



## RESPONSE

**Continuities, Ruptures, and Causation  
in the History of American Legal Culture**

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Henry Vanderlyn, an antebellum lawyer from the small town of Oxford, New York, whom I discuss in *Inventing American Exceptionalism*, kept a daily diary for a thirty-year period and was in the habit of regaling visitors with selected readings from his collected thoughts.<sup>1</sup> Confident that his visitors eagerly attended to his every word, Vanderlyn never appears to have questioned whether, given the choice, they might have opted to occupy themselves otherwise.<sup>2</sup> Unlike Vanderlyn vis-à-vis his captive audience, I am well aware that the three distinguished scholars who agreed to read and comment on my new book have a great many obligations on their time, and I am deeply honored by and grateful for their willingness to share their thoughts. While their remarks range widely, all three scholars engage with important questions about the extent to which the nineteenth-century developments I trace should be understood as continuous with the longer arc of American history or instead as moments of rupture, as well as with complex questions of historical causation.

It is widely accepted that American procedure (and indeed American legal culture as a whole) are adversarial—and distinctively so. Yet precisely because this assumption is so deep-rooted, we have no history of how American adversarialism arose. In *Inventing American Exceptionalism*, I provide such a history. In particular, I show that the United States long employed not only lawyer-empowering adversarial procedure but also various forms of more judge-dependent, quasi-inquisitorial procedure, including the equity tradition

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1. See AMALIA D. KESSLER, *INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800-1877*, at 171-73 (2017).

2. See *id.* at 173.

borrowed from England and, to a lesser extent, conciliation courts transplanted from continental Europe. But by the close of the Civil War and Reconstruction, the United States had largely abandoned these quasi-inquisitorial modes, committing itself to lawyer-driven adversarialism—though the postbellum emergence of the modern industrial economy and administrative state would, in turn, give rise to a resurgence of the inquisitorial. In explaining the United States’ nineteenth-century embrace of adversarialism, I look to developments both internal and external to the law. Among the key internalist factors on which I focus are the rise of the previously unknown category of “procedure,” as well as a set of seemingly small changes in the approach to taking testimony before equity court officials, known as masters in chancery, that ended up having unintended systemic consequences. Additionally, from an externalist perspective, I trace how advocacy of adversarialism became intimately linked with demands for a largely unregulated market and the preservation of white supremacy. The product of deep-rooted inheritances, as well as more immediate and contingent occurrences, the nineteenth-century embrace of adversarialism would prove profoundly consequential, shaping Americans’ experience of the law down to the present, often in ways that constrain rather than expand access to justice.

Within the constraints of this brief response, I cannot address all of the fascinating observations the three commentators make, and so I instead focus my attention on their main questions and comments. Edward A. Purcell, Jr. inquires about the connecting threads between my nineteenth-century history and later developments.<sup>3</sup> What is the relationship, he asks, between my book’s account of the nineteenth-century triumph of lawyer-dominated adversarial legal culture and subsequent Progressive-era reform efforts aimed at increasing the power of judges? Did these later, judge-empowering reforms mark a change in lawyer-driven, adversarial culture or should they instead be viewed as but “another tactic in the continuing efforts of the lawyer class—or at least of the elite bar—to burnish its own image”?<sup>4</sup>

While the reforms to which Purcell alludes extend beyond the period studied in my book, my sense is that, as with much history, the story here is one of both continuity and rupture. The Progressive-era lawyers who devoted so much effort to remaking key judicial institutions—for example, by developing new municipal courts—were deeply anxious about the rise of the modern administrative state and the concomitant emergence of new sorts of professionals like bureaucrats and social workers who might challenge the legal profession’s monopoly on lawmaking and law enforcement.<sup>5</sup> In addition, legal

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3. See Edward A. Purcell, Jr., *Exploring the Origins of America’s “Adversarial” Legal Culture*, 70 STAN. L. REV. ONLINE 37, 45 (2017) (book review).

4. *Id.* at 45.

5. See generally WAYNE K. HOBSON, *THE AMERICAN LEGAL PROFESSION AND THE ORGANIZATIONAL SOCIETY, 1890-1930* (1986) (describing how American lawyers

elites worried about competition from recent (especially Jewish) immigrants, who began to constitute a new plaintiffs' bar.<sup>6</sup> Pursuing various kinds of legal reform—including restructuring the judicial system in judge-empowering ways—was a means of strengthening the hand of WASP elite lawyers vis-à-vis those they deemed “ambulance chasers” while also trying to ensure that the courts (and the lawyers who practiced before them) would be sufficiently cost effective and service oriented to survive the competition posed by new administrative institutions and their nonlawyer staff.<sup>7</sup> In this sense, lawyers' drive for power is a theme that connects the nineteenth-century developments on which I focus with the Progressive-era reforms to which Purcell points.

At the same time, such continuity should not blind us to the reality of significant differences between the two periods. Progressive-era judicial creations like the municipal courts embraced a judge-empowering, quasi-inquisitorial mode of procedure that, even while serving to preserve (and perhaps in some circumstances augment) the power of the legal profession as a whole, also significantly changed the nature of lawyers' roles in the courtroom and beyond.<sup>8</sup> The end result was to accelerate the process by which lawyers from the late nineteenth century onward were increasingly transformed from litigators into advisers and negotiators, or as J. Willard Hurst memorably described this new breed, “administrators of social relations.”<sup>9</sup>

Purcell also observes that while I discuss the relationship between judges and lawyers at some length, I devote less attention to the relationship between judges and juries. He notes that just as nineteenth-century judges were losing out to lawyers, they were gaining in power over juries.<sup>10</sup> The evolving judge/jury dynamic is fascinating and important, but given my book's focus on equity courts and conciliation courts—neither of which relied on juries—it was beyond the scope of my project to engage with this topic as well. That said, as Purcell implies, the history of American law can be (and indeed has been) told

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responded to social, economic, and political changes that threatened their power); JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 313-22 (1950) (providing a synoptic socioeconomic and institutional account of developments in the legal systems of the United States over the long course of American history); MICHAEL J. POWELL, *FROM PATRICIAN TO PROFESSIONAL ELITE: THE TRANSFORMATION OF THE NEW YORK CITY BAR ASSOCIATION* (1988) (discussing the late nineteenth-century birth and twentieth-century transformations of the New York City Bar Association); see also Amalia D. Kessler, *Arbitration and Americanization: The Paternalism of Progressive Procedural Reform*, 124 YALE L. J. 2940, 2952-53 (2015).

6. See JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 49-50, 102-29 (1976); HOBSON, *supra* note 5, at 298-303; POWELL, *supra* note 5, at 11-27, 141-43; Kessler, *supra* note 5, at 2953-54.

7. See HOBSON, *supra* note 5, at 262-90, 298-99; POWELL, *supra* note 5, at 6-28.

8. See MICHAEL WILLRICH, *CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO* 122, 163 (2003).

9. HURST, *supra* note 5, at 342-52.

10. See Purcell, *supra* note 3, at 42 & n.35.

as an ongoing struggle by the legal profession (an elite encompassing both lawyers and judges) to wrest power from juries and the broader lay public.<sup>11</sup> And from this perspective, key nineteenth-century developments like the decreased power of juries to make law, the increased frequency of motions granted for new trial, and the emergence of the directed verdict are very much in line with the Progressive-era, judge-empowering reforms to which Purcell alludes (as well as with later developments like the loosening of standards for granting summary judgment and motions to dismiss for failure to state a claim).<sup>12</sup>

Like Purcell, Richard White suggests ways of reading my nineteenth-century account that would connect it to a story of longer continuities in American legal history. White focuses in particular on the distinctive nature of the American state, highlighting how my history of the antebellum attacks on chancery aligns with a growing body of scholarship that disputes the longstanding notion that the nineteenth-century American state was somehow weak.<sup>13</sup> On this account, Americans developed and deployed considerable state power but did so through decidedly non-Weberian, nonbureaucratic mechanisms.<sup>14</sup> These included, most importantly, delegating governmental authority to quasi-independent actors who received compensation by charging fees to those they served—a practice against which a significant backlash arose over the course of the nineteenth century.<sup>15</sup>

As White notes, chancery was but one of many institutions that came to be targeted for facilitating such fee-based governance.<sup>16</sup> So too, White trenchantly observes that although the various constituencies that joined together in attacking chancery proclaimed their commitment to advancing democracy, their legacy has been decidedly mixed.<sup>17</sup> With the passage of time, elements of equity reemerged through “a backdoor,” and these elements have been used both to promote the interests of the disempowered (as in the case of the

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11. See, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at xiv-xvi, 1-31 (1977).

12. For discussions of the historical evolution of these various judge-empowering devices, see Renée Lettow Lerner, *The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial*, 22 WM. & MARY BILL RTS. J. 811, 828-69 (2014); Renée Lettow Lerner, *The Rise of Directed Verdict: Jury Power in Civil Cases Before the Federal Rules of 1938*, 81 GEO. WASH. L. REV. 448, 457-75 (2013); Renée B. Lettow, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth-Century America*, 71 NOTRE DAME L. REV. 505, 505-52 (1996).

13. See Richard White, *Contextualizing Inventing American Exceptionalism*, 70 STAN. L. REV. ONLINE 23, 25 (2017) (book review); see also *id.* at 25 n.7 (collecting some of the key literature staking out this claim).

14. See *id.* at 25-26.

15. See *id.*

16. See *id.* at 26.

17. See *id.* at 26-27.

Freedmen's Bureau courts and the subsequent Progressive-era development of labor arbitration) and to advance the interests of elites (as in the issuance of labor injunctions against striking workers and the various judge- and expert-empowering Progressive-era endeavors to which Purcell gestures).<sup>18</sup>

White is surely correct that much could be learned by situating chancery more directly within a broader account of nineteenth-century American struggles over fee-based governance, including, as he suggests, by attending to the odd alliances—like the one between liberals and evangelical reformers—to which these struggles gave rise.<sup>19</sup> That said, there are features specific to the debates over chancery that are also worthy of independent study. Although nineteenth-century New York chancery came into the crosshairs of a broad-brush attack on fee charging, animosity against the institution long preceded such concerns, dating back to the seventeenth-century English Revolution during which chancery came to be associated with absolutist claims.<sup>20</sup> This tendency to associate chancery with royal (and “popish”) authority resurfaced during the colonial period and continued into the American Revolution; and as reconfigured in various ways more suited to nineteenth-century American conditions (including in relation to mounting concerns about fees), it remained a distinctive discursive frame for criticizing the institution.<sup>21</sup> So too, the distinctively judge-empowering features of chancery's quasi-inquisitorial procedure, especially as conceptualized and propagated by Federalist elites like Kent and Story, generated a particular set of anxieties about the dangers of excessive governmental power.<sup>22</sup> While these anxieties were heightened by the fact that various chancery officials operated as relatively unconstrained, fee-charging contractors, they existed independently of the institution's fee-based structure.

In noting that despite the abolition of chancery, “a backdoor [opened] for the return of equity,” White highlights the parallels between equity courts and conciliation courts, including, most importantly, the fact that both institutions promote the relative empowerment of judicial (or communal) elites.<sup>23</sup> Placing these two distinct institutional traditions within a shared conceptual frame highlights a point at which Purcell also hints<sup>24</sup>—namely, the significance of the ongoing struggle between elites and the broader public for control of the legal system. That said, it bears emphasis that these traditions also differ in ways worthy of attention. While the Freedmen's Bureau courts can be viewed as

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18. *See id.*; *see also* Purcell, *supra* note 3, at 45.

19. *See* White, *supra* note 13, at 25-26.

20. *See* KESSLER, *supra* note 1, at 24, 34, 113, 258.

21. *See id.* at 24, 34, 113.

22. *See id.* at 37-61.

23. White, *supra* note 13, at 26.

24. *See* Purcell, *supra* note 3, at 42-43 & n.27.

drawing on a tradition of equity in that they relied heavily on judges empowered with significant discretion, they also differed from equity courts in that they were staffed not by lawyers required to apply the formal rule of law but instead (like European conciliation courts) by nonlawyers expected to apply communal norms of common sense.<sup>25</sup> Any effort to craft policies that would help move us beyond the back and forth that White so powerfully traces between “dark” and “benign” uses of governmental power must include careful attention to institutional differences of this sort.<sup>26</sup>

Like Purcell and White, Mark Tushnet is interested in questions of continuity and rupture, but he focuses especially on the issue of causation. He presses, in particular, on my discussion of the role played by what he calls lawyers’ “self-understandings” in shaping nineteenth-century procedural reform.<sup>27</sup> In so doing, he contrasts my attention to lawyers’ self-understandings with two other approaches to explaining procedural reform in this period—namely, one focused on lawyers’ material self-interest and another on Weberian pressures to rationalize institutional design.<sup>28</sup>

Tushnet begins by questioning my claim that the revisionist literature on procedural reform presents a largely materialist account of lawyers’ motivations.<sup>29</sup> Given the constraints of this brief response, I cannot thoroughly review the literature. But needless to say, we read it differently. In arguing that lawyers may have “favor[ed] codification because it is the cheapest means of giving the illusion of reform”<sup>30</sup> and that codification embodied an “interest in disguising and suppressing the inevitably political and redistributive functions of law,”<sup>31</sup> revisionist scholars suggest, as I discuss in the book, that “the procedural reform embodied in the Field Code was simply a feint” designed “to distract . . . from the profession’s failure to engage in meaningful, substantive reform of the law.”<sup>32</sup>

Tushnet’s more central assertion is that my book “may not have put the internalist [Weberian] account entirely to rest.”<sup>33</sup> But this misperceives the nature of my argument. The book does not seek to demonstrate that materialist and Weberian rationalist accounts have no purchase whatsoever in explaining nineteenth-century procedural reform but rather that they are by themselves

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25. See KESSLER, *supra* note 1, at 5-6.

26. See White, *supra* note 13, at 27.

27. Mark Tushnet, *The Lawyer/Judge as Republican Hero*, 70 STAN. L. REV. ONLINE 29, 30 (2017) (book review).

28. See *id.* at 31-33.

29. Tushnet, *supra* note 27, at 31-32.

30. Robert W. Gordon, Book Review, 36 VAND. L. REV. 431, 443-44 (1983).

31. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW* 265-66 (1977).

32. KESSLER, *supra* note 1, at 10.

33. Tushnet, *supra* note 27, at 30.

inadequate to the task and require supplementation in the form of attention to possible cultural or ideational factors.

As a way of demonstrating this point, let me turn to another of Tushnet's observations—namely, that one of the key challenges faced by my cultural account of equity's turn to oral, adversarial procedure is the problem of timing. As he notes, the heroic, republican image of the lawyer was "seemingly ever-present" in the antebellum period, but the merger of law and equity took place from roughly 1817 (when Chancellor Kent decided the important case of *Remsen v. Remsen*<sup>34</sup>) through to the enactment of the Field Code in 1848.<sup>35</sup> So how can a cultural constant account for a set of procedural and institutional changes that took place within a specific time period? The answer, in short, is that culture (and in particular, lawyers' republican self-image) operated not alone but as part of a broader constellation of causal factors. These included new competitive pressures created by decreasing barriers to entry into the legal profession, as well as a number of factors that can be described in Weberian rationalist terms.

As concerns the latter, I argue that in the early decades of the nineteenth century, a combination of increased democratization and a series of socioeconomic developments sometimes described in the scholarly literature as a "market revolution" led to a growing number of lawsuits, thus putting new pressure on the longstanding disjunction between chancery's quasi-inquisitorial logic and limited judicial staff.<sup>36</sup> The end result was to generate a growing sense of urgency that antebellum New York chancery had to be reformed in some fashion—urgency that can be understood as pressure for institutional rationalization.<sup>37</sup> Such pressure (along with the political dynamics of the struggle between Democrats and Whigs) led to some important changes, including, as Tushnet notes, the 1823 creation of a set of circuit judges, later renamed vice chancellors, endowed with first-instance jurisdiction in equity and situated in towns throughout the state rather than (as was the case of the chancellor) in Albany alone.<sup>38</sup> But while there were pressures to rationalize chancery in some way, rationalization can take more than one form, such that the mere fact of these pressures does not in itself suffice to explain the particular oral and adversarial direction of chancery's reform. Indeed, the perception that chancery's docket was at a breaking point arose around the mid-1830s—by

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34. 2 Johns. Ch. 495 (N.Y. Ch. 1817); see also KESSLER, *supra* note 1, at 56 (discussing Kent's decision in *Remsen*).

35. See Tushnet, *supra* note 27, at 29, 35.

36. See KESSLER, *supra* note 1, at 331-33.

37. See *id.*

38. See *id.* at 97-98, 117-18, 399 n.124; Tushnet, *supra* note 27, at 34.

which time chancery had already come to embrace significant components of the oral, adversarial model.<sup>39</sup>

Tushnet is right that the establishment of circuit judges created more opportunities for lawyers to engage in oral argument,<sup>40</sup> but this development was also part and parcel of a decades-long series of efforts to strengthen the quasi-inquisitorial foundations of equity by augmenting its judicial staff.<sup>41</sup> Moreover, to the extent that the creation of circuit judges did create more opportunities for lawyers to engage in adversarial argument, lawyers did not view these opportunities as sufficient. That is why, as I describe at length in the book, lawyers also aggressively sought to insert themselves into proceedings before masters and examiners, thereby undertaking responsibility for the oral, adversarial examination and cross-examination of witnesses.<sup>42</sup> Tushnet points to Henry Vanderlyn's account of his role in equity proceedings to suggest that he "seems to have been completely satisfied with his ability to see himself displaying republican virtue in unreformed equity proceedings."<sup>43</sup> But the very fact of Vanderlyn's involvement in these proceedings, taking cross-examination for hours on end before examiners in the local tavern, was itself a product of chancery having already been considerably reformed—and due not to any legislative change, but instead to lawyers like Vanderlyn having chosen to insert themselves into proceedings from which they had previously been excluded.<sup>44</sup>

The question then becomes why lawyers made this choice, and here I do not believe that rationalization gets us very far toward an answer because the kind of cross-examination on which these lawyers prided themselves was in Weberian institutional terms highly irrational. Indeed, the rise of oral, adversarial witness examination and cross-examination added greatly to the cost and delay of equity proceedings, thus contributing to pressures for reform.<sup>45</sup> Lawyers like Vanderlyn embraced adversarial procedure because they viewed it as a means of advancing their own glory and power—and in the process, they ended up changing equity procedure in ways that made it decidedly less rational.<sup>46</sup> With time, however, these increased irrationalities,

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39. See KESSLER, *supra* note 1, at 130-35.

40. See Tushnet, *supra* note 27, at 34.

41. See KESSLER, *supra* note 1, at 132-34.

42. See *id.* at 89-102.

43. Tushnet, *supra* note 27, at 36.

44. See KESSLER, *supra* note 1, at 89-102, 194-96.

45. See *id.* at 102-07.

46. Because Tushnet also questions the distinction between lawyers' republican self-image and their material self-interest, see Tushnet, *supra* note 27, at 32 n.10, I should emphasize that, as I argue in my book, lawyers' status-based motivations (stemming from their self-image) cannot be reduced to mere material interests but are nonetheless intimately linked to such interests. See KESSLER, *supra* note 1, at 198-99 ("[I]n the

combined with changing ideas about the nature of procedural justice itself, led to more global reform, as reflected in the abolition of masters and examiners and of chancery itself, accomplished at New York's state constitutional convention of 1846.<sup>47</sup> The ensuing Field Code, in turn, reflected the merger of law and equity that had been all but accomplished through lawyers' own bottom-up efforts.<sup>48</sup>

Tushnet questions my emphasis on cross-examination as an important part of lawyers' toolkit for engaging in what I call republican self-display. He suggests that because "[c]ross-examination is generally plodding and not dramatic," it does not afford lawyers "real opportunities" to engage in such display.<sup>49</sup> It is less obvious to me that cross-examination is necessarily lacking in drama. Even when questions are technical and plodding, they are commonly designed to fluster the witness and undermine credibility, such that it is often possible to detect the proverbial whiff of blood. But more importantly, to my mind, the distinction Tushnet draws between self-understanding and courtroom reality is necessarily illusory.<sup>50</sup> Cross-examination enables lawyers to demonstrate their worthiness as defenders of civic virtue if they and others see it that way. And there is an abundance of evidence from the antebellum period that many did indeed see cross-examination in precisely these terms—as a mechanism that, in the words of one contemporary, made the lawyer "appear[] as if designed by Providence to be the refuge of the unfortunate, and the protector of the oppressed."<sup>51</sup>

Finally, Tushnet observes that he has "some question about the accuracy of the views [espoused by Kent and Story] that the equity judge differed in republican virtues from the common law judge."<sup>52</sup> As he rightly suggests, lawyers as a whole in the antebellum period appealed to the broadly prevalent discourse of civic republicanism as a means of justifying their guild monopoly and their aspirations for increased professional and political power.<sup>53</sup> But while the elite Federalist judges who worked to reinvigorate the equity tradition in the early nineteenth century were not alone in appealing to the discourse of

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nineteenth century, as today, social respect was meted out in part in material rewards, while wealth contributed to high social standing.").

47. See KESSLER, *supra* note 1, at 102-09, 136-44.

48. See *id.* at 144-50.

49. Tushnet, *supra* note 27, at 34.

50. *Id.* at 35.

51. *Preface to the First Edition of SPEECHES OF THE RIGHT HONOURABLE JOHN PHILPOT CURRAN, MASTER OF THE ROLLS IN IRELAND, ON THE LATE VERY INTERESTING STATE TRIALS*, at ix (London, Longman, Hurst, Rees, Orme & Brown 4th ed. 1815) (describing John Philpot Curran's "unequaled" skill at cross-examination); see also KESSLER, *supra* note 1, at 167.

52. Tushnet, *supra* note 27, at 33.

53. See *id.* at 32-33.

republican virtue, they did so in ways that were distinctive. There was, in short, a contemporary battle between different kinds of lawyers over who exactly could claim the mantle of republican hero. Kent and Story claimed it for the equity judge—for highly educated and propertied elites like themselves who would deploy the distinctively judge-empowering procedures of equity as a means of resisting the democratic onslaught that they feared had been brought about by the Jeffersonian victory of 1800.<sup>54</sup> In contrast, lesser lawyers of the sort whose entry into the profession was made possible by the loosening of guild barriers appealed to the discourse of republican virtue as a means of glorifying the activities of ordinary, everyday lawyers, including those who practiced before their small-town neighbors in rural justice of the peace courts.<sup>55</sup> It was this more democratic version of lawyers' claim to the mantle of republican hero that would ultimately win the day.<sup>56</sup>

And so we come full circle. As all three readers suggest in different ways, lawyers' successful bid for power is a theme that has repeated itself throughout American history—whether in the form of nineteenth-century appeals to a Ciceronian image of the orator-statesman or later Progressive-era experiments with supposedly streamlined and scientific institutions like the municipal courts or present-day modes of increasingly lawyerized alternative dispute resolution.<sup>57</sup> Along with the struggles over racial hierarchy and market power on which my book also focuses, the legal profession's remarkable ability to reimagine and reposition itself so as to preserve its continued authority is one of the great through lines of American legal history.

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54. See KESSLER, *supra* note 1, at 47-48.

55. See *id.* at 157-58.

56. See *id.* at 60-61, 190-99.

57. See Purcell, *supra* note 3, at 45 n.52; Tushnet, *supra* note 27, at 30; White, *supra* note 13, at 27.