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Semi-Wonderful Town, Semi-Wonderful State: Bill Nelson's New York The Making of a Legal Historian: Reassessing the Work of William E. Nelson

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SEMI-WONDERFUL TOWN, SEMI-WONDERFUL STATE:
BILL NELSON'S NEW YORK

EDWARD A. PURCELL, JR.*

Russell H. Conwell, the Baptist minister who founded Temple University in 1884, was a wildly successful promoter of the so-called "Gospel of Wealth." Traveling back and forth across the country for half a century, he gave his famous speech about "Acres of Diamonds" some 6,000 times. He was outdone, perhaps, only by his contemporary, DeWolfe Hopper, an actor who on some 10,000 occasions thrilled audiences with his dramatic recitation of "Casey at the Bat." While Hopper sentimentalized abject failure, Conwell promised spectacular success. Everyone can and should become rich, Conwell preached, for "acres of diamonds" were available to everyone in their own hometowns. "My lesson," he declared, "is that man's wealth was out here in his back yard"¹

I doubt that Bill Nelson believes that everyone can and should become rich, but I do know that he finally followed Conwell's advice about where to focus his efforts. After a long and extremely productive career that produced a superb, wide-ranging, and still growing collection of books and articles about American law and government, and after living in New York City and teaching at New York University for a quarter of a century, Bill at long last did turn his attention to his own backyard. And, proving Conwell a prophet, he discovered there his own acres of diamonds, in his case scholarly gems, document rather than carbon based.

In 2001, Bill published *The Legalist Reformation: Law, Politics, and Ideology in New York, 1920-1980*,² and he followed that seven years later with *Fighting for the City: A History of the New York City Corporation Counsel*.³ The first title is apt, for *The Legalist Reformation* is a study of

* Joseph Solomon Distinguished Professor, New York Law School. The author wishes to thank Richard B. Bernstein and William P. LaPiana for their comments and suggestions in preparing this essay.

1. There are several versions of Conwell's speech, not surprising given the number of times he gave it. The quote is from the version published by Temple University. Russell H. Conwell, *Acres of Diamonds*, TEMPLE UNIVERSITY, <http://www.temple.edu/about/history/acres-diamonds> (last visited Apr. 11, 2014).

2. WILLIAM E. NELSON, *THE LEGALIST REFORMATION: LAW, POLITICS, AND IDEOLOGY IN NEW YORK, 1920-1980* (2001). [hereinafter NELSON, *LEGALIST REFORMATION*].

3. WILLIAM E. NELSON, *FIGHTING FOR THE CITY: A HISTORY OF THE NEW YORK CITY CORPORATION COUNSEL* (2008) [hereinafter NELSON, *FIGHTING FOR THE CITY*]. Bill also wrote a third

the birth, evolution, and decline of a powerful ideology of “legalist reform” that Bill argues was first cultivated in New York State before spreading across the nation and blossoming widely in the mid-twentieth century. Its subtitle is equally apt, for the book covers most areas of state law and many if not most of the multitudinous social, political, and economic developments that marked the state’s history during the past century. In contrast, neither the title nor the subtitle of the second book seems quite so apt. The title, *Fighting for the City*, is somewhat misleading, for one of the book’s principal themes is that the Corporation Counsel’s office alternated between periods of fighting for and fighting against the city and its general welfare. In those latter negative periods, the office supported the causes of partisan mayors and self-seeking interest groups who were exploiting the city and, by the late 1960s, bleeding it to death. The book’s subtitle, *A History of the New York City Corporation Counsel*, is also somewhat misleading, albeit for a different reason. It suggests a relatively narrow institutional study of a single government agency, but the book belies that suggestion by providing a wide-ranging history of the Corporation Counsel’s office as it was shaped by New York City’s complex and tumultuous politics, its ethnically and religiously diverse population, and its shifting economic position in national and world commerce.

Regardless of their titles, however, the two books are in their substance admirable and illuminating scholarly works: insightful, imaginative, thoroughly researched, and deeply thoughtful. Both reflect a broad understanding of the scholarly literature on law and politics in city, state, and nation, and both are rooted in an exhaustive mining of massive amounts of primary material. *The Legalist Reformation* draws on a careful reading of literally thousands of judicial opinions from both state and federal courts in New York and an additional statistical analysis of approximately fifty thousand unreported trial court cases.⁴ *Fighting for the City* is based on the extensive files of the Corporation Counsel’s office as well as numerous interviews with those intimately familiar with the office, its operations, and its role in New York politics and government.

book dealing with a New York subject, though space and editorial mandate exclude it from consideration here; see WILLIAM E. NELSON, IN PURSUIT OF RIGHT AND JUSTICE: EDWARD WEINFELD AS LAWYER AND JUDGE (2004) [hereinafter NELSON, IN PURSUIT OF RIGHT].

4. The book focuses mainly on civil actions and excludes most cases involving criminal procedure and many areas of substantive criminal law. The statistical sample of unreported trial court cases “included about one hundred cases per year from each of the four federal district courts in the state and one hundred cases per year from trial courts in each of four counties – New York County, which comprises the island of Manhattan; Nassau, a suburban county on Long Island; Erie, an upstate industrialized county containing the city of Buffalo; and Tompkins, an upstate rural county.” NELSON, LEGALIST REFORMATION, *supra* note 2, at 2.

As I linked Bill's New York books to the speech of Russell H. Conwell, a linkage that may seem tenuous and perhaps a bit mischievous, I will also link them to the work of another figure from the past, a linkage that is both more substantive and more flattering. Here, I have in mind Perry Miller, the author of numerous brilliant books and articles on American history and thought, most impressively the two volumes of his monumental work, *The New England Mind*.⁵ Bill's books, like Miller's, are comprehensive in scope, probing in analysis, soundly based on primary sources, and deeply rooted in an understanding of historical time and place. More particularly, the relationship between Bill's two New York books parallels the relationship that existed between Miller's two volumes of *The New England Mind*. New York City is pivotal to the history of New York State, and *Fighting for the City* broadens and deepens our understanding of the role the city played in the larger history of New York State that *The Legalist Reformation* recounts. Thus, Bill's second volume can be understood—as Miller understood the second volume of *The New England Mind*—as a book that “may be imagined as taking place, so to speak, inside” the overarching framework created by the first volume.⁶

I. THE LEGALIST REFORMATION

The Legalist Reformation divides the history of twentieth-century New York State into four periods marked off by three dividing dates: 1922, 1938, and 1968. The first period was characterized by “virulent class conflict between the poor, largely of immigrant Catholic and Jewish ancestry, who lived in urban ghettos, and wealthier, mainly upstate, WASP New Yorkers determined to use law to preserve traditional moral values and their own wealth and power.”⁷ The latter ruled through “a conservative coalition” held together by an ideology rooted in “populist localism” and a “set of racist beliefs” that privileged WASPs while denigrating other religious and ethnic groups, “especially southern and eastern European Catholics and Jews.”⁸ For “the WASP groups on one side of the social divide in early twentieth-century New York,” the book explains, “racially exclusion-

5. PERRY MILLER, *THE NEW ENGLAND MIND: THE SEVENTEENTH CENTURY* (1939); PERRY MILLER, *THE NEW ENGLAND MIND: FROM COLONY TO PROVINCE* (1953).

6. MILLER, *NEW ENGLAND MIND: FROM COLONY TO PROVINCE*, *supra* note 5, at vii.

7. NELSON, *LEGALIST REFORMATION*, *supra* note 2, at 271.

8. *Id.* at 3. “Throughout the first two decades of the [twentieth] century, Republicans generally dominated the politics of New York State . . .” *Id.* at 19. “The rural and small-town voters from upstate New York who provided the preponderance of the Republican Party’s votes showed little of the sympathy for the poor and for descendants of immigrants that New Deal Democrats would display three decades later.” *Id.* at 18.

ary policies and the preservation of democracy appeared to go hand in hand.”⁹ Although “the gap between the classes” steadily “widened day by day,” the conservative coalition “displayed little tolerance toward the poor.”¹⁰

The second period began in 1922 with the election of Democrat Alfred E. Smith as governor, an event that “transformed the Empire State’s politics over time.”¹¹ Reflecting the rapid growth and diversification of New York City’s population and the gradual social and political ascent of Catholics and Jews, the election of Smith “inaugurated seventy-two years of reform-oriented rule in New York during which only two Republicans—the liberals Thomas E. Dewey and Nelson A. Rockefeller—were able to wrest the governor’s chair away from Democrats.”¹² The newly victorious reform coalition adopted innovative social and regulatory policies and began remolding the state’s government and judiciary to better serve the interests of New York City’s immigrant population and to protect the state’s poor and disadvantaged. The coalition’s efforts were limited, however, because its leaders rejected radical ideas and only “moved forward to a new social vision slowly and cautiously.”¹³ In truth, the early reform drive “was very much an elitist, top-down movement, in which social justice meant neither liberty nor equality but merely, in [Benjamin N.] Cardozo’s words, charity, mercy, and compassion.”¹⁴ Most important, the reformers “failed to elaborate clearly a new approach that would have enabled them to escape fully from old conceptual limitations.”¹⁵ Indeed, as the book repeatedly emphasizes, the failure of the reform movement to develop a clear and coherent political ideology would continually plague its efforts and ultimately help undo much of its work.¹⁶

9. *Id.* at 4.

10. *Id.* at 14. “Prejudices along religious and ethnic lines often lay beneath the social and economic inequality that was rampant in New York in the early twentieth century.” *Id.* at 15.

11. *Id.* at 19.

12. *Id.* In 1860, the five counties that would later constitute New York City (New York, Queens, Kings, the Bronx, and Staten Island) together with three adjacent counties (Nassau, Suffolk, and Westchester) accounted for thirty-one percent of the state’s population. That number jumped to forty-five percent by 1890, fifty-six percent in 1910, and sixty-four percent in 1940. *Id.* at 4.

13. *Id.* at 26.

14. *Id.* (internal quotation marks omitted)

15. *Id.* The early reformers failed “because they lacked a clear, commanding ideological vision” and “failed to invent any new ideology.” *Id.* at 116. They “needed an ideology to justify enhancing government’s power over the economy while at the same time restricting its power over personal choice.” *Id.* at 120.

16. Even in full-blown mid-century form, the “legalist reformation’s acknowledgment of individualism and individual rights” would come “into service of the nineteenth-century value of preventing redistribution.” *Id.* at 243.

The third period did not begin, as readers might have expected, in 1929 with the Great Depression or in 1933 with the New Deal, but rather in 1938 with the shock of *Kristallnacht* and the intensifying threat of Nazism.¹⁷ While the reformers' own timidity had cabined their thinking, Hitler's racist ideology, his early foreign policy triumphs, and his increasingly brutal repression of Jews forced them "to elaborate why and how [under their leadership] New York's direction would differ" from Germany's under Hitler.¹⁸ As a result, the reformers "began articulating an ideology of equality, liberty, and dignity that ultimately would result in a legalist reformation, that is, in a complete transformation of New York law and, through law, a complete reconstruction of New York society and culture."¹⁹ Driving that process, lawyers and judges reshaped the common law to play a new and vital role "promoting economic opportunity, upward mobility, and ultimately assimilation and equality."²⁰ The reformation brought not merely more ambitious social and regulatory policies but, more importantly, a fundamental rethinking of old ideas and values that included a radical revision in ideas about equality and the very nature and purposes of law, ideas that would support both broader social legislation and the protection of minority rights.²¹ At the century's onset, New Yorkers had regarded law as "the embodiment of precedents preserving the existing distribution of wealth and established standards of morality," but with the legalist reformation they came to see law as "the process by which judges decided how to balance the majority's vision of social justice against the liberty, dignity, and rights of minorities."²² In essence, the legalist reformation after 1938 constituted the full-blown emergence of modern, post-New Deal liberalism, an ideology that triumphed after World War II and dominated national law and policy for the following two decades.

17. *Id.* at 121-24.

18. *Id.* at 121.

The advent of Nazi atrocities in the late 1930s and then World War II in the 1940s altered the dynamic of New York's conflict: that conflict began to appear not as one of class but of ethnicity and religion. Suddenly, a new ideology, declaring that people of all religious and ethnic backgrounds should be free, equal, and protected from discrimination, emerged.

Id. at 271.

19. *Id.* at 121.

20. *Id.* at 183. "In the early part of the twentieth century, as we have seen, the courts routinely favored existing wealth holders. In mid-century, in contrast, they favored the frequently Catholic and Jewish entrepreneurs striving to move upward." *Id.*

21. New York's immigrant communities embraced ideas of "nonexploitation and opportunity" which "are principles of distributive justice." *Id.* at 166. It then "became easy to merge nonexploitation, opportunity, and nondiscrimination into a new conception of equality demanding the elimination of gaps in wealth and power among various ethnic and religious groups. With the merger, a new conception of equality as distributive justice entered into American legal thought . . ." *Id.* at 166-67.

22. *Id.* at 147.

Finally, the fourth period began in 1968 when a range of events—from the failures of post-New Deal liberalism to the agonizing turmoil of the 1960s—combined to fragment the Democratic coalition, challenge its values and goals, and turn the country in a new and different direction. Voters made it clear that they “had tired of legalist reform,”²³ and the “reformation surely did die as a national political force in the final dramatic event of the year, the election of 1968.”²⁴ Republicans subsequently succeeded in “undoing much of the reform legal doctrine that had been crafted through the 1940s, the 1950s, and especially the 1960s.”²⁵ The legal reformist principle “that courts should revise legal doctrine to attain liberty and justice for all,” a conviction that reached its peak in the jurisprudence of the Warren Court, “was forsaken,”²⁶ and with the appointment of Clarence Thomas in 1991 “the transformation of the Supreme Court was complete.”²⁷ Increasingly, politicians and judges adopted narrow pro-business positions, while ideas of “efficiency” began shifting legal rules away from the inclusive, egalitarian, and protective social values of legalist reform and toward the more restrictive, self-regarding, and profit-seeking values of purportedly “individualistic” and “free market” ideologies. In tort law, for example, the law moved from a mindset “that counseled increased compensation for injuries to one that put the brakes on compensation.”²⁸

All, however, was not lost. In spite of major setbacks and the waning of national influence, New York’s legalist reformation retained some residual vitality. Indeed, in three respects, the book declares, legalist reform “remained triumphant.”²⁹ Its principle that courts should protect minorities continued to command support; its idea of equality continued to aid blacks, gays, women, and other minorities in seeking legal rights; and the greater inclusiveness that legalist reform had brought to American society led to a weakening of repressive customs and an increased formalization and fairness in dispute resolution processes.³⁰

This brief sketch makes it clear that *The Legalist Reformation* is about far more than the wide range of technical legal doctrines that it examines

23. *Id.* at 287.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 360.

29. *Id.* at 288.

30. *Id.* at 288-90. At the end of the twentieth century, “most of the policy values that had underlain legalist reform” in New York “remained in place.” They had, however, been transformed. “The main difference was that the values were no longer deployed to promote progressive ends like opportunity for the downtrodden, assimilation into the mainstream, and redistribution of wealth.” *Id.* at 368.

with particularity and at extended length. On one hand, the book is based on “the common lawyer’s faith that analysis of judicial opinions is key to understanding law,” and it anchors many of its specific legal arguments in material drawn from those opinions. On that level, the book succeeds admirably in reconstructing New York law “in all its detail and complexity.”³¹ On the other hand, the book is also based on the fundamental premise of all good legal history, “that law is deeply embedded in the culture and political economy of its time.”³² Accordingly, it encompasses the politics of state and nation as well as the role that a wide range of social forces—ethnic, racial, cultural, sexual, religious, and economic—played in driving events in New York. If the book has a basic flaw, then, it may be that those two fundamental premises make its ambition too vaulting. Innumerable shortfalls exist between legal rules and social reality and between formal judicial reasoning and actual judicial decision making. Moreover, myriad tensions exist between common law doctrines and the conflicting social forces that press upon the judiciary for recognition. Thus, vast and complex disjunctions often exist between the formal reasoning in judicial opinions and the driving forces that shape the “culture and political economy” of their time. Accordingly, gaps sometimes open in the book’s analyses, and the relationship between New York’s common law and its broader social and political history becomes at times cloudy or problematic.³³ Indeed, the focus on lawyers and legal doctrines sometimes obscures the importance of the more general social and political forces that created powerful, if complex and

31. *Id.* at 2. The bulk of the book is devoted to analyses of judicial decisions and common law doctrines in a wide variety of subject areas, analyses that condense the much more extensive discussions of those areas that appeared in a *festschrift* and a series of fourteen law review articles that Bill published. *See id.* at 444-45.

32. *Id.* at 3.

33. The “legal reformist” changes that came after 1938, for example, were halting and irregular. The New York courts stayed with their “familiar patterns of repressing speech” well into the 1950s, and most “continued to apply older, more pro-defendant rules” in product liability cases into the 1970s. *Id.* at 148, 192. Similarly, through the 1950s, the state’s highest court “refused explicitly to recognize discrimination aimed at keeping African-Americans, Catholics, and Jews in positions of subordination” even though it “established a broad principle of religious autonomy” designed to protect “the religious liberty of all.” *Id.* at 158, 161. For a critical review raising similar issues, see Richard F. Hamm, *All Those Cases*, 30 REV. IN AM. HIST. 413, 415-18 (2002) (reviewing WILLIAM E. NELSON, *THE LEGALIST REFORMATION: LAW, POLITICS AND IDEOLOGY IN NEW YORK, 1920-1980*); *see also* ISAIAH BERLIN, *THE HEDGEHOG AND THE FOX: AN ESSAY ON TOLSTOY’S VIEW OF HISTORY* 1-2 (1953). Charles McCurdy noted correctly that, in “method, scope, and significance[.]” *The Legalist Reformation* “is comparable to Nelson’s *The Americanization of the Common Law: The Impact of Legal Change upon Massachusetts Society, 1760-1830*.” Charles W. McCurdy, Book Review, 107 AM. HIST. REV. 226, 227 (2002). The later book, however, confronted a far more difficult challenge than did the earlier book. The common law and other legal sources, and certainly the social, cultural, political, and economic forces at work, were far more extensive and far more varied in twentieth-century New York than they were in late eighteenth- and early nineteenth-century Massachusetts.

internally conflicted, popular movements that made legalist reform possible and pushed it toward its broadest goals.

The overarching achievement of *The Legalist Reformation*, however, lies not on its treatment of specific legal doctrines but in its general argument about the broader “legalist reformation” itself. The book’s fundamental claim is that a new “ideology” shaped far more by practical social challenges than by general legal or political theories began to coalesce in the late 1930s as lawyers and judges sought to articulate and then navigate along a decent middle-way between the extremes offered by Marxism and Nazism.³⁴ The label “legalist reformation” identifies its two main elements. It was “legalist” in that it centered on “the arguments of lawyers” striving to change official policies and then on the more popular arguments of the lawyers, judges, and officials who sought “to build [political] support for what they had done.”³⁵ It was “reformist” in that its goal was largely limited to “the expansion of existing hierarchies to include people who had previously been made subordinate.”³⁶ Together, those two elements gave the new ideology creativity and dynamism but harnessed it equally to tradition and moderation. “For legalist reformers of the twentieth century,” the book explains, “the rule of law not only served as an established cultural norm but also offered greater promise of social change than any other political or philosophical alternative.”³⁷

By and large, the book casts the ideology of “legalist reform” in a highly favorable light, and it offers not only a history of its rise and decline but also an implicitly normative, if qualified and sometimes highly ambivalent, argument for its ultimate wisdom. The qualifications and ambivalence are rooted in Bill’s recognition of the ideology’s contradictions and even “incoherence.”³⁸ Legalist reform held “that judges should treat all citizens as formally equal while at the same time extending special privileges to

34. Legalist reform was “a new, slowly emerging, urban-based, but still inchoate ideology of social justice and reform hostile to populist localism, Nazism and racism, and Marxism” that was fully “constructed only in the late 1930s.” NELSON, *LEGALIST REFORMATION*, *supra* note 2, at 7.

35. *Id.* The “new ideology was proclaimed mainly by judges and lawyers, who then used it to transform judge-made doctrine over the course of the next three decades.” *Id.*

36. *Id.* The limited “reformist” nature of the ideology was clear in the later period:

In granting radical groups, including racial and religious minorities, gays, the unconventional, and the poor, a legal right to reject traditional cultural norms and to live by their own lights, judges were extending the values of the legalist reformation and also were empowering the various groups. But it is vital to focus on the nature of this empowerment. The egalitarian constitutional decisions of the late 1960s and 1970s encouraged radicals to withdraw from society rather than to reform society, and, as a result, the established social order may have been more solidly entrenched at the end of the 1970s than ever before.

Id. at 323-24.

37. *Id.* at 7.

38. *Id.* at 353.

less favored citizens in an effort to make them more equal, and that judges control underclasses while at the same time helping them and leaving them alone.”³⁹ While such contradictions were inherent in the legalist reform ideology, they were also imposed by two interrelated and extraneous forces, “a paradoxical social reality” and the “tenacious adherence” of the American people to conflicting values. The first external force, the “paradoxical social reality,” gave “extraordinary personal freedoms” and “opportunities for upward mobility” while at the same time “ensnaring” people in a “bureaucratic state that ensures political stability and makes any fundamental redistribution of wealth and power unimaginable.”⁴⁰ The second external force, the conflicting values of the American people, compelled the embrace of an activist government that remained limited, the availability of entrepreneurial opportunity and upward social mobility that preserved tradition and stability, the protection of individual and minority rights that allowed democratic majorities to work their will, and a recognition of the fundamental equality of all citizens that accepted massive inequalities in wealth, power, and status. Thus, while the legal reformist ideology contained internal contradictions that were sharp and debilitating, those contradictions reflected the nation’s own traditional, fundamental, and conflicting values. “Americans simply were unwilling to give any of them up.”⁴¹

Granting those contradictions, the book nonetheless declares the legal reformist ideology worthy and inspiring. Indeed, as the twentieth century unfolded, it declares, much of the rest of the world began to look to legal reformist values and goals “as their only hope for a brighter future.”⁴² Thus, the contradictory and limited ideology of the legalist reformation “became the hope of the world.”⁴³ The reason for its resilience and appeal was the fact that its origins in the experience of New York gave it a potentially worldwide resonance. The city and state were places “where people of different religions and ethnicities were so intermixed that they had no choice but to create a society in which they could live together in harmony.”⁴⁴ The most fundamental achievement of the “legalist reformation,” then, was the elaboration over the decades of “organic legal rules enabling

39. *Id.* at 352. For examples of the “contradictions” in the legalist reformation, see *id.* at 240, 267, 289, 305-06.

40. *Id.* at 352.

41. *Id.* at 353.

42. *Id.* at 372.

43. *Id.* New York’s “legalist reformation . . . came to dominate New York and American, and ultimately global, sociolegal culture.” *Id.* at 8.

44. *Id.* at 372.

diverse people to live together in liberty, justice, and self-fulfillment as well as democratic self-determination.”⁴⁵

Consequently, the contradictions in the legalist reform ideology constituted not only a debilitating weakness but also a paramount virtue. Indeed, the ideology embodied the strengths and weaknesses of the American constitutional system itself. The ideology created a structure of meaning and value that balanced multitudes of tensions and thereby succeeded in extending the nation’s benefits to larger numbers of people while maintaining its stability, civility, and freedom. Thus, *The Legalist Reformation* concludes with a severely chastened but still vital lesson: the legalist reform ideology marks out “the path that America and the world must follow in order to avoid further Bosnias, Chechnyas, Kosovos, Rwandas, and even worse catastrophes in the new millennium.”⁴⁶

It would be impossible to discuss the “detail and complexity” of New York law that *The Legalist Reformation* unfolds in anything short of another equally long book, but one example will illustrate the kinds of synthesizing insights that sparkle from its pages. Emphasizing the importance of 1938 as a turning point, the book moves from the widespread condemnations of Nazism that followed *Kristallnacht* to the seemingly unrelated subject of the contemporaneous New York State constitutional convention and its debate over a relatively technical legal matter, the exclusionary rule in criminal law. Examining the political forces at the convention and the code words they deployed, the book reveals the profound subsurface connections that existed between “the shadow of the spreading swastika,” the convention and its “most passionately debated issue,”⁴⁷ and the evolution of the legalist reform ideology.

At the convention, the political line-ups themselves were entirely familiar. Democratic supporters of labor, the New Deal, and urban minority groups squared off against conservative Republicans, law-enforcement advocates, and upstate WASPs claiming to be “real Americans” opposed to “lawlessness.” The former group urged adoption of the exclusionary rule, while the latter opposed it. The political goals and values that the Democrats asserted in their advocacy, however, were new. With union organizing and reactive business repression vividly in mind, they “feared in the year of *Kristallnacht* [sic] that Nazi-like repression might spread to America through police lawlessness and other comparable abuses.” They “no longer had redistribution in mind,” and their new “core issue” was “whether urban

45. *Id.* at 373.

46. *Id.*

47. *Id.* at 125.

Catholics and Jews and perhaps even blacks would obtain protection from arbitrary imposition of public and private power.”⁴⁸ The convention’s debate, then, signaled the emergence of a “modern conception of equality” in political discourse and a shift by legalist reformers from a focus on economic issues and class conflict to a focus on civil liberties and legal protections against “ethnic and cultural persecution.”⁴⁹ The episode thus encapsulated a major shift in orientation and constituted a moment when the legal reformist ideology began crystallizing into its full-blown mid-century form.⁵⁰

Not surprisingly, *The Legalist Reformation* notes that 1938 also produced a companion event that proved far more famous, the appearance of footnote number four in *United States v. Carolene Products Co.* Penned by another New Yorker, Supreme Court Justice Harlan F. Stone, the footnote suggested that the courts should provide special protection to “discrete and insular minorities” unable to protect themselves in the ordinary democratic political process.⁵¹ The footnote “was an ingenious response not only to Nazi atrocities but also to the quandary in which legalist reformers were mired, as they strove to make all citizens equal through law while at the same time immunizing them from government control of their personal lives.”⁵²

Thus, Nazism and *Kristallnacht*, the state’s constitutional convention, the political battle over the exclusionary rule, and Stone’s classic footnote about “discrete and insular minorities” were all intimately related. Together they helped form the pivot on which the legalist reformation turned, creating what became modern American liberalism with its focus not only on economic inequality but also on civil liberties and minority rights.

II. FIGHTING FOR THE CITY

Bill’s second New York book, *Fighting for the City*, traces the history of the office of the New York City Corporation Counsel from its origins in the traditional position of municipal Recorder, through its gradual evolution in the nineteenth century, to its modern and more professional form

48. *Id.* at 128.

49. *Id.* at 129.

50. “Ultimately, the debate enabled the reformers to redefine equality as requiring the protection of discrete ethnic, religious, and cultural minorities rather than dictating the redistribution of wealth from rich to poor.” *Id.* at 125.

51. *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

52. NELSON, *LEGALIST REFORMATION*, *supra* note 2, at 123-24.

that began in the 1870s and continues today.⁵³ The Corporation Counsel serves as the city's chief lawyer and heads a law department that for more than a century has been the "largest law office in the world."⁵⁴ Two interrelated themes dominate the book's analysis. The first is the importance of the city's changing economic position in shaping the Corporation Counsel's shifting role, and the second is the struggle within the law department itself between politics and professionalization.⁵⁵

On the first theme, the book argues that New York City "enjoyed near monopoly power" in America's Atlantic commerce from the end of the eighteenth century into the early twentieth century, and "as a result, its political leaders could impose heavy taxes that ultimately would be borne by those who had no choice but to use New York's instrumentalities of commerce."⁵⁶ That economic reality fueled a century-long conflict over who would profit from the city's monopoly power. Tammany Hall sought to raise public revenues in order to spread largesse among its members and among its relatively poor and often immigrant supporters, while various business interests sought to lower taxes and thereby retain monopoly profits for themselves.⁵⁷ The city's "oscillation between corruption and reform during a century from roughly 1850 to 1950," *Fighting for the City* explains, "reflected a distributional contest over who would retain the monopoly profits that the city's commerce generated – the merchants, the politicians, or the common voters."⁵⁸

New York City's economic position, however, began declining after World War I, and Tammany's traditional politics became increasingly burdensome and unworkable. From the 1930s through the 1960s only massive infusions of federal funds sustained the city, but by the 1970s continued economic decline, federal cutbacks, and unfavorable changes in national politics strapped the city and pushed it toward bankruptcy. In the short run

53. The office "came into being incrementally, beginning with the 1798 retainer of Recorder Richard Harison on a separate salary for his counselling [sic] duties and culminating in the 1849 charter." In the process, "practice and the development of custom were as important to the growth of the office as legislation enacted either by the Common Council or by Albany." NELSON, *FIGHTING FOR THE CITY*, *supra* note 3, at 34.

54. *Id.* at 111. For accounts of the recent activities of the city's law department by former corporation counsel, see the essays collected in the symposium issue of the *New York Law School Law Review*. 53 N.Y.L. SCH. L. REV. (2008).

55. For insightful discussions of the book, see William P. LaPiana, *Fighting for the City in Context: William Nelson and the Legal History of New York*, 53 N.Y.L. SCH. L. REV. 561 (2008-09); Ross Sandler, *The History of the New York City Law Department: Fighting for the City by William E. Nelson*, 53 N.Y.L. SCH. L. REV. 541, 542-43 (2008).

56. NELSON, *FIGHTING FOR THE CITY*, *supra* note 3, at 40.

57. *Id.*

58. *Id.* at 41.

the city's desperate plight led to a state takeover of its finances, emergency federal aid, severe cuts in services, and layoffs of thousands of government workers.⁵⁹ In the slightly longer run it led to the election of Edward I. Koch as mayor and an administration that further restricted social services while vigorously encouraging new economic developments capable of creating jobs and enlarging the city's tax base. Koch "redesigned municipal government as a business that had to avoid bankruptcy and produce growth for the city as a whole, instead of a policy dedicated to promoting the welfare of powerful interest groups."⁶⁰ His success and the work of subsequent mayors who often adopted similar policies helped revive the city's economic fortunes and returned it to a central position in national and international commerce and finance.

On the second theme, the book argues that the city's changing economic fortunes combined with its shifting political dynamics to shape a struggle between politics and professionalism within the Corporation Counsel's office. Since the early nineteenth century the challenges of population growth and economic development had increasingly demanded a highly professional law department capable of efficiently handling the city's extensive affairs and securing its essential tax base. At the same time the conflicting interests of the city's various ethnic, religious, and economic groups continually pressed for more favorable treatment and self-serving policies that drained the city's resources. "Increasing legal needs tended to professionalize the office," the book explains, "while democracy tended to politicize it."⁶¹

The city's political dynamics also influenced the law department on a second level—the nature and quality of its personnel. Social divisions combined with democratic politics to press for the appointment of lawyers who represented the groups and interests that gained control of the city's government. On winning office, for example, both Tammany Democrats and their "reform" adversaries fired many of the law department's attorneys hired by previous administrations and replaced them with their own supporters. Tammany "used the Law Department to provide upward socioeconomic mobility to its brightest workers," while the business-oriented "reformers" and "fusionists" who claimed to hire only "the best men" made their appointments "not based on merit, but on lineage and wealth."⁶²

59. *Id.* at 241.

60. *Id.* at 252.

61. *Id.* at 30. The two contending forces emerged almost in tandem, with demands for professionalization growing by 1800 and the pressures of democracy gathering only shortly thereafter. *Id.* at 27-28.

62. *Id.* at 109.

Tammany and later Democratic administrations regularly hired Catholics and Jews, especially graduates of Fordham Law School, while the various reform coalitions tended increasingly to hire WASP graduates from elite eastern schools.⁶³ The political affiliations and partisan values of the department's changing personnel, moreover, often helped shape policy. Tammany's law department, for example, supported expanded services for the city's immigrants and poor while vigorously defending "Roman Catholic moral values."⁶⁴

The city's changing economic base and the conflicting demands of its diverse citizenry highlight what *Fighting for the City* argues was the central ethical problem facing the Corporation Counsel's office. Did it represent the popular coalitions that elected city officials, or did it represent the city itself as a functioning economic unit?⁶⁵ Should the law department bend its efforts to assist the groups that were victorious in the political process, or should it strive to help the city "function effectively as a maximizer of wealth for the benefit of all its citizens?"⁶⁶

The book sides for the most part with the professionalizers and the wealth maximizers, and it views the salutary turning point in the city's contemporary history as Koch's appointment in 1978 of Allen G. Schwartz as Corporation Counsel. Schwartz repudiated the law department's uneven and often partisan past and remade it along highly professional and merit-based lines. "For a century and a half everyone had understood city government to be a device that took power and wealth from some groups in the community and gave it to others," but Schwartz "put an end to the old poli-

63. Under Mayor Fiorello LaGuardia, who proclaimed "a non-partisan, non-political government," for example, the law department "completely spurned the Tammany view" and made "elitist judgments" that saw forty of its sixty-four new appointments between 1935 and 1940 go to graduates of Columbia, Harvard, and Yale. *Id.* at 161-62.

64. *Id.* at 150; *see also id.* at 143, 211-13. In its most controversial section, *Fighting for the City* draws a close connection between the law department's anti-communist efforts after World War II and the strident anti-communism of the Catholic Church in New York. *See* LaPiana, *supra* note 55, at 570; Sandler, *supra* note 55, at 550-52. Reviewing a preliminary draft of the book, Judge Paul A. Crotty, who served as Corporation Counsel under Mayor Rudolph Giuliani, vigorously rejected the claim that the law department's anti-communist activities were influenced by the Church. Paul A. Crotty, *A Response: Why William Nelson's Analysis of the Law Department 1946-1965 is Wrong*, 53 N.Y.L. SCH. L. REV. 519, 520 (2008). In response to Crotty's early criticism, Bill subsequently made a mild revision to the final manuscript but otherwise defended his claim. The alterations, however, did not satisfy Crotty. *Id.* at 528-30. Nelson then replied. William E. Nelson, *Defending the Historian's Art: A Response to Paul A. Crotty's Attack on Fighting for the City*, 53 N.Y.L. SCH. L. REV. 533 (2008). For the discussion of the Church and its influence on the law department after World War II, *see* NELSON, *FIGHTING FOR THE CITY*, *supra* note 3, at 195-211, and for the qualification added to the final manuscript, *see id.* at 209-11.

65. "[E]very Corporation Counsel has had two intertwined but separate roles – as lawyer for the government of New York City and as advisor to the Mayor or other democratic master who placed him in office . . ." NELSON, *FIGHTING FOR THE CITY*, *supra* note 3, at xii.

66. *Id.* at 290.

tics.”⁶⁷ He “brought an unselfconscious perspective of a micro-economist to his office” and “understood his task to be increasing the size of the city’s economic pie, not worrying about what share different groups should get.”⁶⁸ In the history of the Corporation Counsel’s office, the book declares, “no one has had a greater and more enduring impact than Allen Schwartz.”⁶⁹

While *Fighting for the City* is a self-contained work, it serves as a particularly useful companion to *The Legalist Reformation*.⁷⁰ As the earlier book explained, New York State was an obvious choice as the focus for a single-jurisdiction study because of the “wider variety of the sociopolitical forces that shape law in New York.” In large part, that “wider variety” existed because New York City was “the world’s first multicultural metropolis” and “a center of world finance and commerce.”⁷¹ Understandably, then, the two books share a good many themes: the importance of New York’s changing economic base; the relationship between economic power and social policy; the cultural, ethnic, and religious roots of social and political conflict; the immigrant drive for assimilation and upward social mobility;⁷² the ambiguous impact of democratic politics on both law and government; and the fragmentation in the late-twentieth century of the ethnic, religious, and economic coalition that underwrote the legalist reformation.⁷³

Tellingly, *Fighting for the City* reveals, perhaps even more sharply than does *The Legalist Reformation*, the same ambivalence about both the

67. *Id.* at 265-66.

68. *Id.* at 266.

69. *Id.* at 274. It should be noted, as the book acknowledges, *see id.* at unpaginated “Acknowledgments,” that the law department supported and assisted in the preparation of *Fighting for the City* and that it required that the book “be dedicated to Allen Schwartz and that it had to recognize the special contribution that Allen had made to the creation of the Law Department we know today.” Nelson, *Defending the Historian’s Art*, *supra* note 64, at 535.

70. Although twentieth-century amendments to the New York State constitution granted “home rule” to New York City, the state legislature continued to hold almost complete legal authority over it. NELSON, *LEGALIST REFORMATION*, *supra* note 2, at 49 n.48.

71. *Id.* at 2.

72. The theme of Catholic and Jewish assimilation and upward social mobility in New York City after the turn of the century also features in Bill’s third New York book, the biography of Judge Edward Weinfeld. NELSON, *IN PURSUIT OF RIGHT*, *supra* note 3, at 2.

73. NELSON, *LEGALIST REFORMATION*, *supra* note 2, at 272-75.

As the 1950s progressed, though, the Law Department practices such as assisting the police and aiding in the suppression of sin became less effective mechanism for currying popular support. The difficulty lay in the city’s growing lack of moral harmony, especially in regard to issues such as race. As the once unitary immigrant community of the 1920s split into subgroups and as the major subgroups – Irish Catholics, Italian Catholics, and Jews – developed sometimes conflicting attitudes, it became increasingly difficult to find issues on which the Law Department could act in a manner that the majority of voters clearly favored.

Nelson, *FIGHTING FOR THE CITY*, *supra* note 3, at 214-15.

practices of democratic government and the contradictions inherent in the legal reformist ideology. Admiring the democratic impulse that led Tammany and the Democratic Party to cater to the social and economic needs of the immigrant poor, *Fighting for the City* nonetheless notes how easily their politics became corrupt and their rhetoric transmogrified into symbolic and harmful demagoguery.⁷⁴ Defending the idea that democratic majorities should be able to set public policy, it nonetheless bemoans the fact that the law department too often followed majority values to the detriment of the city and its diverse minority populations. In the 1940s and 1950s, for example, "in thrall to a majoritarian democratic ethos," the law department conducted a vigorous anti-communist campaign that failed "to comply with laws adopted by government for the defense of all citizens."⁷⁵ Most striking is the book's deep ambivalence about Mayor John V. Lindsay and his administration. heralding Lindsay's "conception of the role of the Law Department as defender of equality and individualism," the book proclaims that conception "new and noble."⁷⁶ Nonetheless, it also concludes that in practice, the conception proved a disaster because "Lindsay's lawyers were advocates for an ideological agenda, not for the city as a whole."⁷⁷ Echoing the earlier book's explanation for the decline of the legalist reformation, the later book explains Lindsay's failure as the result of severely straightened economic conditions and the fact that "a majority of New Yorkers were not committed either to truly full equality or to genuinely individualistic values."⁷⁸ Consequently, and as an unavoidable result, Lindsay's "noble idea could not survive."⁷⁹

Most illuminating as a matter of historical understanding, *Fighting for the City* adds to *The Legalist Reformation* a sharpened and expanded consideration of the role of diversity and conflict.⁸⁰ The earlier book, after all, focuses broadly on the history of a unifying ideology that drew together

74. NELSON, *FIGHTING FOR THE CITY*, *supra* note 3, at 149-51. Similar democratic pressures led Republican Mayor Fiorello LaGuardia into an equally demagogic political style. *Id.* at 178, 181.

75. *Id.* at 196.

76. *Id.* at 239.

77. *Id.*

78. *Id.* at 239-40.

79. *Id.* at 240.

80. Given its emphasis on conflict within the city, *Fighting for the City* gives surprisingly little attention to racial tensions involving African Americans in the long period up to World War II. Indeed, even when it notes the issue of racial discrimination in the 1940s and 1950s, it curiously lumps it together with the quite different issue of religious discrimination. The Corporation Counsel's office, it states, "declined to take a strong, imaginative stand in addressing issues of racial and religious discrimination." *Id.* at 216. The book does give more attention to the issue in the later period. "Racism . . . remained rampant even in New York City in the early 1970s," it notes, and Mayor Lindsay showed a concern "to eliminate institutional racism" and to represent African-Americans and other similar minorities. *Id.* at 222, 230, 239.

many disparate elements and melded a vast number of varied and often discordant judicial opinions into a synthetic whole.⁸¹ In contrast, *Fighting for the City* focuses on the conflicts and tensions that continually wracked New York City and drove its partisan politics: ethnic and religious groups against one another; narrow interest groups against the interests of the city as a whole; those claiming the mandate of popular democracy against those asserting the values of elitist professionalism; those advocating justice for individuals against those protecting the city's fisc; divergent local and borough politicians against one another and often against the mayor; the Corporation Counsel's office against other city departments in battles over bureaucratic turf; and, inside the Corporation Counsel's office itself, conflicting ideas about the nature of the client: mayors with their specific political goals or the city with its own general interests.⁸²

The Legalist Reformation, moreover, limits conflict for the most part to the overarching struggle of upstate and small-town New York with its dominant WASP majority against a seemingly almost monolithic metropolis filled with working class and immigrant poor, most of whom were Catholics or Jews.⁸³ In contrast, *Fighting for the City* fragments the metropolis and reveals the deep and often widening fissures that divided its residents and set them against one another. Established and powerful economic interests suddenly appear in the city and battle the workers and immigrant poor who seemed to dominate the city's politics in the earlier book. WASPs suddenly appear in the city, embracing for themselves the label of "reformers" and opposing the "corruption" of the proto-legalist reformers at Tammany Hall. African-Americans and Jews fight bitterly over issues involving the public schools,⁸⁴ and Catholics and Jews split sharply on a range of contested issues—anti-communism, morals legislation, religion in

81. Although its focus lies elsewhere, *The Legalist Reformation* does refer to persisting social conflict and inequality, and it acknowledges that legalist reform had strikingly different results for different social groups. Catholics, Jews, and men did quite well; gays, blacks, and women much less so. E.g., NELSON, *LEGALIST REFORMATION*, *supra* note 2, at 216-21, 234-35, 274-75, 283, 289, 317-18, 321.

82. NELSON, *FIGHTING FOR THE CITY*, *supra* note 3, at x-xi. The Corporation Counsel was made a mayoral appointment, rather than an independently elected official, immediately after the Civil War. *Id.* at 59.

83. E.g., "In the political metamorphosis following the 1922 elections, which elevated Alfred E. Smith to the governorship, progressives centered in the city seized control of the state from the small-town, conservative forces that had dominated it through most of the nineteenth century . . ." NELSON, *LEGALIST REFORMATION*, *supra* note 2, at 91. Indeed, one reviewer noted that "Nelson overstates the power, coherence, and originality of the ideology of legalist reform" and emphasized that, as a result, "he underestimates the persistence of white supremacy in American life and law." Book Note, *The Double Edge of Legal Ideals*, 115 HARV. L. REV. 1533, 1534 (2002).

84. NELSON, *FIGHTING FOR THE CITY*, *supra* note 3, at 235-37.

public affairs, and educational policy and funding.⁸⁵ Thus, *Fighting for the City* complicates and qualifies the alignments undergirding the political framework of *The Legalist Reformation* while, at the same time, making the actual achievements of the legalist reformation all the more remarkable and, in a sense, surprising.

The Legalist Reformation reveals Bill as the hedgehog, while *Fighting for the City* shows him equally as the fox.⁸⁶

III. SOME CONTRIBUTIONS

The scholarly contributions of these two books are numerous and substantial.⁸⁷ *The Legalist Reformation* discusses literally dozens of common law doctrines and helps illuminate the historical development of each, while *Fighting for the City* provides a valuable education in the history New York City and the structure and operations of its government. Limited in time and space, this essay can offer only a brief and non-exhaustive list of seven significant contributions the books make to our understanding of law and history.

First, and most obvious, the books provide rich histories and a wealth of information about one of the most important states, and the single most important city, in the United States. They illuminate the social, economic, and political dynamics that animated New York, including the power and persistence of racism, sexism, and the many forms of class, ethnic, and religious prejudice.⁸⁸ They trace the slow, erratic, and uneven paths of legal change and thereby unravel many of the complex forces that molded modern legal doctrines.⁸⁹

85. *E.g., id.* at 207 ("Concealed beneath the attack on Communists in the city school system was a religious and cultural cleavage between New York City's Roman Catholics and its secularly oriented Jews . . .").

86. *See* BERLIN, *supra* note 33, at 1-2.

87. Even the finest historical scholarship, like Perry Miller's work, can be criticized for its oversights and inadequacies, and Bill's New York books are no exception. Given the breadth of their scope and the wealth of information they offer, critics can surely find points of disagreement. *See, e.g., supra* notes 33, 64, 80, 83. One could suggest, for example, that *The Legalist Reformation* ignores the wealthy and powerful conservative forces that resided in New York City and staunchly opposed many progressive reforms, especially those involving policies that smacked of economic redistribution. Similarly, the book may assume too easily, rather than demonstrating, the practical social impact of some of the common law rules it discusses. Finally, it seems likely that the book overemphasizes the role that lawyers and courts played in inspiring and shaping the major reform efforts that triumphed in the half-century from the 1920s to the 1960s. Exploring such criticisms, however, is for another time and place.

88. *E.g.,* NELSON, LEGALIST REFORMATION, *supra* note 2, at 153, 161, 233-35, 306.

89. *E.g., id.* at 159-67, 221. "The new tolerance [of the 1960s] accordingly represented much less change than had at first appeared to be the case." *Id.* at 317-18.

Second, they set the stage and provide a tentative baseline, as *The Legalist Reformation* proposed, for parallel studies of common law development in other states.⁹⁰ Such comparative studies promise insights into the varieties and similarities of common-law development across the United States and, further, insights into the ways in which differing social conditions and political values channeled that development in the various states. More broadly, they also set the stage for a deeper and more nuanced understanding of the detailed operations of American federalism. Too often scholars examine the federal system only from a national perspective, and too often they consider the states, aside from lumping them in block categories for certain limited purposes, as largely fungible “units” rather than as distinctive components with their own characteristics and contributions.⁹¹

Third, the books demonstrate the enormous continuing influence of courts, even in a world dominated in so many respects by the power of legislatures and the proliferation of statutory law.⁹² Judicial power can sometimes expand because a political deadlock disables the legislature and sometimes because an ideological consensus privileges certain kinds of judicial action.⁹³ More commonly and consistently, however, courts remain powerful because so much social conflict manifests itself “in the form of private-law litigation between individuals.”⁹⁴ And, regardless of constitutions and statutes, only individual adjudications that construe and apply the vague, general, incomplete, and sometimes inconsistent provisions in those constitutions and statutes can settle the countless numbers of disputes that societies generate. However important broad legal principles may be, they do not resolve most concrete disputes. Nor, by themselves, are they capable of fulfilling the law’s noble promise of justice and equality for all. Thus, the two books address not just the past but also the present, confirming the paramount importance of the principle that the right and ability of individuals to bring their grievances to a court of law—a principle currently under

90. *Id.*

91. I have shared this understandable failing. See Edward A. Purcell, Jr., *The Courts, Federalism, and the Federal Constitution, 1920-2000*, in 3 *THE CAMBRIDGE HISTORY OF LAW IN AMERICA: THE TWENTIETH CENTURY AND AFTER (1920-)*, at 127-74 (Michael Grossberg & Christopher R. Tomlins eds., 2008). But see EDWARD A. PURCELL, JR., *ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY*, chs. 3, 6 (2007) (discussing emphasis on state diversity and conflict).

92. See, e.g., WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010); GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

93. E.g., NELSON, *LEGALIST REFORMATION*, *supra* note 2, at 5, 143-47.

94. *Id.* at 5.

assault by the United States Supreme Court itself⁹⁵—is an absolutely essential component of any just and democratic society.

Fourth, *The Legalist Reformation* provides additional evidence that the “conservative” courts of the so-called “classical legal order”⁹⁶ may have been “formalistic” in writing their opinions, but were nonetheless highly instrumentalist in shaping their doctrines.⁹⁷ The common law, it declares, “had long served” as one of “the main bulwarks of conservatives as they strove to defend themselves against the perceived onslaughts of the immigrant poor.”⁹⁸ The conservative courts developed doctrines that “protected the money and property of the rich against redistribution to the poor” and, further, “protected inherited Puritanical traditions with regard to sexual and other moral values.”⁹⁹ Prior to the 1920s, the New York courts harbored a “bias in favor of upper-class litigants,”¹⁰⁰ and their “conservative agenda of protecting wealth also demanded the repression of free speech by immigrants and the laboring classes.”¹⁰¹ The book provides ample support for its pointed claim that the courts were “favoring upper-class litigants.”¹⁰² It highlights four areas of private substantive law that advanced “the conservative agenda” in protecting “the existing distribution of wealth,”¹⁰³ for example, and it identifies an additional half-dozen procedural rules that helped “elite individuals and large entities”¹⁰⁴ while placing “obstacles in the path of lawsuits against deep-pocket defendants.”¹⁰⁵ In short, the book makes it clear that however “formalistic,” “classical,” “mechanical,” or “Langdellian” their opinions might have appeared, the “conservative”

95. This, of course, is why the political values and social policies that have recently guided the Supreme Court in significantly restricting the ability of ordinary Americans to sue corporations and governments present such a dangerous problem. See, e.g., Edward A. Purcell, Jr., *From the Particular to the General: Three Federal Rules and the Jurisprudence of the Rehnquist and Roberts Courts*, 162 U. PA. L. REV. (forthcoming 2014); Jonah B. Gelbach, *Locking the Doors to Discovery?: Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270, 2277-78 (2012); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010).

96. NELSON, *LEGALIST REFORMATION*, *supra* note 2, at 27, 90-91, 240.

97. See, e.g., EDWARD A. PURCELL, JR., *Some Horwitzian Themes in the Law and History of the Federal Courts*, in 2 TRANSFORMATIONS IN AMERICAN LEGAL HISTORY: LAW, IDEOLOGY, AND METHODS, ESSAYS IN HONOR OF MORTON J. HORWITZ 271-81 (Daniel W. Hamilton & Alfred L. Brophy eds., 2010); Edward A. Purcell, *The Particularly Dubious Case of Hans v. Louisiana: An Essay on Law, Race, History, and “Federal Courts”*, 81 N.C. L. REV. 1927, 1954-75 (2003).

98. NELSON, *LEGALIST REFORMATION*, *supra* note 2, at 27.

99. *Id.*

100. *Id.* at 38-39.

101. *Id.* at 28.

102. *Id.* at 40.

103. *Id.* at 31.

104. *Id.* at 36.

105. *Id.* at 32.

judges of the late nineteenth and early twentieth centuries knew quite clearly what they wished to do and how they could use legal reasoning to do it. If on one level they believed that they were simply “finding” and applying rules implicit in established principles, on another level they surely understood and sought the social results that those rules and principles promised. They were, however unreflective and unselfconscious they might have been, “realists” and “instrumentalists” in fact, and they shaped their doctrines to honor and enforce the substantive social values they cherished.¹⁰⁶

Fifth, the examination of the formation, triumph, and decline of the legal reformist ideology adds an important layer to our understanding of American history in the twentieth century.¹⁰⁷ It illuminates some of the revealing differences that separated Progressives from New Dealers. It broadens our understanding of the critical shift around World War II that led to the crystallization of twentieth century “liberalism.” It deepens our insights into the complex developments in the 1960s and 1970s that fragmented and narrowed that “liberalism.” Finally, it suggests how developments in the years after 1968 helped to generate a reinvigorated political “conservatism” and ultimately to spawn particularly strident forms of right-wing libertarianism and “free market” ideologies.¹⁰⁸

Sixth, indirectly but powerfully *The Legalist Reformation* further undermines the claims of ideological originalism, those forms of “originalism” that purport to find not only basic principles and fundamental values in the Constitution’s general language but also specific directions for deciding contemporary disputes. While the book says relatively little about constitutional law, the evidence it adduces and the arguments it develops

106. Of course, in this regard, as in others, the New York courts might not have been representative of the courts in other states or common law countries. Not all courts were “conservative,” e.g., PETER KARSTEN, *HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH-CENTURY AMERICA* 2 (1997), and, like the values of “legalist reform,” the values of late nineteenth and early twentieth-century “conservatives” contained their own complex and sometimes conflicting goals. See, e.g., EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958*, at 266-91 (1992).

107. The books can be usefully compared to, among many others, ALAN BRINKLEY, *THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR* 268 (1995) (examining the New Deal “not just as a bright moment in which reform energies briefly prevailed but as part of a long process of ideological adaptation”); ALAN DAWLEY, *STRUGGLES FOR JUSTICE: SOCIAL RESPONSIBILITY AND THE LIBERAL STATE* 4-13 (1991) (emphasizing the limited and conservative nature of the New Deal, the subsequent decline of “liberalism” and of the American economy, and the continued hope for the revival of progressive values); and two books by the same author, RICHARD H. PELL, *RADICAL VISIONS AND AMERICAN DREAMS: CULTURE AND SOCIAL THOUGHT IN THE DEPRESSION YEARS* (1973), and *THE LIBERAL MIND IN A CONSERVATIVE AGE: AMERICAN INTELLECTUALS IN THE 1940S AND 1950S* (1985) (examining the changing social and political attitudes of American intellectuals from the Progressive Era through much of the Cold War).

108. See, e.g., NELSON, *LEGALIST REFORMATION*, *supra* note 2, at 120-21, 133-37, 241, 267, 272-88.

demonstrate the processes of interpretation, adaptation, and change that shape the law and ensure its vitality. A “judge deciding how to apply a constitutional provision to a pending case,” Bill wrote many years ago, “is in the same situation as a judge deciding how to apply a common law precedent.”¹⁰⁹ The massive amount of material on common law development in *The Legalist Reformation*, then, serves as a compelling demonstration of the ways that social, cultural, religious, economic, political, and ideological forces press upon the law and, through the intermediation of a judiciary employing a variety of supple reasoning techniques, continuously remold its concepts, restructure its doctrines, and redirect its benefits. The book thereby confirms by analogy the claim that constitutional interpretation, like common law adjudication, is necessarily a “living” process that is seldom controlled by any specific direction found in “originalist” sources.¹¹⁰ Thus, the claims of “originalists” on seriously contested constitutional issues are ultimately the product not of originalist sources but of the claimant’s own ideological values and goals.¹¹¹ As Bill also wrote many years ago, on such issues originalism “becomes merely an argumentative device to justify a judge’s resolution of cases on the basis of his own personal values and sense of justice.”¹¹²

Finally, in its dichotomy between the welfare of the city as a whole and the welfare of its various “special interest” groups, *Fighting for the City* highlights the inadequacy of all “general” conceptions of the “general welfare.” The book praises the administration of Mayor Koch, for example, because Koch sought to “produce growth for the city as a whole” instead of “promoting the welfare of powerful interest groups.”¹¹³ Accepting the fact

109. If a constitutional “provision is susceptible to multiple interpretations or does not deal directly with the issue facing the court, the judge should not be an unthinking interpretivist. He must make law At least in hard cases, constitutional decisionmaking [sic] calls upon judges to make law themselves.” William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237, 1294-95 (1986).

110. The book’s sensitive analysis of the ways in which the fundamental concept of “equality” changed during the twentieth century, for example, explains many of the shifts that occurred in the Supreme Court’s interpretation of the Fourteenth Amendment. The shifts were driven at varying times by liberal and then conservative Justices who employed various formulations and reformulations to serve the goals and values they found in the Constitution. The theme of the changing nature of the concept of equality runs through *The Legalist Reformation*. For an earlier general statement on the issue, see William E. Nelson, *The Changing Meaning of Equality in Twentieth-Century Constitutional Law*, 52 WASH. & LEE L. REV. 3 (1995).

111. See, e.g., Purcell, *supra* note 95.

112. Nelson, *History and Neutrality*, *supra* note 109, at 1295. For a recent and superb example of such ideological originalism, see the conflicting opinions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and the historical analysis in Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008); and Robert Leider, *Our Non-Original Right to Bear Arms: How Public Opinion Has Shaped the Second Amendment*, 89 IND. L.J. (forthcoming, 2014).

113. NELSON, *FIGHTING FOR THE CITY*, *supra* note 3, at 252.

that Koch became mayor at a desperate time for the city, and accepting the further fact that Koch took a number of forceful and effective actions to right the city's course and strengthen its economic base, it nonetheless remains true that Koch also catered to certain particularly powerful interest groups and that he did relatively little to see that those who were heavily burdened by his policies received adequate care and attention.¹¹⁴ Indeed, *Fighting for the City* acknowledges that Koch adopted a "trickle down" theory of economics that "matched perfectly" the philosophy of the Reagan administration and that he sometimes showed needless and callous disregard for the city's racial minorities.¹¹⁵ If the welfare of the city as a whole is the proper goal, then democratic government properly demands that the welfare truly be "general" and not skewed as was the welfare that Koch helped bring to New York City.

The ultimate democratic lesson should be clear: political ideologies of whatever stripe claim to be able to achieve some version of the "general welfare," a normative goal fundamental to all democratic theories. At the same time, however, particular formulations of what constitutes the "general welfare" often ignore, minimize, or mask deep inequalities that belie the claim that the heralded welfare is, in fact, truly "general." Thus, any honest discussion of the "general" welfare, even one defined narrowly and solely in terms of wealth maximization, must always address not just one but four distinct and equally important questions. The first, of course, is what "general" conditions most favor the communal welfare or, more specifically, the goal of wealth maximization. The next three, however, are equally important: what particular groups and interests gain the most from those conditions; what particular groups and interests gain the least or suffer the most from those conditions; and how can those conditions be structured, or their effects moderated, to best ensure that a reasonable amount of the gains going to the most favored are employed to alleviate a reasonable amount of the burdens borne by the least favored? To truly and honestly calculate the "general" welfare, in other words, one must examine not just the "general" welfare of a city or a society as a whole but also the welfare

114. For studies of the Koch administration that discuss its flaws and favoritism toward certain economic interests, see JONATHAN SOFFER, *ED KOCH AND THE REBUILDING OF NEW YORK* 399-403 (2010); JACK NEWFIELD & WAYNE BARRATT, *CITY FOR SALE: ED KOCH AND THE BETRAYAL OF NEW YORK* 442-453 (1988); and JOHN HULL MOLLENKOPF, *A PHOENIX IN THE ASHES: THE RISE AND FALL OF THE KOCH COALITION IN NEW YORK CITY POLITICS* (1992). For Koch's own views, see EDWARD I. KOCH, *MAYOR: AN AUTOBIOGRAPHY* ix-x (1985).

115. NELSON, *FIGHTING FOR THE CITY*, *supra* note 3, at 267, 286. The acceptance of ideas of economic "efficiency" in *Fighting for the City* seems to be in some tension with the more distanced, if not critical, view of "efficiency" ideas in *The Legalist Reformation*.

of all of the varied and unequal groups and interests in that city or society.¹¹⁶

CONCLUSION

Bill's ennoblement of the legalist reformation, and his suggestion that its goals and values are spreading across the world, is understandable and appealing. One haunting question, however, is whether the ideology of legalist reform is truly exportable. Do many other nations around the globe, especially poorer and non-Western countries, have the values, traditions, resources, and other advantages that enabled the United States to produce its legalist reformation?

An equally haunting, and even more immediately pressing, question is whether its advocates can reenergize the ideology of legalist reform in the land of its birth. Can the United States itself—as its relative economic position in the world declines, its many social divisions sharpen, the political power of concentrated wealth grows, and the inequalities among its citizens continue to increase—actually revive and honor the values of such an ideology? As Bill's discussions of New York State and especially New York City make clear, it bodes ill for a society aspiring to protect the liberty, equality, and well-being of all its citizens to rest on a declining economic base. More important, it bodes even worse for such a society to rest on an economic base that squeezes most of its citizens while increasingly funneling its benefits to a small and ever-narrowing segment of its population.

116. *Fighting for the City* invokes the need for economic efficiency and suggests that the test for what is in the welfare of the city as a whole is the extent to which policies maximize the city's total wealth. *Id.* at 290. The concepts of "efficiency" and "wealth maximization" are notoriously slippery and amorphous, but they can be employed using the "Kaldor-Hicks" definition which identifies wealth-maximizing efficiency as changes that increase wealth to the extent that those making gains could share some of their gains with those suffering losses, such that the gainers would be better off than before and the losers no worse off than before. Kaldor-Hicks efficiency has its critics, but it retains a democratic appeal and is no more hypothetical or subjective than other economic definitions of "efficiency" and "wealth maximization." See, e.g., 2 *The New Palgrave Dictionary of Economics and the Law* 19-23 ("efficient norms"), 417-21 ("Kaldor-Hicks compensation") (1998).