

On Becoming Relevant: The Role of Legal History in Legal Scholarship

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Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. Rev. 1 (2011), available at [SSRN](#).

A while back over at the [Legal History Blog](#), there was a brief discussion about the relevance of legal history to the legal academy. On the heels of this discussion, Pierre Schlag posted a typically hilarious paper on SSRN about [the faculty workshop](#) that in part demonstrated the irrelevance of legal history, or at least the inability of legal scholars to access historians' questions. This is probably the main source of anxiety/frustration of legal historians who work in the legal academy, despite the (apparently "[whiggish](#)") historical turn in constitutional scholarship. History these days seems to be relevant to legal scholarship only in the context of debates over original meaning/intent. What makes this particularly frustrating for historians is that the quality and quantity of legal history, produced by professionally-trained historians, has increased dramatically in recent years. The last two decades, in particular, has witnessed the emergence of a bountiful body of scholarship, that is both theoretically and forensically rich, and that engages some of the biggest questions about law: its nature and function, and its relationship to various other macro-institutions such as society, the market, the polity, the state, and democracy. (For starters, just look at the work by [the contributing editors to the legal history section](#) here.) And yet we still find it difficult to engage our colleagues and convince them of the importance of our work; for many institutions we remain a "luxury." Historians have long worried about our declining ability to reach popular audiences. Apparently, we are losing some colleagues too.

This is where I find Tabatha Abu El-Haj's recent article heartening. What struck me immediately about the article was how Abu El-Haj framed it. In a seven-page introduction she spends two paragraphs on legal historiography; her main target is law and democracy scholarship. Consciously or not, Abu El-Haj has offered an example of how to smooth the ground between historian and legal scholar. Translating between disciplines, Elizabeth Mertz has told us, is a project fraught with misunderstanding. But, perhaps because of her training in a law and society program, Abu El-Haj appears to have both the fluency and willingness to attempt an effective translation. In this article, for example, she uses "the repertoire of democratic political practices" in the past to expose and undermine two major assumptions of modern law and democracy scholarship.

The first assumption Abu El-Haj critiques is the idea that "the political process necessarily will be structured by law" (p. 5). Although there has always been some regulation of the political process in the United States, in the nineteenth century there were wide swaths of the public sphere where law (in the sense of rules produced by legislative, administrative, and judicial institutions) was absent. As Abu El-Haj explains, "Public meetings, petitions, local and national festivities, and even juries and mobs were the normal channels through which citizens, ordinary and elite, enfranchised and disenfranchised, participated in their new democracies," and "regulatory controls were relatively weak and often exercised only intermittently" (p. 3). The imposition of legal controls on these practices in the period between 1880 and 1930 either eliminated or narrowed them, giving the state greater power to determine the direction of politics and popular engagement in self-government. Abu El-Haj thus denaturalizes the assumed relationship between law and democracy that modern scholars posit.

The second major assumption held by scholars writing in the law and democracy field that Abu El-Haj critiques is the idea that democracy consists solely of elections. Democracy as both a concept and a practice is enormously complex; reducing it to elections robs it of its richness, and reduces it to a caricature. Assembly, for instance, has long been a tool in popular politics. This “neglected right,” which Abu El-Haj discusses more fully in [another article](#), is now neglected precisely because law has had such a powerful effect on the ways in which people can gather. The simple requirement that people get a permit before assembling, Abu El-Haj demonstrates, means that the state rather than the “demos” controls when and where people can gather, undermining, indeed criminalizing, spontaneous political action. In fact, gaining control of the streets long has been a crucial if largely hidden site for the expansion of state power, often at the expense of popular politics. The history Abu El-Haj has unearthed, as well as the rise and demise of the Occupy movement, demonstrate the continuing relevance to democracy of the use and control of streets. Abu El-Haj thus challenges legal scholars to search for connections between law and democracy in less obvious sites and practices, rather than focusing myopically on electoral issues.

One of the defining characteristics of good scholarship, it seems to me, is to ask interesting questions going into a project, or to raise interesting questions coming out of it. Although Abu El-Haj does not draw this conclusion herself, she seems to call into question the plausibility of “law and democracy” as an area of law. If the imposition of law on political practices has narrowed their scope and made them subject to state regulation, refining legal rules would seem only to change the nature of the state regulation of politics. If the state can determine the time, place, and manner, and through them the nature of popular politics, what is left of “democracy” as a political practice? Perhaps the proper conjunction should be “or” rather than “and” when discussing the relationship between “law” and “democracy.” In fine, Abu El-Haj’s article is a good example of the ways in which historians can challenge the boundaries of legal scholarship. Let’s hope our colleagues are game for it.

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