal Tradition of the Supreme Court Clerkship, supra note 23, at 1804.
37. See NELSON, THE FOURTEENTH AMENDMENT, supra note 9, at 148-151.
40. RONALD DWORKIN, LAW’S EMPIRE (1986).
Cardozo viewed law as a caboose. In his view, the duty of judges was to keep law consistent with

“the mores of the community,” with its “ethics or . . . social sense of justice, whether formulated in creed or system, or immanent in the common mind.” Cardozo was clear that the “standard” for judges . . . “must be an objective one.” Judges were not “free to substitute their own ideas of reason and justice for those of the men and women whom they serve.” They were not “commissioned to set aside existing rules at pleasure in favor of any other set of rules which they may hold to be expedient or wise.” When judges were “called upon to say how far existing rules [were] to be extended or restricted,” their duty was to “let the welfare of society fix the path, its direction and its distance.”


42. Id.

43. Id. at 802.

44. Id.

45. Id.

Of course, Cardozo recognized that no guarantee existed that judges would “interpret the mores of their day more wisely and truly than other men” or otherwise get the direction of social change objectively correct.42

Dworkin agreed with Cardozo “that a judge’s task is to interpret society’s values, not to impose her own.” But he recognized “that society’s values sometimes will be ambivalent. When they are, the judge must point them in one direction rather than another in order to make them ‘the best they can be’” by taking “recourse to ‘political morality.’”43

For Dworkin, law is thus an engine directing the course of social change. Because the duty of the train’s engineer is to drive the train in accordance with political morality, which, according to Dworkin, “is objectively true and thus transcends the mere policy preferences of judges,”44 Dworkin hopes to avoid Cardozo’s concession that the direction of change in society’s values at times is unclear.

As I argued in the Brown article, however, “Dworkin’s claim of objectivity is difficult to maintain . . . in a constitutional culture that venerates political and religious equality and pluralism.”45 Jeremy Waldron has explained the difficulty as well as anyone. Waldron writes:

A confident theorist of justice [might] announce, . . . “[o]f course, there is disagreement about justice, but . . . the existence of disagreement is quite compatible with one of the contestant views being true and the others false.” He can say that, but it is hardly sufficient, particularly if it is just a prelude to his saying, “And of course the true view of justice is my view, . . .” For if he is at all self-aware, he knows very well that he will be followed, one by one, by his ideological rivals, each making a similar announcement in similarly self-assured tones. . . . [E]ven among those
who accept the proposition that some views about justice are true and others false, disagreement will persist as to which is which.46

Both Cardozo and Dworkin thus agree that judges must have recourse in their decision-making process to something outside formal legal doctrine—something they label societal mores or political morality. Both recognize that such recourse must occur pursuant to objective standards, but both Cardozo and Dworkin’s most salient critic find it difficult indeed, given the depth with which Americans typically disagree about the directions that legal change should take, to elaborate what those objective standards might be. Both also must be aware of the substantial overlap that exists between searching for society’s values and striving to determine true transcendent morality.

Important differences exist, however, between Cardozo’s approach of searching for society’s vision of political morality and Dworkin’s approach of elaborating the true transcendent nature of that morality. The means of demonstrating transcendent truth are quite different from the evidence one might offer of what a particular society at a specific point in time believed truth to be. And here is where history can help.

At most times in American history, diverse, often antagonistic groups have struggled against each other to gain control of the political process and to impose their moral vision on the nation. In the presence of conflict of this sort, Dworkin would but Cardozo would not permit judges to incorporate contested values they happen to favor into the law. Of course, judges should give effect to political judgments codified in statutes. Otherwise, in Cardozo’s view and in mine, they should apply preexisting law whenever they can and avoid deciding novel issues if possible. If doctrinal ambiguity forces them to confront the law’s conflicting, underlying values, judges should resolve the ambiguity in as minimalist a fashion as possible.

As I have pointed out in my writings about them, both Justice Byron White and Judge Edward Weinfeld routinely decided cases in this minimalist way. Weinfeld, for one, did not, in cases where competing policies or principles were at stake, rest his decision on the choice of one or another. Instead, he turned to fundamental, true and tried principles acceptable to all and then found facts that enabled him to fit the case within these principles in a just fashion. Of course, his fact-finding resulted at times in the elaboration and tweaking of these principles, but only gradually and minimally.47 White likewise was a gradualist and minimalist. In Griswold v. Connecticut,48 for example, White did not join the opinions either of Justice William O. Douglas or of

46. JEREMY WALDRON, LAW AND DISAGREEMENT 3 (1999).
47. See NELSON, IN PURSUIT OF RIGHT AND JUSTICE, supra note 12, at 139-155.
48. 381 U.S. 479 (1965).
Justice Arthur Goldberg, which attempted to create a constitutional right to contraception by proclaiming some amorphous right of privacy. For Douglas, the right of privacy emerged out of constitutional penumbras, whereas for Goldberg, it arose out of the Ninth Amendment. Nor was White prepared to join the balanced, thoughtful opinion of Justice John Marshall Harlan, who, after examining “the teachings of history” and “the basic values that underlie our society,” concluded that the Connecticut statute “violate[d] . . . values implicit in the concept of ordered liberty” protected by the Fourteenth Amendment’s due process clause. He therefore found Connecticut’s statute void because the only justification the state offered for it—that it advanced a policy against promiscuous or illicit sexual relations—was not in fact furthered by prohibiting married people from using contraceptives. This holding merely decided the case at hand and had little transportability into other right of privacy cases that might arise in the future.

At this point, I may sound like a legal process theorist, committed to passive virtues and the practice of judicial restraint. But, as Brad Snyder recognizes, that misinterprets my views. I also believe, as Mark McGarvie has noted, that judges should incorporate the “recognized shared beliefs” of the “political culture of the American people” into constitutional law and should protect constitutional rights, especially, as Ed Purcell has observed, the rights to liberty, equality, and minority rights emerging out of World War II. And, like Bruce Ackerman, I understand that constitutional rights can be found not only in the text of the 1787 constitution and subsequent amendments, but in less formal sources as well.

49. Id. at 502 (Harlan, J., concurring).
50. Id. at 485-86.
54. See generally 1 BRUCE A. ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); 2 BRUCE A. ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998); 3 BRUCE A. ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION (2014). Ackerman and I were colleagues first at the University of Pennsylvania Law School and then at Yale Law School during most of the 1970s, and he probably influenced my thinking more than I appreciated at the time. As I look back, I can see that, when I became an assistant professor in 1971, I was concerned with what I perceived as a decline in the quality of judicial decision making; I wanted somehow to bind judges to the better law of the past. I believe that Ackerman had similar concerns that led him to look to time periods in the past—the framing and ratification of the 1787 constitution, the adoption of the Reconstruction amendments, and the New Deal—quite close to the ones I would later examine. But, although we may have had somewhat similar motivations, three important differences have distinguished our work.
Indeed, the recognition that activist judges can create constitutional rights out of informal sources is more important to understanding my views of judging than my acceptance of judicial passivity and restraint in times of political division. During the three special periods associated with the three great wars about which I have written the bulk of my historical scholarship—the Revolution, the Civil War, and World War II—judges did incorporate and properly should have incorporated new rights into the American constitutional edifice. As I believe my writing has shown, those wars created the material conditions and moral ideals under which the United States exists today—ideals that are embedded in the material conditions from which they arose, cannot readily be separated from them, and together with them constitute a seamless whole. Judges, in my view, rightly incorporated the ideals of the three wars into the law and thereby transformed the ideals into part of America’s constitution.

The Revolution, for example, created our political independence against a background ideal that all people are created equal with liberty to pursue happiness. The Civil War and Reconstruction, in turn, created a unified nation out of merely confederated states—a nation ruled by the majority, but one in which majorities are required to accept divergent minorities no matter how strongly they dislike them or disagree with their views. World War II then gave the United States global hegemony based on ideals that all nations should enjoy political independence, that majorities should govern through democratic processes but at the same time accept minorities, and that all citizens of a nation should possess equal liberty to pursue happiness without regard to ethnicity, religion, or race.

I do not claim that it was easy during any of these three eras of transformative change to know with certainty the precise direction that American society was taking at any exact point in time. But it was easier than finding ultimate, transcendent truths. The eras of the American Revolution, the Civil

First, Ackerman knew what he was doing—he planned out his argument before he began to write. I knew what sources I would examine, but I did not anticipate where they would lead. I simply followed them, and only now in retrospect can I begin to elaborate the ideas to which they pointed. Second, a major element in Ackerman’s project has been to show that key political events during the New Deal were equivalent to formal steps required by the constitutional adoption and amendment processes. My work, in contrast, has never addressed these formalisms. I have written instead, to use the language of Justice Cardozo, about “the mores of the community,” with its “ethics or . . . social sense of justice, whether formulated in creed or system, or immanent in the common mind.” CARDOZO, supra note 39, at 72. Third, unlike Ackerman, I do not see the New Deal as a time of generally accepted social change, but rather as a time of continuing political contestation. As I wrote in The Legalist Reformation, I see 1938 as the year in which New Yorkers, at least, shifted their attention from highly divisive domestic issues to international issues. But, it was only after Pearl Harbor that consensus in support of war emerged and ultimately led to the consensus that dominated American law and politics through the Eisenhower presidency and into the 1960s.
War, and World War II were times of crisis and reformation. Transcendent truth would emerge from each of these eras of war unchanged, as it always must, but the ideals of American society would emerge in a new form. And, if a judge had faith about who would win the war and made some good guesses about how peace would be sculpted, she could predict the ideals that would emerge from the era of war and that she thus should incorporate into the law. Above all, she could plausibly believe that in doing so she was following the train of social change in the caboose rather than determining the direction of change in the engine.

Moreover, whatever uncertainty may have existed during the course of the three transformative eras, historical hindsight leaves no doubt that judges who incorporated the democratic, libertarian, and egalitarian ideals of the Revolution, the Civil War, and World War II into the law were not directing the course of change but merely following it. Two examples will illustrate. The first is Justice Harlan Fiske Stone’s famous footnote 4 in United States v. Carolene Products Co. As I wrote in The Legalist Reformation, Stone was not making a policy judgment when he crafted footnote 4 but merely restating what political leaders were declaring—he was offering an obvious comment on the world that he was observing. Although Stone commanded only a tenuous 4-3 majority in 1938 in support of his opinion and footnote, historical hindsight proved him correct.

Brown v. Board of Education is the second example. It shows how the Court acted as a catalyst for the egalitarian ideology of World War II and the postwar era. My historical scholarship in The Legalist Reformation and elsewhere, together with the work of others, establishes that America’s leaders and the American people had rejected racism and accepted an ideology of ethnic and racial equality as a basis for the fight against Hitler and the need to counter Communist propaganda about Southern racial segregation. While

55. 304 U.S. 144 (1938).
56. See Nelson, The Legalist Reformation, supra note 11, at 123-124. I have the same view of a statement by Senator Robert F. Wagner that, while “the essential governmental problem” of “the 18th and 19th centuries . . . was how to establish the will of the majority in representative government,” in “the world of today, the problem is how to protect the integrity and civil liberties of minority groups.” Quoted in id. at 129; see also Nelson, Marbury v. Madison, supra note 4, at 108-112 (suggesting that the worldwide spread of judicial review in recent decades may be a result of concerns about protecting minority rights); see generally id. at 119-147.
60. See Nelson, The Jurisprudence of Legal Realism, supra note 24, at 811-815.
counter trends, most notably the internment of Japanese-Americans and the persistence of Southern segregation, occurred during and after the war, the crushing defeat of Hitler made the Nazi idea that some races are intrinsically inferior to others—the idea at the root of Southern segregation—unacceptable in respectable circles. The Court simply could not have upheld segregation in Brown based on that Nazi idea. On the contrary, the Court justified its invalidation of segregation based on widely shared American values generated by World War II and the new position of the United States in the world order as the bulwark of freedom. While doubts persisted through the 1950s about the legitimacy of the Court’s reasoning, these doubts have been erased by historical hindsight, which proved the ending of state-sanctioned segregation correct.

Let me then summarize my main points. (1) Judges must at times have recourse to values outside formal doctrinal materials to determine the law’s substance and meaning. (2) Judges should not turn to their own personal values but to objective societal standards. (3) When society is divided over its values, judges should not incorporate the values they favor into the law. (4) There have been three unique eras in American history—the eras of the Revolution, the Civil War, and World War II—when Americans have united at the level of ideals behind a value structure of liberty, equality, democratic majoritarianism, and protection of minority rights. Judges have properly followed the direction taken by the American people during those three eras and made the people’s highest ideals the foundation of American constitutionalism.

In conclusion, my position is that libertarian and egalitarian ideals, proclaimed during and in the aftermath of the Revolutionary War, the Civil War, and World War II, enjoy special standing in American jurisprudence. Documents such as the Declaration of Independence, constitutional provisions such as the Fourteenth Amendment, and cases such as Brown v. Board of Education proclaim the values for which America stands—values to which judges have a special obligation to adhere zealously.

Of course, judges also have a duty to keep the law attuned to changing social realities of a more meager sort. But in so doing, they must proceed carefully. They need to listen to what they hear from all elements of the political spectrum; they need to proceed in a slow and minimalist fashion; and they need the humility to recognize that only future historical hindsight will reveal for sure whether they actually captured the direction of social change. They also need to understand that the political ideals that get incorporated into legal doctrine are tightly interconnected with the material conditions out of which

the ideals arose—the ideals and material conditions are part of the same seamless whole, and it is impossible to reject bits and pieces of the whole without undermining it in its entirety.

Thus judges, in my view, ought not reject, for example, World War II ideals of democracy, liberty, and equality for which the world honors America and which therefore provide whatever legitimacy may exist for American global hegemony. The package of democracy, liberty, equality, and hegemony cannot be disaggregated into separate parts, and only the American people through the political process have a right to reject the package in its entirety. Similarly, majority rule together with acceptance of dissent and local autonomy are part of the fabric of American law and constitutionalism; judges cannot reject individual threads in the fabric that they happen to dislike without undermining the integrity of the fabric as a whole—a fabric owned again by the American people, not by five or even nine Supreme Court justices.

In short, while I understand that we, the people of today, collectively can make the law whatever we want it to be, I also understand that a majority of justices on a divided court should not change bits and pieces of the law into what they want. Judges can, of course, make law by relying on evolving social practices that do not generate controversy. Likewise, America’s wartime ideals of democracy, liberty, and equality are a legitimate source of law, or at the very least were a legitimate source in the immediate aftermath of the wars in which the American people with near unanimity proclaimed their validity. But judges should not impose alternative values that dissenting colleagues reject and that divide the American people.

III. THE IMPACT OF SOURCES ON MY SCHOLARSHIP

There are several other characteristics of my work that I also want to mention that result, I think, from the types of sources I use and from the ways in which I use them.

If an historian is interested in the role law plays in economic development or on whether lower economic classes as well as upper classes can use law to alter the distribution of wealth, he or she will focus on contract, property, tort, and business law. Like Hurst and Horwitz, he or she will write a general history of law focused on those doctrinal subjects.62 Like Hurst and Horwitz, I devoted a good deal of attention to those subjects in Americanization and The Legalist Reformation. But I learned when I wrote Americanization to focus on other subjects as well.

62. See Horwitz, Transformation of American Law, supra note 6; Hurst, Law and the Conditions of Freedom, supra note 7.
It was not that I was smarter than my predecessors or that I ever gave any thought to the subjects on which I should focus. Rather the nature of my sources compelled me to examine cases about issues beyond those related to the economy. The manuscript case records on which I mainly relied in writing *Americanization* were not indexed by subject matter, and so I had to read all of them to find important and unusual cases. What I discovered when I read all the cases is that litigators care far more about procedure than about any single body of substantive law. Accordingly, as David Konig has so ably and eloquently observed, procedure, especially rules about the power of juries to find law as well as fact, became the foundational subject of the book—the skeleton to which everything else was tied. Procedure similarly is an important topic in *The Legalist Reformation*. Another matter to which my sources taught me to pay great attention was religion, perhaps because the sources also paid attention to it. A third was the regulation of sexuality and family life.

The sources did not, of course, pique my interest in the constitutional issues and issues of government structure that are the focus of *The Roots of American Bureaucracy* and *The Fourteenth Amendment*. That interest arose out of my clerkship with Justice White and especially from my work on the opinion that he and Justices William Brennan and Thurgood Marshall filed in *Oregon v. Mitchell*. I have always wanted to thank Justice White publicly for his assigning me to that case, which first led me to study the history of the Fourteenth Amendment, but he took the view that it was improper for me to reveal that I had worked on it. I always thought he was wrong, and so I thank him now when my work on the case is documented in publicly available archives and the Justice can no longer object.

The nature of my sources also affected my work in several other respects. The primary sources on which I relied in writing *Americanization*—manuscript court records—compelled me to turn to a method of analyzing cases that I had learned in law school. Manuscript records of colonial and early nineteenth-century cases almost never reveal the judicial reasoning behind decisions; at best, they reveal the facts of a case and the result that the decision maker reached. Some legal realists in the 1930s had argued that the facts and the result were all that mattered—that the holding of a case consisted only of the result that a judge reached on the facts and that everything said in an opinion was dictum. I had been taught this realist approach as a first-

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year law student, and it enabled me several years later to make full use of
manuscript records in writing Americanization. I used the approach again in
summarizing the cases of which I took note in The Legalist Reformation, and
I doubt whether I could have mastered the vast quantity of cases cited in that
book if I had paid close attention to everything that the judges wrote rather
than simply to facts and results.

My scholarship also reflects the legacy of legal realism in a final respect.
Several years ago the author of a reader’s report on volume one of The Com-
mon Law in Colonial America complained that I had not paid sufficient atten-
tion to colonial legislation—a matter that he found of greater importance to
colonial legal development than do I. On the understanding that I had to ac-
commodate the reader’s concern to maintain the Oxford Press’s willingness to
publish the book, I added some references to statutes. But my legal realist
convictions still tell me that the reader fundamentally was wrong: that if histo-
rians want to know what the law was, they cannot rely on statutes, but must
read cases that determine what statutes mean, how statutes have been applied,
and even whether they were applied at all. While there are occasional statutes
that direct administrators to act in contexts where they are not subject to judi-
cial review, most legislation, as the legal realists well understood,66 receives
its ultimate meaning only when interpreted by a court. The corpus of my
work, which relies overwhelmingly on case law and deemphasizes the enact-
ment and citation of legislation, has long reflected this legal realist under-
standing.

IV. CONCLUSION

In the end, what most distinguishes my scholarship from that of other le-
egal historians is my concern with the power of the ideals that have emerged
from the nation’s three great wars—the Revolution, the Civil War, and World
War II. America’s ideals of democracy, liberty, and equality, I suggest, have
had far more ultimate impact on the law than most recent legal thinkers have
wanted to acknowledge. For better or worse, my historical scholarship has
focused on how America’s great wars have transformed the structure of insti-
tutional power and on how those transformations in the structure of power
have led to change in national ideals and ultimately to legal change. This em-
phasis on war and wartime ideals distinguishes my work from that of neo-
Marxists whose historical writing focuses on the distribution of wealth, of
Hurstians who focus on the role of government in creating wealth, and of a

66. Id. at 83-84.
vast body of recent historical scholarship emphasizing matters of race, gender, sexual orientation, and the like.

In the case of America, the three great wars—the Revolutionary War, the Civil War, and World War II—confirmed and enhanced the power of popular, democratic forces, who instantiated the ideal of equal liberty into the American creed. During and in the aftermath of the three wars, judges and other institutional actors transformed this creed of equal liberty into law—law that has been broadly accepted by the American people as a whole. Individual judges, in my view, are obliged today to follow this law. They have no business in pursuit of their private policy agendas or of the agendas of transient political majorities altering what the people over time collectively have done.