COMMENT ON SCHLEGEL

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Schlegel is right. It *is* difficult to swallow the notion that twentieth century history began twenty years late. I agree that the central issue for legal historians is the growth of the nation state's apparatus. We should indeed be concerned with the regulation and direction of an economy. Yet my own preferred date for the beginning of twentieth century legal history is 1901. More precisely, I would pinpoint 2:15 A.M. on September 14, 1901, the morning Theodore Roosevelt became President (Pringle, 1956: 163).

Roosevelt's legislative program of 1905–6, and even his more modest achievements of 1903, paved the way for the birth of the regulatory state. His New Nationalism and his debate with Wilson and Taft in 1912 made the issue of regulation central to national identity. After espousing antitrust in that debate, Wilson became Roosevelt. Wilson moved toward regulation when he switched from a strong Clayton Act and a weak Federal Trade Commission to a weak Clayton Act and a strong Federal Trade Commission in 1914. He brought the regulatory ideal to its logical conclusion when he forced the federal government to assume control over the economy during World War I. But let us not give that priggish opportunist any more credit than we must. Essentially, he had just stolen Roosevelt's New Nationalism (but see Cooper, 1983: 253).

As long as we agree that the growth of the nation state's apparatus is the most important issue, it is unnecessary to engage in an insoluble debate over periodization because it is relatively unimportant whether twentieth century legal history began in 1901 or in 1918. In either case, the central methodological problem we confront, as Schlegel indicates, is answering what lawyers have done about that apparatus and how their work has changed over time. And as he suggests, we legal historians have proven woefully inadequate in answering that question.

I think that Schlegel underestimates some difficulties and overestimates others, however. I do not find it surprising that we know so little about private practice. Most law firms are reluctant to give historians access to their files. The round of searching questions asked by partners that must be survived before access is awarded is truly daunting. Even when access is granted, problems remain because most firms today engage in a fairly frequent program of file destruction. They have no National Archives in which

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to leave a record of their triumphs and disasters. The area of private practice remains "darkness" for a good reason.

Nor do I find it curious that we know more about public law. The archives are rich. They range from the records of agencies housed in the National Archives to those of key individuals in the Library of Congress to those of personages in university collections. Jerome Frank's papers, in particular, are a treasure trove and help to explain why we know a relatively large amount about New Deal lawyers. The action is where the correspondence is.

If that is the case, why do we know so much about the Supreme Court and yet so little? Is it because of "the real secrecy surrounding the institution" and because of "Felix Frankfurter and his acolytes?" I don't think so.

Twentieth century presidents must have made some decisions in meetings that were at least as secret as those of the Court. Of course unlike Supreme Court justices, after they leave office, presidents or their aides often reveal what happened. But such memoirs are generally no more helpful than the reminiscences of Supreme Court justices would be, if they too accepted big money to tell all. It is archives and oral histories that have enabled us to understand the progress of events, and in many cases they are more severely edited or bowdlerized than any set of Court papers. In comparison to trying to make sense of the Johnson Administration's intervention in the Dominican Republic, where one confronts an inordinate number of documents whose key passages have been partially "withdrawn" in accordance with National Security regulations, Frankfurter and even his illegible handwriting look inviting. Secrecy and edited papers are not unique to the Court and do not explain why we have so little meaningful information about it.

All of which is not to say that I like Felix Frankfurter. He stands next to Woodrow Wilson in my pantheon of villains. But surely Supreme Court justices are not the only biographical figures surrounded by acolytes who yearn to protect them. Surely they are not the only such figures who possess, as Schlegel notes, "networks of affiliation [which] extend deep into the executive and judiciary as well as academia." Surely Kennedy inspired at least as much devotion among his minions as Felix Frankfurter, and yet we are beginning to come to grips with his presidency. Just because the participants might try to keep us from getting it right does not mean that we should avoid trying to figure out what happened.

Schlegel seems to acknowledge that although difficult, the task is feasible, but asks whether in the case of the Supreme Court it is worth the effort. Since I am currently writing a biography of Abe Fortas, I can hardly provide an unprejudiced answer to that question. Naturally, I believe it is.

As does Schlegel, I would like nothing more than to see doc-

trinal legal history buried. I suspect that both of us have a particular antipathy for it because we have spent so much time with the legal realists. If one accepts the realist notion that the decisional process is inherently idiosyncratic and the judicial opinion is only a rationalization, it hardly seems worthwhile analyzing the evolution of doctrine in a judicial opinion—or writing one, either. Herein lies a puzzling question. Given their attempts to debunk the judicial process, why did so many realists want to become judges?

I think that one possible answer is that the realists were more ambivalent about a rule of law than they pretended to be. I think that some of them may even have believed in it at least some of the time. But the only way we will ever know for sure is to examine the process they went through in reaching decisions and writing opinions on the bench.

What have Supreme Court justices done all day? How much has the idea of a rule of law affected them? Did justices blithely tell their clerks that all law was politics but to write them up something they could sell to their colleagues down the hall? Or did they approach the judicial process with greater reverence? We do not know, and we need to find out before we can begin to address realism's most troubling question. Once the realists had shown that there was no such thing as principled decision-making, how did they reach decisions? (Fiscus, 1984: 492).

The kind of socialized intellectual history Schlegel has in mind could address this question. It could illuminate the decisional process and place doctrine within the context of the evolving nation state, the individual justices, and the Court as an institution. Surely this achievement would be worthwhile.

Of course it may be true that, as Schlegel states, "we are much more likely to learn about the federal assumption of responsibility for economic and social policy by putting time into Joseph Cannon, Samuel Rayburn, Everett Dirksen and Lyndon Johnson and their legal counselors" than by wading through individual Supreme Court justices' papers. But legal historians often lack the training in political history or political science that would make figures such as Cannon *et al.* accessible. At the same time, they are particularly well qualified to address judicial law, however patrician it may be. If we should not tackle the Court, who should? It is one way of fulfilling what Schlegel aptly identifies as "the task of the unwritten legal history of the twentieth century": discovering "the relationship between lawyers as intellectuals making things happen with words, the growth of the nation state and legal history."

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