

RISA GOLUBOFF: Welcome, everyone. I am delighted to see you all here and to welcome you to this wonderful event. I am standing here in two capacities. The first one is as a Dean, who is celebrating the achievements of one of my faculty members, G. Edward White, or Ted, as we fondly call him.

Scholarship, as many of you in the room know, can be a lonely undertaking. It is mostly done sitting at one's desk by oneself. And even in a place as committed to our vibrant intellectual community of faculty and students as we are here at UVA, it still can be a lonely undertaking. And so we look for opportunities to celebrate what we do, and this is one of those opportunities.

Today we have invited eminent legal historians and legal scholars, both from within our community and across the country, to engage with one of our own. So the second capacity in which I stand before you today is as a legal historian and a longtime beneficiary of the learning and wisdom of everyone sitting on this panel.

Ted White has been a bedrock of the University of Virginia's legal history program since his arrival in 1972. Many of you are familiar with Ted's astounding productivity and the awards, accolades, and prominence that have attended it. This book is his 18th, in addition to edited collections and many, many, many law review articles and shorter works. These books range in subject matter from Alger Hiss to Oliver Wendell Holmes, from the American judicial tradition to the American West, from tort law to baseball, and so I hear more recently, to soccer.

Ted is a fellow of the American Academy of Arts and Sciences, a fellow of the Society of American Historians, and a member of the American Law Institute. He is a recipient of too many awards to name, but I will just name a few. The Order of the Coif book Award, the James Willard Hurst award, the Choice Award for outstanding academic book. He has also received a Guggenheim Fellowship and our own Roger and Madeleine Traynor award for scholarship.

The book we celebrate today is the final volume in his ambitious and sweeping *Law in American History* series. This volume is from 1930 to 2000, and I brought the three volumes so that you could see.

[LAUGHTER]

OK, so two things to notice about this. When we say Ted has written 18 books, they're not little books. They are, many of them, very big books. And then second, it looks to me like Ted has increased in size as he's gone through the volumes, the most recent one at the bottom being the largest.

So in this book, as you will hear, Ted chronicles the evolution of American law from the beginning of the Depression through *Bush versus Gore*. He connects law to the major political, economic, cultural, social, intellectual, and demographic developments of these decades, and he identifies what modernity has meant for the history of the United States and its laws. And we will hear more about this masterful book momentarily.

What might be less visible to you but has been clear to me since even before I arrived here close to 20 years ago, is that even as Ted has been so prolific, he has also been an incredibly generous colleague, as a legal historian and scholar. He comments on manuscripts. He strategizes about the shape of book projects. He teaches many students. I was just talking to one who was his student in his small section many, many years ago, and he makes a real impact on everyone he interacts with in this institution.

So I make this introduction not only with celebration, but also with gratitude. And in many ways, Ted's work and this panel is part of a celebration of the larger legal history community that has flourished for many decades at UVA Law School, not only with Ted, but also Mike Klarman, Barry Cushman, Chuck McCurdy. It continues to flourish with faculty, among many others, like Cynthia Nicoletti, Jessica Lowe, [? Flora ?] Peterson, and today's moderator, Charles Barzun.

Charles is, segue into introductions, Charles is the faculty advisor for our JD MA Program in Legal History, along with Cynthia Nicoletti. He is a 2005 graduate of that program, and his areas of interest include constitutional law, torts, evidence, and the history of legal thought. He joined the UVA law faculty in 2008.

And before that, he was a Climenko Fellow and lecturer at Harvard Law School and a clerk to Judge Sack on the Second Circuit. He is the author of a slew of scholarly articles, most recently "Constructing Originalism, or Why Professors [? Boit ?] and Sack Should Learn to Stop Worrying and love Ronald Dworkin."

We also welcome back to the law school, to UVA Law, Jack Goldsmith. He is the Henry L. Shattuck professor of law at Harvard University and a senior fellow at the Hoover Institution.

Professor Goldsmith is the author of many books and articles on topics related to terrorism, national security, international law, conflicts of law, and the law of the internet.

His most recent book is a memoir *In Hoffa's Shadow, a Stepfather, a Disappearance in Detroit, and My Search for the Truth*. Kirkus Reviews calls it, a darkly engaging account of an important, misunderstood epic. And I'm happy to welcome Jack back. He was on the faculty here many moons ago. I'm just going to note these are excellent titles that our panelists have offered us.

It is wonderful to see how relationships that are fostered here can live on over decades and across the country. And we know that as well because we welcome back Laura Kalman, who has been here before commenting on books. I have been the beneficiary of her commentary before.

She is a distinguished professor in the history department at the University of California Santa Barbara. She is a quite distinguished scholar whose area of expertise is 20th century US political, intellectual, and legal history. Her colleagues describe her as, an exceptional constitutional scholar. And her students call her, an inspiring professor and a passionate teacher.

She is the past president and an honorary fellow of the American Society of Legal History. She is the author of a number of award winning books on 20th century legal and political history, as well as on the legal academy. She has won so many prizes, including the Littleton-Griswold prize in American Law and Society for her biography of Supreme Court Justice Abe Fortas, and her latest book, *The Long Reach of the '60s, LBJ, Nixon, and the Making of the Contemporary Supreme Court*, recently won the David J. Langum, Sr., Prize in American Legal History.

Victoria Nourse-- I'm going alphabetically, but they're not sitting alphabetically, so I apologize. So Professor Nourse is at the end-- is the Ralph V. Whitworth Professor in Law at Georgetown. She directs Georgetown Law Center on Congressional Studies, and her scholarship focuses on statutory interpretation, Congress, and separation of powers.

She worked in the government as a lawyer for the Justice Department, the Senate Judiciary Committee, and as chief counsel to Vice President Biden. And during her service to the Senate Judiciary Committee, she helped draft the Violence Against Women act. She is described by the dean of Georgetown Law School as a superb scholar and someone who has made great

contributions as a public servant. Her latest book is *Misreading Law, Misreading Democracy*.

So thank you in advance to all of our distinguished panelists for joining us today to discuss law in American history. I know I am going to enjoy every minute, and I trust you all will as well.

Thank you.

[APPLAUSE]

CHARLES

Thank you. Ooh, OK, does this work? Thank you so much, Risa. My job will mostly be to keep time in this. Basically, what's going to happen is we'll hear from each of the panelists. And then Ted will have 15 minutes or so to respond. And then we will open it up to questions to all of you. And so we'll keep track of that. OK, Victoria, thanks.

BARZUN:

VICTORIA

Well, I'm really honored to be here, and I'm delighted to be out of the swamp. I was driving down 29 and really loving the fact that I was outside of the range of Twitter and the latest protest at Georgetown involving the Department of Homeland Security and all sorts of other things.

NOURSE:

And I'm honored to be on this panel of extraordinary scholars. I have been inspired over the years by Ted White to write, or attempt to do, constitutional law scholarship on Lochner Era. And I have been inspired by his work for many, many years.

So how with the separation of time will we look back on the history of the 20th century? How will we look at its constitutional law? What will we see? I don't think you can answer that without the essential reading of Ted White's latest book. So I want to take a look at this extraordinary book and use it as a launching pad of sorts.

It is unparalleled, in my view, with its attention to detail, in terms of the doctrines of the Supreme Court and other courts, as well as evoking the scholars of another day. So as we say, history is a foreign country. But this book allows the reader to really enter the minds of those who have long passed, who have been the authors of American law.

Now great history provokes thought. And so I'm going to entertain you with a couple of ideas here that may or may not be ideas that the panel agrees with, but I think may help us understand what this book does in terms of its contribution to the 21st century and how we look back on the 20th century.

So the first theme I'm going to talk about is brittle rights. The second one, structural drift. So what do I mean by that? Well, one of the major themes of this book is the shift from guardian review to bifurcated review. In guardian review, the Supreme Court imagines itself as protecting individuals from ravaging majorities.

In bifurcating review, which occurs at the end of the 20th century, the court shifts. On one side of the bifurcation sit economic statutes, where the court defers. On the other side lie statutes that involve non-economic matters and rights claims. Here, the court engages in much more searching review with respect to the First Amendment, the Fourth Amendment, et cetera. White has challenged prevailing views in this book in terms of guardian review on *Lochner*. And these are views that I share with him.

Lochner is the case that Teddy Roosevelt made famous, actually, at the beginning of the century. It has become a symbol for lawyers of an aggressive review by the Supreme Court. It has also become a symbol for debates between libertarians and others about the role that the court should play.

White's account of the *Lochner* Court may well be controversial in some quarters. But I think he's absolutely right to say that the court was engaged in what he calls a boundary pricking exercise, which is to say that the court was engaged in due process cases not with the tradition of substantive due process, which is a modern term, but rather with ancient ideas that have long since disappeared.

If you Google or Westlaw the terms "police power" and "class legislation," you will find those are the terms in which constitutional law was argued for about 50 years, 1880 to 1930. White knows this very well. These are language that doesn't-- they're not taught in your first year constitutional law course. But as I said, the past is a foreign country, and one thing one gains from reading a book like this is a reminder that this is the language in which scholars, lawyers, judges debated the scope of economic legislation and the scope of other rights, including the First Amendment.

Now one of the things that I take from this history is the fact that we should remember-- for all of you textualists out there, I'm a scholar of interpretation, whether statutory or constitutional-- clause parsing was not part of constitutional law for a very, very long time. Original public meaning was not part of this era either. Instead, the Court used these terms, as I've mentioned, police power and class legislation, to address major constitutional ideas.

Now contrast that guardian review idea with the core of the book, which is about the late 20th century and the emergence of bifurcated review, where the court defers to economic legislation and at the same time engages in aggressive review on matters involving enumerated rights. And I wanted to suggest to you that one of the things that we will look back on the 20th century and begin to question is the embrace in bifurcated review of a brittle rights notion.

So what do I mean by brittle rights? Well, one idea of rights is the Dworkinian notion of Trump's, that the right is absolute. And I'm going to call that brittle right. The other idea of right is that it's subject to regulation in the name of the public welfare. That was guardian review.

So if you look at hundreds of cases during this period, 1880 to 1930, you will find that courts have a view of right that we have lost. It's not rights as Trumps. It's rights that can be seen as overcome by the public welfare, which seems odd even for me to state.

But this, after reading hundreds of cases from this era, is what I've taken, that we really have not been able to see any other idea of right without engaging in the kind of history that is in this extraordinary book.

So what is the problem with the brittle right? Well, the problem with the brittle right is, by the notion of brittle, I am suggesting that it breaks. It is perhaps too expansive, and one engages in pricking the boundary of the right in ways that seem to be quite peripheral to the law. So the strong rights cases that come at the end of the century are, indeed, it seems to me, a break. And here's where Professor White may disagree with me.

He believes, as the book suggests, that they are both boundary-picking enterprises. And I think that's true, but I think that the way that the Court constructed the First Amendment, and later other amendments, suggests to me a different idea of right altogether. This brittle right raises two problems in my view. One, it has caused an enormous amount of public controversy.

So brittle rights seem that they're absolute. So it causes a lot of public drama. The Court's decisions on gay rights and abortion, not to mention speech-- think of Citizens United-- have generated enormous political turmoil precisely because their adherents claim the right to be absolute and the opponents believe that their claims of harm, including public harm, are not credited. Meanwhile, as the public debate rages, the court engages in boundary pricking at an increasing space from the core of the right, at the margins.

So we see cases about creches, and cakes, and playgrounds, and nude dancing-- very far from the core of these rights. So I worry about brittle rights. I'm not the only one. We are coming to see, through the great history of Ted White and others, that the idea of right, even at the founding, the First Amendment-- Judge Campbell, who's at Richmond, has written a very interesting article about how the First Amendment was not viewed in the same way as a brittle Trump at the time of the founding.

Jamal Greene has written in the *Harvard Law Review* about the way in which other countries deal with judicial review in which rights are not brittle. They are assessed by a proportionality analysis. So one thing I think that we will look back on the 20th century and see, and with the help of Ted White we will see, that bifurcated review has a legacy that we may not be willing to embrace, or that is, as we see in the gay rights cases, diminishing, where the Court has refused to engage in strict scrutiny.

OK, so I've talked to you a little bit about brittle rights. I want to mention-- since I'm truly a structuralist in constitutional law, I care a lot about Congress and the president. And I teach mostly about that. I want to leave you with a discussion of what I call structural drift.

One of the fascinating things about this book because it is so far ranging-- I was walking around Georgetown with it in my hand, and Dan Ernst, who's a brilliant 20th century historian, said to me, you haven't read that whole thing, have you? And I said, of course, I have. Of course, I have. He sent me all the chapters, and they're in my study at my office.

In any event, one of the astonishing things about the book, and we're going to hear from Jack Goldsmith about the foreign relations chapter, which is brilliant, is that each of the chapters deals with a separate episode in law. But when you add them all up, you are led to a story about structural constitutional law that is fascinating in part because it suggests what I call drift.

The Court has not had a master plan. Instead, we see in a chapter on foreign relations exceptionalism, where the president gets to do pretty much what he wants to do, despite the treaty clause. We see in a wonderful chapter on the administrative state, how the rise of the state leads not only to an expanse of congressional power, but as well delegation.

The Court may well decide that Congress can affect intrastate activity, the big move surrounding the switch in time. But that move actually not only increases Congress's power, but also increases the need for Congress to delegate. So throughout these chapters, what you

see, they're not all specifically focused on the separation of powers. But what they suggest is that the Court has engaged in these doctrinal areas without a larger theory about where the balance of power will land.

So we see a chapter on the administrative state, we see a chapter on foreign relations, we see the final chapter on the political question doctrine, each of them extraordinary. But when you add them all up, one begins to wonder whether the story we will take and look back on the 20th century is whether the Court has not quite comprehended how all of these cases come together.

What I mean by this is that there's a series of doctrinal decisions that had no particular structural vision in mind and that wander aimlessly from doctrinal area to doctrinal area without a sense of what the result is. And I think it's fair to say that many in Washington today believe our structure is heavily unbalanced toward presidential power and judicial power.

After all, the last chapter is about the political question doctrine in *Bush versus Gore* because one of the things that goes on here is not only an increase in presidential power but a view that the Court itself, although it is a player in the separation of powers, can actually determine important separation of powers cases.

So what you have here is a relatively weaker Congress relative to a stronger judiciary and a stronger executive. I think that's inadvertent. I don't think the Court-- and we can see this through the range of topics that the Court has addressed-- that they do not have an overall structural vision. And it's very difficult for them to have that because they are both inside the separation of powers and reviewing the separation of powers.

So I just want to say in the end here that I am delighted to be here. I've given you a couple of ideas that have come out from this extraordinary book. It truly is masterful, as the dean said. And I am so delighted to be outside of Washington, to have a day of history, and thought, and praise for work of integrity and insight. So thank you for inviting me.

[APPLAUSE]

JACK LANDMAN So thank you so much for inviting me to be here today for the celebration of Ted's book. And
GOLDSMITH: it's so great to return to the University of Virginia, where I started my academic career and to see so many so many friends in the audience. I want to start by building on a couple of things

that the dean said, first about what an extraordinary colleague Ted is.

When I came here in the mid-'90s, I was your typical insecure, uncertain, flailing young academic, not sure of my ideas, not sure of what I wanted to write about. And Ted was truly one of my most important mentors.

He paid attention to my ideas. He appeared to care about them. He read my drafts, and he gave me ideas. And he also demonstrated, through his own work, his extraordinary work capacity and work ethic. He really modeled behavior that I came to admire and I've tried to follow in my career. So I'm really just enormously grateful to Ted for his help early in my career and his mentorship throughout my career.

The second thing is I just want to reiterate what the dean said about Ted's productivity. When you read the book, the first page lists all of his books. And his first book was written in 1968, when I was six years old. He's written 18 books since, then for a productivity rate of a book every-- if my math is right-- two years and 10 months, which is just an extraordinary accomplishment, especially since the books are so great and the range is so great. So congratulations, Ted, on your latest in a long line of great books.

So this book, *History of American Law from 1920 to 2000*, has all of Ted's characteristics front and center. It is a book that has astonishing range. It's about private law and public law. It's about constitutional law, statutory law, and common law. It's about domestic law, as well as international and foreign relations law. It's just astonishing range.

And what's so interesting about it is how these topics are often treated separately in histories, in legal histories, and he integrates them altogether and shows how they really affected one another. And since I'm a scholar of foreign relations and international law, I'm going to focus on his really great chapters on war and foreign relations. I'm going to suggest what some of the contributions are of these chapters, and then I'm going to end with a question for Ted.

So one of the interesting things about focusing in this history of American law on foreign relations and international law is, as Ted points out at the beginning of his foreign relations law chapter, I think it's that chapter, most histories of American law generally just leave out foreign relations law. International law is something different. Foreign relations law is something different. It's not real law. It's not real con law. It's something separate.

And Ted does not take that view. And a short anecdote on how Ted gets up to speed on

topics, when he was thrashing me on the squash court in the late 1990s, we would, in between games when I was huffing and puffing and he was not huffing and puffing, talk about my foreign relations law scholarship at the time. And he started taking an interest in foreign relations law, about which he knew practically nothing then.

And every time we played squash, he would ask me more questions, and he started asking me more questions. And then the next thing I know these books appeared outside of his office stacks, stacks of books. And I saw him one day carrying these books out to his car. And then about six weeks later, Ted White knew a lot more about the history of foreign relations law and about what happened in the 1930s, for example, in foreign relations law than I did.

And it's reflected in this book, but I remember well the origins of the Kurdish right chapter on the squash court. I think that's where the origins were. I'm not sure about that. OK.

G. EDWARD --all your ideas, Jack.

WHITE:

JACK LANDMAN No, no. I didn't say that. I didn't say that. I definitely did not mean to imply that. OK, so I was
GOLDSMITH: going to give two examples of how Ted uses developments that he thinks are sparked by war or foreign relations in the law to illuminate our understandings of the history of public law in this case.

The first is the impact of war on the rise of the administrative state. As Ted points out, the state as an apparatus for administration really gets going in an aggressive way in the Civil War, because, as he points out, total war and the administration of total war takes an administrative apparatus for tax, for conscription, for allocating resources and the like, for controlling public goods.

And Ted points out that there was this large apparatus that developed in the Civil War, but it dissipated. It went away after the Civil War. But as he says, as he argues, that didn't quite happen in World War I.

As is well known, the early agencies in the administrative state, at least at the federal level, started getting going in the late 19th, early 20th century, the Interstate Commerce Act, the Sherman Act, what was the Food and Drug Act, the Pure Food and Drug Act.

But as Ted argues, the state, in terms of really taking over and regulating the economy in a massive way that required massive federal intervention and massive federal control of the

economy, including nationalization, and price controls, and quotas and the like, that got going in World War I.

And as Ted also pointed out, this was all news to me, basically, some of those agencies dissipated after World War I, but many stayed on. And Ted's basic argument is a couple. So why is this relevant to the larger history of American law?

He basically argues that this was relevant because when the New Deal comes around-- first of all, he claims. I don't know if this is true, but he claims and it seems plausible to me, that basically America and the United States had become somewhat accustomed to this type of regulation, that at least because of what happened in World War I and because of these agencies, at least some of them had continued after World War I, that the country had grown accustomed to regulation of this sort.

And two, and more importantly, he says when the crisis came in World War-- excuse me. In the New Deal-- that the World War I administrative apparatus and operations in terms of coordinating the economy was really the model and was seen as a guidepost to the early New Deal. So that's one way in which war and foreign relations has an impact on domestic law that ends up affecting other elements of domestic law.

The other chapter is an amazing chapter on foreign relations exceptionalism. This is the idea that foreign relations law is different. It consists of basically two ideas. First, there is a distinction between foreign and domestic affairs that we can articulate. Foreign affairs basically are things that happen outside the borders. Domestic affairs are things that happen inside the borders. And although that distinction is elusive, it's clear in many contexts, even though it's elusive in some.

That's the first element of foreign relations exceptionalism. The second one is that basically in foreign affairs, the constitutional law operates differently. It operates differently because, as Justice Sutherland articulated in *Curtis Wright*, and Ted does a masterful job of unpacking *Curtis Wright* and its intellectual history-- this was the 1936 decision in the Supreme Court-- as the Court said in *Curtis Wright*, basically the sources of federal authority that are not necessarily from the Constitution. They may inhere in sovereignty.

And that was a move that was designed to loosen up the idea that enumerated powers applied to the conduct of foreign relations. And the second idea is that there's something about the

important role of the president in conducting foreign relations, both because of his functional advantages, and also just because the Constitution, as read by Sutherland, will endow the president with these extraordinary, and in some respects, exclusive presidential powers.

And Ted does, again, a masterful job of talking about the intellectual history of that, of Sutherland's early efforts in the 1910s to articulate this distinction between domestic and foreign affairs, and to articulate this different constitutional basis for understanding these.

And the basic idea was, and I think Ted was the first to point this out, was that this was a way for the conservative justices on the Court, who were internationalists, to have a vigorous international foreign policy and to support that, which they thought was important in the 1920s and 1930s, while at the same time being skeptical about the New Deal because the Delegation Doctrine basically had firm bite with regard to the domestic regulations.

But *Kurdish* right itself was a case about delegated authority from Congress to the president for an arms embargo. And the court there basically said the Delegation Doctrine doesn't work the same way in the context of foreign relations. So this foreign relations exceptionalism idea was a way for the conservatives on the Court, and it became more influential generally, to continue to criticize the New Deal for at least a few more years, while at the same time having a robust presidency that can conduct foreign relations.

And Ted ties this in-- the main way that he ties this in to the rest of constitutional law is to show that foreign relations exceptionalism is just a species of the bifurcated review that he sees throughout the rest of constitutional law. And indeed, he argues that it was-- I think he argues, basically, that it was something of a model for a bifurcated review at the administrative state.

And it preceded it, this idea that for certain actions, the Court would just defer, because it was outside of its competence, it would defer to the executive branch. And so he basically sees bifurcated review in the foreign relations context as of a piece with bifurcated review, both with regard to due process, rational basis scrutiny of economic legislation, and also rational basis legislation defer-- excuse me, deference-- deference on economic legislation, but non-deference on individual rights issues.

So these are two of several ideas. He has an amazing account of Lieber, and international law, and changes in the laws of war, and the Civil War, an amazing account of the rise of executive agreements and their importance to constitutional law. I won't tell you about those. You can read about those. I want to end by asking Ted a question that he can answer if he

likes.

So the main theoretical claim in the book is that there was a change, an epistemological change, a change to modernism, as he calls it, or the modernist consciousness. And the idea, I think, is that he wants to explain changes in legal doctrine in the 20th century as a result of changes in a modernist sensibility, in the way we see the world.

And the basic move, and I'm simplifying quite a lot, is that human understanding of how society gets organized in the pre-modern era was basically there were external constraints, external to human agency, that basically organized or influence society. Law was one of those, religion perhaps. And there were others.

And Ted's claim is that there was a move to modern consciousness, where it came to be seen that individual agency actually was efficacious in controlling human destiny, I'm simplifying a great deal, and that this change had implications for judges, because it meant judges were lawmakers, that judges made policy, and that judges had agency. And it basically gave rise to legal realism, gave rise to bifurcated review, because judges shouldn't be making policy. They should be deferring to the elected majority and the like.

So my question is one of causation. It seems to me that the foreign relations cases and the International Law cases have the flavor of less the judges because they had a different sensibility were issuing different legal doctrines. It seems that those cases are pretty obviously judges and politicians responding to exogenous shocks in the world, either about technology or war that required a change in society to address those exogenous and perhaps unpredictable changes.

And those changes by legislatures, and then changes in legal doctrine by courts, seems to me were a response to those exogenous changes and more explained by that than they were explained by this epistemological change. And indeed, you might even see the epistemological claim being a result of a consequence rather than a cause of these changes that took place in the world.

So I guess my question is how do you tell how the causation works and why does it matter? And since it's a claim that runs throughout your book, hopefully you can address it. Thank you.

[APPLAUSE]

LAURA KALMAN: Thank you so much for inviting me here to celebrate this spectacular book and historian. Ted's work has inspired me forever, and he edited my first book. I always remember how after absolutely shredding my first chapter, Ted lifted my spirits by telling me that he, and Earl Warren and I all shared the same birthday.

[LAUGHTER]

In 1973, Ted was bearish about our field's future. A year after he had begun teaching, he lamented that American legal history has been one of the most unfortunate stepchildren of the academic profession, disdained by historians and lawyers alike, struggling to establish itself in curricula and to disengage itself from antiquarian, largely bereft of distinctive or distinguished scholarship. This bleak assessment appeared in a review of Laurence Friedman's *History of American Law*, which Ted didn't think improved things.

[LAUGHTER]

The book treated law as the mirror of, and inevitably molded by, economy and society and focused on the relationship between private law and economic development. Friedman, Ted complained, neglected the role of historical contingency, the interplay of law, politics, and ideology in defining national values, the mutually constitutive nature of law and history, the importance of professional reasoning to law, and the constitutional, interpretive issues that focus on law's ideological dimensions would provide.

Friedman's history is like a cathedral without a dome, Ted concluded. Its foundations are intact, and a structure has been built on them, but nothing caps. 45 years, 18 books, and more than 100 articles later, Ted has given the cathedral its dome. It's majestic. In this stunning volume, we see modernist theories of law become intellectual orthodoxy and contribute to a new approach to judging, administrative government, the [INAUDIBLE] of the common law, and the shift from Republican to Democratic constitutionalism.

Law is no longer viewed as a collection of timeless principles, that brooding omnipresent in the sky. Rather, decision makers influenced by legal realism understand that they shape their own destinies. We see too how legal actors turn to process theory to domesticate legal realism and reaffirm faith in the rule of law amid concerns about the rise of totalitarianism, the move from guardian to bifurcated review, and concern about the counter-majoritarian difficulty.

We also see doctrine get its due. Ted has married intellectual and constitutional history to produce a fascinating account of the complex and constantly changing relationship between law, politics, and culture. It's common today to divide legal historians into internalists and externalists. Externalists, many of them inspired by UVA to disagree, argue for the importance of politics as well as law to judicial decision-making, while internalists, many trained here, highlight the primacy of law over politics and the importance of doctrine to understanding judicial behavior.

For example externalists argue that Chief Justice Hughes and Justice Roberts made the so-called switch in time because of the threat posed by FDR's big win in 1936 and/or his court-packing plan, pointing to doctrinal changes that began well before 1937 and continued afterwards, though internalists argue, in contrast, that plausible intellectual reasons explain the Court's journey and that no sudden shift took place.

Ted leaves no doubt that his allegiance is with the internalists. For example, he points out that although the Court delayed handing down *West Coast Hotel v Parrish* until the spring of 1937, well after Roosevelt threatened to pack the court, the Justices had actually voted on it in December of 1936, before FDR's court-packing plan had been announced. But for me, that doesn't preclude the possibility that the public outcry against *Morehead versus Tipaldo* and FDR's landslide 30 states' win could have influenced the Justices to vote as they did, that political considerations affected them even if the plan, itself, did not.

Well, these scholarly disagreements keep us all employed.

[LAUGHTER]

The more important point is that Ted's book brilliantly reminds us that no pure externalist or internalist exists. Ted himself discusses the impact of changing judicial personnel, war, and perceptions of race, gender roles, and sexual orientation on doctrine.

For all his success in reviving and reconfiguring legal history, though, I detect a note of unease in Ted's account. The prospects for good legal history have improved since 1973. But if the cathedral has its dome, what has happened to the legal historian law professor who labors at the scaffolding?

Intellectual biography may play a role in helping us understand Ted's unease, if I correctly diagnosed his mood. Ted doesn't just write history. He has a past. And odd as it seems,

considering elite law school hiring practices now, his path to UVA was once an aberration. He is part of the pioneering generation of legal historians who got PhDs and JDs.

In the early 1960s, when higher education was booming, Ted worked with Yale's great Western historian, Howard Lamar. But graduate school disappointed him. As Ted has recalled, he had to dress up for class, pick up his athletic equipment, and watch grad students try to impress their teachers with shop talk.

So after receiving his PhD, he went to Harvard Law School in '67, when it was still under the sway of process theory. At just this time, jobs in the humanities and social sciences dried up, but the legal academy was hiring and-- Ted remarks in this volume-- paying more than humanities and social sciences jobs, and awarding tenure for publishing less. So by the early 1970s, many smart undergrads chose law school over grad school, and guys like Ted who did well-- they were mostly hes-- hoped to become law professors.

But as Ted explained here, if they believed that their advanced degrees would help them on the law school job market, the humanities and social science's refugees proved mistaken. For law school appointments committees, a PhD paled next to law school grades, class ranks, clerkship. These attitudes reflected, Ted says, the self-conscious insularity of the postwar American legal profession.

Embodied in a process theory that cemented a tight relationship between the legal academy and the profession from World War II until the 1960s' end, graduate training was deemed irrelevant to one's potential success in teaching doctrine to law students. Nevertheless, in time, Ted observes here, the JD/PhDs and their fellow travelers without PhDs gained a foothold in the legal academy.

They turned away from process theory to law and scholarship that, as Ted explained, applied the substantive methodological training of other disciplines to legal problems. Law and work became prestigious in the legal academy after 1970 and contributed to the belief that some graduate training outside law would benefit law professors.

In 2015, more than 2/3 of entry level hires at the top 26 law schools were JD/PhDs, PhD law professors often with little or no experience in practice. This development resulted in theoretical and interdisciplinary research that brought the law school closer to the rest of the university, but as Ted observes, it deepened the divide between law professors and the bench and bar.

Like Judge Edwards, Chief Justice Roberts complains about law review articles with topics like the influence of Immanuel Kant on evidentiary approaches in Bulgaria.

[LAUGHTER]

So the JD/PhDs who did law and scholarship instead of the kind of doctrinal policy analysis that process theory enshrined won, but at a cost. Ted speaks of a divorce by century's end between law faculties and their students and between law faculties and the profession. UVA's Tom Bergin once observed that the law professor was a victim of intellectual schizophrenia, which had him devoutly believing that he can be an authentic academic and a trainer of lawyers.

Ted implies here that most law professors have embraced the schizophrenia. They teach basic courses doctrinally in part, Ted says, because teaching them differently would require too much work designing alternative course materials and distract legal academics from what became their primary job during the last quarter of the 20th century, writing, Ted says, largely for themselves and their scholarly peers.

And so thanks to the transition from process theory to Law And, we have, Ted says, a legal academy situated only partially in the remainder of the legal profession and only partially in the university. Perhaps I'm wrongly inferring that Ted seems gloomy about, or bemused, by this victory of his guys. And maybe I'm wrong to think of the JD/PhDs as Ted's guys.

Ted has more breadth and more ability to reach the general reader. It's hard to draw inferences about Ted's personal reactions to the developments he so ably historicizes. I think each generation writes its own history and that informing readers of an historian's biases makes them better readers, but Ted prizes the historians' quest for detachment. Future generations may care about the subject matter, not the author, and he wants a provisional, modest shelf life for his work.

So Ted says in his preface that he has tried to leave myself out of narratives as much as possible. He succeeds. The only opinion I was certain he really hated was *Buck versus Bell*. So maybe in tracing the victory of Law And, he is simply reporting on the state of affairs in the legal academy, not warning about them. Even if that's the case though, I think Ted's giving up too much to those who consider contemporary legal scholarship impractical.

Just as law and scholarship which transformed the field of anti-trust, Ted has brought constitutional history back to life. Judges cite his work on the suspension and guarantee clauses. And in his last chapter here, Ted examines con laws Voldemort, *Bush v Gore*, through the lens of the political question and equal protection doctrines and makes the case that the Court's intervention was not unprecedented or inappropriate. That provocative insight deserves to be heard by more than scholars.

So to conclude, it's a big deal that law professors won the freedom to write for themselves and other scholars, but their work also has implications for a broader audience. I think citizens, lawyers, judges, and policymakers would all benefit from reading this wonderful volume. Thank you.

[APPLAUSE]

**G. EDWARD
WHITE:**

Well, thank you all for coming, and I hope that at least some members of the library staff made it to this event, because they've been so important in supporting my work, not just on these *Law in American History* series, but for so many years. And I just think that reference desk and University of Virginia Law School Library is one of the great places in legal education. So hope they got a chance to be here, but I'm glad to see many of you.

If I were Justice Holmes, I would say the following (IN A DEEP, DISTINGUISHED VOICE) In this symposium, my part is only to sit in silence. To express one's feelings as the end draws near is too far intimate a task.

[LAUGHTER]

(NORMAL VOICE) And then I would go on to talk further, actually--

[LAUGHTER]

--and say things like, the riders in the race do not stop short when they reach the goal. There is a little finishing canter. But in any event, enough of that. So I want to start out by saying how helpful the work of all the people on this panel, including Charles and Risa, have been for my own work. I want to single out a couple of things that perhaps the people here don't know that I've learned from them.

Along the way in Vicki Nourse's scholarship, she wrote a piece called "The Lost History of

Equal Protection." I remember that there's a line from a Holmes opinion that says the equal protection clause is the last resort of constitutional arguments. And I was always of the view that the equal protection clause was really largely nonexistent in the period in which Holmes wrote that opinion, the early 20th century.

Vicki has shown that that was not the case. Vicki has shown that, in fact, there were more equal protection cases brought and entertained by the Court than due process cases in the Lochner Era period. Why have we just missed this? Well, in part because equal protection jurisprudence assumed that mere classifications did not violate the equal protection clause. Only certain forms of very egregious classifications did.

And so equal protection cases came to the court often in conjunction with due process cases. That is, the litigants would tack on an equal protection argument, thinking that it was a way of illuminating a due process violation. And the Court over and over again would just reject that out of hand on the anti-classification ground. Well, I couldn't really have gotten deeply into the shift from guardian to bifurcated review and to the idea of boundary pricking in the guardian review era without being informed by some of that. So thank you, Vicki.

Now with respect to Jack, he has already alluded to the formative impact of his ideas on my foreign relations work. Actually, it all started because when Jack and I were playing squash together and doing other athletics together, we were talking about scholarship. And Jack wanted to focus on foreign relations.

And I felt that I couldn't really help, not knowing very much about it. So then he and Curt Bradley got a project off the ground for which he and Curt both became famous, kind of a critique of what they called the modern position in foreign relations law.

And I found that really intriguing and wanted to learn more. And Jack is quite right that it was the basis of conversations that I had with him that stimulated me to think about foreign relations. And in some ways, foreign relations, immigration, and the law of war were the remaining strings in the bow that I was trying to develop on over *The Law in American History* series.

Those were areas I didn't know much about. I very much wanted to fit them in. I didn't want this to be a partial history. I was unsure about how to do that, and basically Jack directed me to scholarship. I started reading widely in foreign relations jurisprudence in the late 19th and 20th centuries. And I started writing some pieces on it. And I then began to feel more

comfortable about these other areas.

So now with respect to Laura, as she suggested, our relationship goes very far back. Her first book was *Legal Realism at Yale*, and what she's referring to is I thought it would be important for her to start the book with a general description of legal realism, what league realism was about. And it was that portion of the book that we had a lot of exchanges on.

But Laura then, having written that book, turned to writing a great many others on law and politics in the 20th century. And what I learned from Laura, and I bet you don't imagine this, was techniques of interviewing people. Laura is just exceptionally good at doing books which require some interviewing of people who have survived a generation but are still alive. Her books on Yale Law School are filled with these interviews.

And she just gets people to talk about things. And I just thought, how does she do that? How do you dev-- how do you end up being a skillful? Well, I've really done very little of this, and I'm somewhat skeptical of an oral history. But for this book, I had to do it, because this book is-- I mean, I'm to some extent a participant-observer in this book.

And that was what triggered that comment about trying to leave myself out of it, because as Laura has said, in the Law And chapter, there are really three cohorts of Law And scholars that enter the legal academy in the late '60s and early '70s, and one of them is legal historians. The other two are sociologists, law and society types, and of course, the very influential law and economics cohort.

But I was the first generation of modern American legal historians. We did have the chilly reception that Laura has described. Many of us had to present ourselves on the entry-level market as something other than legal historians, because presenting us as that was perceived as a negative. So many of us got clerkships and advertised us as ordinary legal scholars.

And then there came the revenge of the refugees, so that is to say the transformation of legal scholarship from doctrinally-oriented, process theory-dominant work to interdisciplinary work, with some of the negative as well as the positive consequences of that. So I felt awkward writing that chapter. I didn't want to write it as winners history. And it ought not to be written as winners history, because the center of legal education is still teaching and doctrinal analysis.

Many of us don't do doctrinal analysis in our scholarship, but some of us do. And it's worth doing. And it's certainly worth teaching. And I mean, I have some legal history courses

organized around these books. I don't think they're partic-- based on course evaluations, I'm not sure they're a great success. Whereas if I teach torts, I've got a casebook. We can do doctrine. We can have exchanges. And I think that's really the heart of American legal education.

So I don't think we-- I mean, to the extent there's a division between scholarship and teaching or between what legal scholars do and legal academics do and the profession or students, I don't necessarily think that's a good thing. But I also don't expect that future generations in the short run of legal academics will revert to process theory and doctrinally-oriented scholarship. I mean, for me, and I'm sure for most of my cohorts, it's just more satisfying to get into things in the level of depth and breadth that you do when you're bringing the insights of another discipline.

I was sorry to hear from Laura that I treated Lawrence Friedman so badly in that review. I mean, Lawrence Friedman has had a great career. I mean, any law school would want to hire Lawrence Friedman on the basis of his citation counts. No, but he's a very distinguished legal historian and a good friend. And I think I was just trying to be a young Turk or something in that.

So I want to respond a little bit to a couple of things that Vicki and Jack said. As I understood Vicki, who's talking about brittle rights and the relationship of brittle rights to bifurcated review and boundary pricking, I don't mean those terms to be used in quite the way that she understood them.

Boundary pricking is a technique of judicial interpretation and analysis that I equate with guardian review. If you have guardian review, adopting anachronistic categories from the present, every time you review another branch activity, legislation or an executive decision, you're adopting heightened scrutiny. You're not deferring or not deferring. Bifurcated review is about that. Bifurcated review is about the choice to defer or not defer, which is largely subject-matter based.

A lot follows from the choice to defer or not defer to defer. But when you have that posture, you are bifurcating, literally, your review process, adopting strict scrutiny, or intermediate scrutiny in some cases, and rational basis review in another. That is not what the guardian review people are doing. What the guardian review people are doing is in the *Lochner* line of cases, and in anti-trust cases, and to some extent in equal protection cases, and to some

extent in First Amendment cases, early First Amendment cases, what they are doing is considering whether a largely police power-generated statute, that is, a statute based on protection of health, safety, or morals, to what extent is that an impermissible invasion of private rights and to what extent is it a legitimate exercise of the police power?

Every case involving the due process clause raises that question. The assumption is, first, that the states have these police powers, but secondly, that there are these private rights against the state. These private rights are not regarded as problematic. They're basically treated as essential.

So when the Court says liberty, that's what they mean. They mean liberties against the state. So what Taft in *Adkins versus Children's Hospital*, what Chief Justice Taft described as boundary pricking means that for every exercise in review under the due process clause, you prick out the boundary over a range of cases between permissible and impermissible exercises of police power.

You put some cases on one side of the line and other cases in another. Now there is no intimation in these decisions that this is somehow an illegitimate or substantive judicial exercise. Even though the Court is placing the cases in different categories, how does that authority to place them-- where does that come from? It is judicially fashioned. That is regarded as essentially unproblematic.

The whole point of guardian review is that the judge is a guardian of private rights. They may not implement those private rights in all cases, but that's what they do. Bifurcated review is a much more chastened role. And bifurcated review presupposes a rather different judicial function. The worry of bifurcated review exponents is the counter majoritarian difficulty worry, the worry that judges will substitute their views.

And so why do you defer in some cases and not in others? Well, you defer in some cases because economic and social rights are involved, and that seems to be the appropriate function for majorities. You retain some of the older view of judges as guardians of private rights, but you don't use those terms. You just, you protect, temporarily protect, individual rights.

So in short, Vicki, I don't mean to suggest that boundary pricking extends beyond. Now the last thing I want to say is Jack's question. It's I hope not the last, but the latest in a long line of comments by members of the legal academy about my modernist, pre-modernist modernist

modernity thesis. It's often accompanied by a kind of rolling of eyes.

[LAUGHTER]

JACK LANDMAN I did not roll my eyes.

GOLDSMITH:

G. EDWARD WHITE: And basically the subtext is typically, isn't all this stuff that you're calling modernist consciousness, or epistemology, or whatever, isn't that just, in the end, a response to practical social things that are going on in the culture? And so where what are you on about with this? And all I can say to that is that I have believed for my entire career as a scholar that perceptions of reality are just as important as reality, that there is a dialectical interaction between the two, and that that dialectical interaction ought to be captured in theories of historical causation.

And so for me, every issue that surfaces of constitutional law or private law has this capacity to be described and analyzed in this reciprocal fashion. It is both a response to what's going on and a response of perceptions about what is going on. Perceptions change as much as what's going on. And so basically that's my model.

I've had a great deal of difficulty bringing this down to Earth for legal academics, and I probably won't surmount those difficulties. But this was an effort. So thank you all very much. It's been a great experience for me.

[APPLAUSE]

CHARLES BARZUN: Thank you so much, Ted, and the rest of the panelists. We do have a little time for questions and I think a microphone to pass around. Oh, you got one? OK, great. So yeah, questions? Yes, George?

AUDIENCE: What role is there simply for generational change in the following, highly simplified model? Ted, I don't think you would have made your reputation by saying, I agree with Lawrence Friedman. Or a philosopher today would not say, I agree with Ronald Dworkin. Or Jack and Curt, they didn't say, we agree with the [INAUDIBLE] statement of foreign relations law. So a degree of opposition is utterly necessary to stake out new ground and offer a new voice. How prominent is that as a causal explanation of the change in views that become dominant?

G. EDWARD Me?

WHITE:

CHARLES Yeah.

BARZUN:

G. EDWARD You know, anxiety of influence issues are absolutely critical in this. For me, the principal
WHITE: explanation for historical revisionism is not that the answers one generation of historians gives to historical puzzles just was inadequate, it turns out, on more searching examination, but because younger scholars come up with incentives to disengage themselves from conventional wisdom so that they can be noticed.

I mean, if all you do for your pre-tenure articles is take the contributions of existing scholars and say, I agree with them, that that's going to be a very awkward tenure process for the committee.

[LAUGHTER]

So I think you're absolutely right. And there's just no doubt-- at one point in the Law And chapter, I talk about the fact that Duncan Kennedy, and Bruce Ackerman, and I, without being aware of each other's work, wrote the same critique of process theory at approximately the same time. Process theory was very important for us as a negative model.

We thought that the process theorists had reached a diminished end of their effectiveness analytically. We wanted to do other stuff. We resented the fact that there seemed to be pressure on junior scholars to do process theory. We wanted to stake this out. And we all this was because we were young people.

CHARLES Other questions? I would like to invoke my moderator's privilege to ask you a question which
BARZUN: touches on some of the things Professor Kalman was talking about, which is-- and you mentioned in your comments-- about there's been lots of discussion about the place of legal history in the law school curriculum. And I'd be curious to hear each of your thoughts, in a sense, on what you think that is.

I mean, we teach, we have lots of classes here on legal history. But as you say, they are not, for instance, part of the required first year of curriculum, though there once was a requirement at UVA Law School, a cultural requirement in history and/or legal philosophy, as I understand

it. Why is it that a law student should know history?

**G. EDWARD
WHITE:**

I was once part of the cohort that taught the cultural requirement. There were about four or five courses listed in the cultural requirement, but everybody had to take them, take one. It's like professional responsibility today. I started the course called the Judicial Role in American history shortly after-- and it was offered as a cultural requirement course. I would have 150 students taking the course, most of whom were sitting in the back reading the *Cavalier Daily*.

[LAUGHTER]

Those of us who were required to teach cultural requirement courses lobbied the faculty to abolish the requirement.

[LAUGHTER]

Now we've had some very successful teachers who've taught legal history while I've been here-- Mike Klarman, Risa-- and there is no question that if you're a very good classroom teacher, you can teach a legal history course which students like a lot, many students take. But I don't think you can teach it in the conventional fashion. I just don't.

I don't think you can teach it conventionally out of a casebook. There are legal history case books. I don't think they're very successful. I don't think you can really teach it doctrinally in a conventional sense. So if we're going to have legal history offerings, I think we have to understand what they are.

They can be very useful. Perspectively, they can be helpful for students that have been history majors. They can be a way in which people get exposed to really gifted teachers. But I just, I don't think requiring legal history made any sense when we had the cultural requirement. It didn't make any sense when I was at Harvard and we had a required course called Development of Law and Legal Institutions. It just, it doesn't have to be a basic course.

And to that extent, my view, it's not gloomy, but I just think properly chastened expectations for the place of it in-- now that's a different matter from in the history department, but in the law school.

**CHARLES
BARZUN:**

Laura, do you have any comments on that?

LAURA KALMAN: I teach in the history department.

CHARLES Oh, so you don't-- oh, that's interesting. OK, well, that doesn't really rise. Are there any other
BARZUN: questions?

JACK LANDMAN Can I-- if there's no one, can I follow up too?

GOLDSMITH:

CHARLES OK.

BARZUN:

JACK LANDMAN On the question that I asked and that you answered. I didn't express it well. The question, I
GOLDSMITH: actually don't have a problem with your this epistemological claim. The question is how the causation runs. I think a case like *Erie* is a case where clearly-- by 1938, the Justices are seeing law just in a completely different way than they did in the early 19th century. And they just can't maintain the old fiction, and they need an adjustment.

And in that sense, the change of consciousness, the change, the modernist consciousness has a real [INAUDIBLE], in what you say. In other cases, though, in the war cases, it seems like it's running in the other direction. It seems like those cases aren't explained by a change of consciousness that leads them to think about executive power differently.

They're explained by, I think, exogenous shocks about technology and war that lead them to do things that I think contribute to that. But I think the causation is running in the other direction. And I'm just wondering if that's consistent with what you're saying? Or is it all moving in one direction?

G. EDWARD Oh, no. It's absolutely not all moving in one direction. No. Indeed, what I'm calling reciprocal
WHITE: means that the causal arrow is flowing in both directions. But I have a couple of things to say about that. First, war cases might be sui generis. They might just be cases-- I mean, consider *Korematsu* or for that matter, the Espionage and Sedition Act cases.

Remember that although these are First Amendment cases in the sense that the claims are made, the defendants all lose. And they lose all these the Sedition Act, seditious advocacy cases. They lose them all until the 1930s. So I think that war-setting cases and maybe national security-setting cases, [INAUDIBLE] you have you have a backing away from.

But as to foreign relations itself, Jack, I would say that foreign relations is not perceived of as

different in the sense of external to the constitutional structure for most of the 19th century. We have a treaty-centered regime. The assumption is that the Executive's power to engage in foreign affairs is largely through the treaty process, and that the treaty process requires Senate ratification. And the Senate is an embodiment, if you will, of the people, generally, of the states, in particular.

We don't move to Executive discretion, the permissibility of agreements that are not treaties without ratification, the constitutionality of those, we don't really move that until the 1930s. And I think we do, Jack, move at that point in part because the idea of the Executive having discretion and not being restrained by the constitutional structure itself, in some degree, that is a modernist development.

So that's what I say.

CHARLES

I think that is about it for time, unless there are last, final, quick questions. Then I'd like to thank all the panelists and Ted for--

BARZUN:

[APPLAUSE]