

LIFT, SIFT, PEEL, AND TUNNEL: EMPOWERING UNDERGRADUATES TO EMBRACE LEGAL OPINIONS

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Too often history students avoid legal resources because they are presumably difficult to understand or because these primary sources lie beyond their ranges of expertise. This essay aims to remedy those misconceptions or misguided fears by helping undergraduate instructors, particularly historians, teach students how to handle judicial opinions effectively and confidently. I begin with an explanation of the benefits of using judicial opinions in teaching. The article then offers ways to boost students' confidence and skills in managing, dissecting, digesting, and understanding case opinions. This empowerment involves three simple steps: Boost students' academic confidence, teach them how to read cases, and show them how to take useful notes. If teachers and students embrace judicial opinions as productive learning tools, students should have a fuller understanding of historical developments as they were happening. Beyond the historical benefits, examining judicial opinions can improve students' skills in critical thinking and critical applications, as well as sharpen their appreciation for their roles as thoughtful citizens.

Judicial opinions can yield great historical benefits as primary sources. Sometimes judicial opinions get cloaked in less-than-accessible legal language and jargon, but they offer contemporary snapshots of social, economic, political, and cultural developments and perceptions. Courts grapple with a variety of legal issues, from the mundane (like patents or contracts) to the extraordinary or charged (like gun control or capital punishment). Regardless of the legal issue's "sexiness," the opinions that accompany judges' rulings can be windows into the varied arguments and historical considerations at play in and out of the courtroom. It is even better for the historian if the case elicits several judges' opinions; in addition to controlling majority rulings, some cases generate persuasive concurring or dissenting opinions. The more opinions a case inspires, the fuller the picture we have of competing viewpoints on critical issues. We also can explore judges' contextual evidence to unravel the historians' question of "why" history unfolds the way it does. If written well, judicial opinions can serve as well-developed, self-contained primary sources, rich in factual and analytical examples, ripe for honing students' research and reading talents.

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The controversial *Roe v. Wade* illustrates the historical value judicial opinions can have.² Justice Harry Blackmun's lengthy opinion provides a thorough snapshot of Americans' varied understandings of abortion in 1973. Blackmun offered an extensive account of the enduring acceptance of abortion, reaching back to its ancient known roots. He balanced this historical record with an exposition of the reasons American states began criminalizing abortion in the late nineteenth century. After these relatively objective historical narratives, Blackmun introduced emergent socio-psychological reasons for reconsidering criminal abortion laws. He pointed to the emotional and financial strains that wanted and unwanted children can bring to underprepared parents. Then, addressing the lack of consensus in state and medical definitions as to when life begins, Blackmun created the monumental trimester schedule that clarified the scope of the states' authority in regulating abortion and preserving potential life. Finally, the concurring and dissenting opinions represented additional perspectives on governmental roles in regulating abortion. Most notably, then Associate Justice William Rehnquist accused Blackmun of exceeding his judicial authority by drafting a legislative-like prescription for terminating pregnancies. Studying *Roe* reveals how Americans understood abortion and its histories, while also laying out the course of debates that followed in succeeding decades.

Beyond substantive historical gains, reading judicial opinions can sharpen students' critical thinking skills. Like most liberal arts and humanities instructors, historians train their students to be excellent critical thinkers. We insist that they gather and explore foundational evidence to get a better understanding of why things happen and why they are significant. Court cases can be essential to this. Students might know that Americans entrust their courts to weigh the constitutional validity of statutes, but they might not understand the origins of judicial review in the United States without reading Chief Justice John Marshall's opinion in *Marbury v. Madison*.³ Likewise, judicial rulings can unveil the significance of historical developments. For example, instructors can lay *Lochner v. New York* and *Muller v. Oregon* side by side to explore the longstanding effects that Progressive-era thinking had on gender-based workplace divisions throughout the twentieth century.⁴ Examining judicial rulings and taking useful notes on these cases can help students see the difference between fact and analysis, and show them how to apply their historical findings in meaningful, critical ways.

The study of legal resources can also push students to be better-informed citizens. American legal historians know that immersion in constitutional materials can foster

²*Roe v. Wade*, 410 U.S. 113 (1973).

³*Marbury v. Madison*, 5 U.S. 137 (1803).

⁴*Lochner v. New York*, 198 U.S. 45 (1905); *Muller v. Oregon*, 208 U.S. 412 (1908).

students' appreciation for belonging to a free republic and the legacies of its evolving liberties.⁵ Legal studies can also prepare our students for "leadership in an interconnected world," learning how the law directly responds to and shapes social and political developments.⁶ Furthermore, exploring specific cases can lead students to a firmer understanding of the fundamental building blocks of social relations, identities, and interests. Many of our students know of *Brown v. Board of Education*, but they might not know the legal foundations for challenging race-based discriminatory policies in the United States.⁷ They might have heard of *Kelo v. City of New London*, but they might not know how important private land ownership is to American identity and how controversial eminent domain can be.⁸ Our many expectations as professors go beyond just teaching history. We need to give students the tools to be well-rounded citizens who will serve as good neighbors, good employees, and good family members. Judicial opinions can be among the many resources we use to lead them down their productive paths.

Knowing the value of judicial opinions, however, does not necessarily make them less daunting to our students. Before we teach them how to manage cases, we must convince them that they are capable of doing so. Because legal writing's esoteric clunkiness can alienate readers, students can be quick to reject the law as inaccessible. In doing so, they deny their own natural and developed talents as history readers. The challenge is to persuade students to set aside their concerns so they can embrace both the glory and ugliness of the law. If their own self-doubts are their greatest obstacles, here are some tips for lifting them over these hurdles.

Above everything, tell your students that they are allowed to be wrong. They are not expected to know everything (or anything, in some cases), especially as undergraduates. I tell students that my classroom is one of the last places where they are allowed to risk floating incorrect answers. I am reminded of an evidence professor who thought the most effective way to teach was to ask convoluted questions and trick his students into offering incorrect responses, creating scenarios to show how comparatively clever he was. Even worse, he insisted that the students he called on remain standing for his entire line of questioning, an exhausting spell that could last half

⁵See James Coburn, "Professor: Constitutional Heritage Can Bring Sense of Belonging to U.S. Citizens," *Edmond Sun*, June 17, 2013, <http://www.edmondsun.com/local/x479814082/Professor-Constitutional-heritage-can-bring-sense-of-belonging-to-U-S-citizens> (accessed January 23, 2014).

⁶American Academy of Arts and Sciences, "The Heart of the Matter: The Humanities and Social Sciences for a Vibrant, Competitive, and Secure Nation" (Cambridge, MA, 2013), 12, http://www.humanitiescommission.org/_pdf/hss_report.pdf (accessed January 23, 2014).

⁷*Brown v. Board of Education of Topeka*, 347 U.S. 284 (1954).

⁸*Kelo v. City of New London*, 545 U.S. 469 (2005).

an hour. While his approach promoted attentiveness and endurance, the discomfort, distrust, and fear did not promote healthy study. For many, it fostered resentment and self-doubt. I do not want my own students second-guessing their abilities or their knowledge, especially while they are developing their academic skills. Instead, I nurture calmness and confidence by telling them that they are allowed to make mistakes, as long as they ground their answers in good preparation. Once we close the classroom door, all should be safe in the laboratory of ideas.

When I assure them that it is safe to be wrong, I marvel at the change in tenor—shoulders drop and nervous smiles sneak in as the class lets out a collective sigh. Empowering students with the permission to be wrong has significant effects on class discussions as well. Students lift their heads from their notes; some even purposely make eye contact with me. Most importantly, amnesty encourages them to take risks in class. They are more willing to express their thoughts freely without having to worry about offering the perfect answer—something that rarely exists in historical and legal studies.

There is a caveat to this amnesty. Students must be willing to hear that they are wrong in front of their peers. The underappreciated element of “learning from mistakes” is learning how to accept critical comments. Think of this as a seasoning process: Learning how to hear that you are wrong in the safety of the undergraduate classroom makes it much easier to manage mistakes in less-forgiving environments, such as the law-school lecture hall, the graduate seminar, the boardroom, or even the Thanksgiving dinner table. While most students bristle at this caveat, I assure them that my corrections and redirections are not proof of my disappointment. I regularly dispel the myth that professors carry wrong answers home with them, as if every “stupid” student response drives us closer to retirement. Just as all of their answers must remain in the classroom, so too must our responses. When class ends, students need to leave their molted skins and bloodied noses behind and take their newfound knowledge and skills with them.

Another way to empower students is to validate their chief complaint about the law: Many legal opinions are difficult to read because they *are* written poorly. Despite more than forty years of law school efforts to teach new lawyers to write in “Plain English,” such a style rarely inspires “Colorful English.”⁹ The law can be terse, precise, redundant, and inflexible. Law students are taught to write faithfully to the already-

⁹The consistency of legal writing’s terseness has bucked recent literary trends and expectations. In the 1970s, on President Jimmy Carter’s plea for increased legal accessibility, many law schools and firms reluctantly embraced the Plain English movement that floated in twentieth-century literary circles. For more on the stylistic turn, see the classic text by Richard C. Wydick, *Plain English for Lawyers* (Durham, NC: Carolina Academic Press, 1979), now available in its fifth edition. See also Rudolf Franz Flesch, *How to Write Plain English: A Book for Lawyers and Consumers* (New York: Harper & Row, 1979). For a more recent example, see Bryan A. Garner, *Legal Writing in Plain English: A Text with Exercises*, second edition (Chicago: University of Chicago Press, 2013).

printed legal word found in statutes, orders, and judicial opinions. Stripped of their literary tricks, students graduate seamlessly into a legal profession fed on lifelessly efficient briefs and memoranda. As a matter of course, many lawyers willingly embrace the abstrusity of stuffy legal forms as a way to reinforce inaccessibility and insulate their specialized field.¹⁰ A final explanation for why some opinions are poorly constructed is the writer's lofty objective to impress the "author." Since the mid-twentieth century, many high court decisions have been written not by judges alone, but with the assistance of their clerks. These neophytes strive to impress their mentors by writing drafts that they hope will represent, replicate, or mirror judges' styles and interests. In the process, clerks can mask their limited experience with overly erudite, elitist, and alienating language, leaving general audiences out of consideration.

I do not raise these legal writing foibles to be catty or snide. I am not a perfect writer, nor do I expect my students to be. I address these issues in class to humanize the writing experience, to make it more approachable. Students become frustrated when they read the works of polished professionals who do not write clearly. Such imperfection, however, should comfort our students. Anyone can have difficulty with tautological and impenetrable legal forms—even judges and their well-trained clerks. If so many learned legal professionals struggle to manage legal writing effectively, why should undergraduate students expect more of themselves?

Having bolstered their confidence, our empowered students need to know how to read judicial opinions. At the undergraduate level, the key to reading effectively is to teach them to sift out all of the opinion's "rubbish," the unnecessary clutter that can confuse inexperienced readers. To simplify, tell them that the majority opinion begins with the judge's or justice's name. Have them look for key initiating phrases such as "OPINION BY J. SMITH" or "MR. JUSTICE SMITH delivered the opinion of the court." Anything preceding this opening disclaimer holds little legal weight. This often bewilders students because the prefatory materials—such as case summaries, procedural posturing, core terms, headnotes, syllabi, and counselors—can stretch for several pages. But these notes have no precedential value. Editors and court reporters offer them as a courtesy to lawyers who rarely have time to read whole cases. Although these prefatory materials have no legal bearing, you still might encourage students to skim them. They typically are written more clearly than the opinions themselves, so they can serve as a nice primer for the opinion below. These summaries and headnotes reduce the opinion's highlights to easily digestible snippets. Be sure, though, to warn students that the prefatory notes are not fair game for citable historical research. They still must read the published opinion because they will only find "The Law" in the text *following* the judge's opening line.

¹⁰I realize that my choice of the word "abstrusity" is a sad testament to the alienating power of elitist jargon.

Like good historical researchers, our students are served best by reading judicial opinions straight from the bound court reporters in the library. These published opinions appear with little fanfare, fewer prefatory materials, and less textual clutter—in other words, with less debris for the reader to sift. But as a teacher reared in the technologically driven classroom, I am not so naive as to believe typical students would use their legs to walk to the library, even if legal reporters were available. If the cases do not come from assigned textbooks or materials, most students will get them from online academic sources such as LexisNexis and WestLaw, or from popular and accessible online public sources like Justia, FindLaw, and Cornell University Law School's Legal Information Institute.¹¹ The chief problem with these online sources is that their formats are rarely as reader-friendly as published reporters are. The text is hampered visually by the welter of page markings from a variety of court reporters that enjoy the subtle marketing that comes with those citations. Some opinions might be tied to five different reporters; citations for each litter the draft with non-substantive distractions. Many online sources survive on the contributions of commercial advertisements that further clutter the legal presentation. Finally, students might draw their cases from less-reputable webpages or databases that offer mere summaries or incomplete cases in "un-citable" formats. If you require students to find their own case materials for class discussion or course projects, take time to discuss the merits and dangers of available online sources.

We must also discuss with our student historians the matter of reading footnotes and endnotes. In law school, professors expect students to digest everything in the majority opinion, including footnotes. I earned the disappointment of my mild-mannered torts professor who caught me off-guard with a question, which I could have answered had I read the footnotes closely. While I stammered for an answer, a foolhardy classmate rescued me by asking, "Do we really need to read footnotes?" The professor's disappointment turned to indignation. She reminded us that everything written has presumed value and it was not our place as inexperienced scholars to measure that value. As an undergraduate history teacher, however, I am more forgiving when students do not read legal footnotes and endnotes. I am sadly aware that many students see notes as "skippable." They avoid notes because they see them as "extra" work. Further, tired students welcome the psychological boost that comes with a page anchored by long footnotes they intend to ignore.

¹¹As of late, my students have been getting much of their online-derived cases from Findlaw.com, which Thomson Reuters operates. It is worth noting that West Group (which oversees WestLaw) is a business unit of the Thomson Corporation. Part of FindLaw's appeal comes from its "searchability." Unlike the often-clumsy search engines available on legal databases such as LexisNexis and WestLaw (which work to drive up billable hours and costs), FindLaw's opinions are readily searchable through Google. Further marketing Justia's, FindLaw's, LII's accessibility, many Wikipedia entries offer direct links to case transcripts. Of course, by the time this essay makes it to print, the culture of technological obsolescence could render this note embarrassingly outdated.

As instructors, we need to decide whether we want students to read legal footnotes. Students can gain a great deal by reading them. Like historians who bolster their principal narratives with supporting arguments in their endnotes, judges and clerks often preserve (or bury) their astute comments or related observations in their annotations. Beyond judicial comments, notes can offer additional gifts to the disciplined reader: related cases and statutes, recommended alternative readings, source origins, judges' biases, cues that enterprising attorneys might adopt as their own arguments, or dicta that other judges might turn into precedent.

With so much to gain from annotations, I require my students to treat notes as an essential part of their readings. Nevertheless, notes can be quite burdensome. Many are composed of lengthy strings of legal citations, offering little substantive value or analysis. To streamline their reading, I give them two tips on how to scan notes productively. First, they should gloss over case names and citations because they usually offer little help in immediately understanding the case. If these cases later prove useful, they can always return to the note for their citations. Secondly, they should skim notes for lengthy textual treasures that shine in the sea of citations, looking for comments that offer some substantive value to the opinion itself. We need to be clear with our students from the course's outset—tell them if you expect them to read notes. Even if you do not require students to read them, be sure to explain what they can get out of them. Lastly, we should warn any of our future law and graduate students that they must practice reading notes now, because they will be required to do so in the near future.¹²

For history instructors assigning judicial opinions, I recommend teaching our note-taking students how to brief cases. The briefing model I use in undergraduate classes is based loosely on the traditional law school "IRAC" (pronounced "EYE-rack") format that identifies the core components of most opinions: Issue, Rule, Application, and Conclusion. For law students, these briefs reduce cases to tight one-to-two-page manageable tracts. They serve as shorthand memoranda for class recitation and exam study. The art of good briefing also hones beginning lawyers' skills in reading and analyzing quickly. It prepares them for the day when they have to process legal materials while hurrying into a courtroom, or if public attorneys, while practicing on the fly before the bench itself.

As briefers, law students are supposed to peel all the layers of the legal onion down to its supposed core, hoping to find singular rules and applications from each case. While structurally similar, the historian's brief serves a different purpose. Instead of stripping the onion bare, the brief helps students find the contexts in which these rules and applications were set. Historians do not discard the onion's layers; they peel them to analyze each layer's significance. Attorneys, rushed by court-imposed

¹²If you are reading this note, you are most likely the kind of instructor who finds value in such notes. Encourage your students to read them as well.

deadlines, might have to disregard tangential cases that are not relevant to their immediate needs. But historians have the luxury of carefully considering those additional legal sources without the same institutional strictures.

To change the metaphor, my history advisor in law school described lawyers' and historians' different approaches in terms of "tunneling."¹³ Lawyers are trained to tunnel down into the legal and factual mantle, looking for the narrowest rules and applications that serve their clients' cases best. While digging, lawyers wear blinders to shield them from distracting or irrelevant nuggets. In contrast, historians tunnel out from a core event or rule, without blinders, examining all possible evidence to frame their subjects in broader, more meaningful contexts. Tunneling out can help create the necessary temporal links that historians seek. As my advisor noted, such an approach allows historians "to understand how things happen *as* they do, *when* they do." In practical terms, lawyers necessarily minimize their research aims for the sake of efficiency and client advantage, while historians bulk up for the sake of comprehensive objectivity.

With these reading differences in mind, I teach students to use an adapted version of the IRAC brief (see Appendix A). This model encourages students to embrace all of the onion's peeled layers and tunnel out from their historical starting points with greater confidence. If done well, these briefs empower students to come to class prepared to discuss the historical significance of judicial opinions, and minimize the need for subsequent research on essays or exams. In the following pages, I explain the elements of a model legal brief for historians. Keep in mind that there is no singular way to take notes on a case. Students should brief cases in ways that reflect their own intellectual understandings and interests. They should also know that each element does not appear in every judicial opinion. Just as judges write without templates, students have to be flexible in briefing each case differently. For example, many benches rule on cases unanimously, thus no concurring or dissenting opinions appear. Even more challenging for students, early nineteenth-century American opinions might be simple one-paragraph assertions of a judge's determination, offering few of the model brief's components. Regardless of the opinion's form and content, this modified case brief should not handcuff students or restrict their intellectual creativity. It is a simple and malleable blueprint for taking useful notes on their legal readings.

Keyword: One objective in briefing cases is assuring students they should not have to read the case deeply again. Thus, we should encourage them to pin keywords to their briefs that succinctly describe their cases. They need nothing fancy here—just short labels that identify the nature of the case's content or the purpose for studying the

¹³For this tunneling analogy, I am indebted to Sandra VanBurkleo, Associate Professor of History and Adjunct Professor of Law at Wayne State University, my academic mother who saved me from a sterile (and financially rewarding) life in legal practice. She often opened her legal history courses with this model.

case. For example, if briefing *Plessy v. Ferguson* the key words might simply read “Race, Segregation, Civil Rights” (see Appendix B).¹⁴ Keywords serve two purposes. First, they should jog students’ memories when returning to the case days or months after they first read it. Secondly, keywords help students easily organize their cases when preparing for papers or exams. If you ask an exam question about the legal history of racial desegregation or civil rights, effective keywords will raise helpful flags for the students, even if they cannot initially recall each case from memory.

Parties: Students need to know all of the key parties involved in a case. Encourage them to adopt the law school abbreviations of “π” for “Plaintiff” and “Δ” for “Defendant.” They should also identify all interested or related third parties relevant to the case, such as crime victims or estate beneficiaries. Simply listing them is not enough, however. They should also pen a shorthand description of each party, no more than a sentence. These blurbs should identify briefly who the parties were, and if possible, their relationship to each other. Students might also note the parties’ relevant vital information, such as residence, age, race, or ethnicity. For example, it matters that Homer Plessy’s racial makeup was mixed and that he often passed for a white man.

Facts: A good brief includes a succinct summary of the case’s relevant facts. Because the fact pattern is often the easiest portion of the case for students to understand, it tends to be the longest, most detailed section of the brief. After all, students want to show that they understood *something*. Remind them, though, that briefing is an exercise in efficiency. They should write terse bullet points only on facts relevant to the case’s outcome. Such pithy line-item notes will challenge students who like to cut and paste lazily from online sources, saving them precious seconds. We need to insist that they write these facts themselves. Actual writing will help them internalize the facts, whether they transcribe the text or preferably paraphrase it. Otherwise, they might falter if they hope to understand their pasted notes later. Briefing cases with purpose will help them remember the case’s intricacies when they return to their notes. Compare the following examples of briefed fact patterns from *Plessy*:

1) Cut-and-Paste: “Plessy, being a passenger between two stations within the State of Louisiana, was assigned by officers of the company to the coach used for the race to which he belonged, but he insisted upon going into a coach used by the race to which he did not belong. Neither in the information nor plea was his particular race or color averred. The petition for the writ of prohibition averred that petitioner was seven-eighths Caucasian and one-eighth African blood; that the mixture of colored blood was not discernible in him, and that he was entitled to every right, privilege, and immunity secured to citizens of the United States of the white race; and that, upon such theory, he took possession of a vacant seat in a coach where passengers of the white race were accommodated, and was ordered by the conductor to vacate said coach and take a seat

¹⁴*Plessy v. Ferguson*, 163 U.S. 537 (1896).

in another assigned to persons of the colored race, and, having refused to comply with such demand, he was forcibly ejected with the aid of a police officer, and imprisoned in the parish jail to answer a charge of having violated the above act.”¹⁵

2) Inefficient Facts: Homer Plessy, man of 1/8 black descent, was arrested after challenging the Louisiana Separate Car Act of 1890 by deliberately sitting in a “Whites Only” railcar in an effort to overturn law as violative of Thirteenth and Fourteenth Amendments.

3) Succinct Facts: “Octoroon” violated 1890 LA Sep Car Act to challenge its constitutionality under 13th/14th Ams.

The final “succinct” example is not lengthy, but it relays the minimal facts necessary to understand the legal rules and importance of *Plessy’s* opinions. If students read the case closely, the succinct note will still refresh their memories of Homer Plessy’s courageous challenge to Louisiana’s Jim Crow law.

Issue: Very simply, students must ask “What question(s) must the court address in this case?” Plessy called on the Supreme Court to determine whether the Separate Car Act violated the Thirteenth Amendment’s prohibition of slavery and the Fourteenth Amendment’s equal protection and due process provisions. Sometimes the court is kind enough to lay out the question with a disclaimer such as “The issue for us to determine in this case is” Most often, it will not be flagged this clearly, in part because some judges do not want to limit themselves to the narrowly defined question before them. Another way to locate the issue is to ask “Why is this case before the court?” If students can identify the issue at hand, they can appreciate more fully the case’s importance to historical and legal developments.

Rule: Students should list the relevant sources of law that judges use in writing their opinions. On its face, the task seems simple: Write down all statutes, judicial precedents, constitutional provisions, procedural rules, and executive orders that are germane to the ruling. However, this element is quite often the most difficult for undergraduates to brief. Students’ cries that they will not understand “legal stuff” can become self-fulfilling. If they are unsure, tell them to look for citation markings that typically accompany legal rules, such as statute numbers and case names. As students become more comfortable with identifying legal rules, challenge them to list only those that are central to the case’s final judgment. While all legal rules bear some

¹⁵*Plessy*, 163 U.S. at 541-542 (1896). The fact that you skimmed this block quote is proof that briefs require greater efficiency. Whenever students hide behind the text and simply read cut-and-pasted portions verbatim in class, it takes great professional energy not to roll my eyes and sigh. With tongue in cheek, I ask them to explain what it means *to them*, in English. Most often, they cannot—underscoring how important paraphrasing is to internalizing legal meanings.

importance, not all play significant roles in judges' rationales. For *Plessy*, the students might only identify the relevant provisions of the Louisiana statute and the Thirteenth and Fourteenth Amendments. In locating "central" or controlling rules, the students should ask themselves two related questions: 1) "Why are we reading this case?" and 2) "What rules should we take away from this case?" Every assigned case serves some purpose for the course. This purpose usually is grounded in the legal rule that the majority's author identifies, interprets, creates, or ignores.

Application: The most important step in briefing is the historical and legal analysis that is done in the "A" component of "TRAC" model—Application. This step is fundamental to shaping our students' critical thinking skills. They should ask themselves the following: "If the court applies a germane legal rule to the relevant facts, what conclusion should it reach?" In *Plessy*, Justice Henry Brown laid the facts alongside the U.S. Constitution and ruled that separating blacks and whites on a train did not work to enslave *Plessy*, and thus did not violate the Thirteenth Amendment. Unfortunately, answers like that rarely come so easily. The "application" portion of the brief often forces students to wade through stilted jargon, extraneous observations, and confusing paths of logic. They must do their best to distill judicial rationale into digestible bites. Where did the judges directly apply the rules to the facts? Where did the judges concretely specify their reasoning? Sometimes, this section need not be limited to the direct application of rule to fact. It also is a space to identify the reasons judges used to justify their conclusions. Perhaps, then, we could best rename this section "Application/Reasons." Flexibility is important here. For example, Justice Brown abandoned both fact and rule when he declared that segregation did not foster any racialized sense of inferiority; instead, subordination was merely a matter of black perception and choice. While his assertion hardly constitutes a strict sense of "application," students would surely be remiss to leave this out of their briefs. Therefore, this section should be a catchall, a place to record important gems for discussion and analysis—but only if they are relevant to legal or historical outcomes.

Policy: Savvy students should be able to identify any policy objectives that judges seek to accomplish with their opinions. Of course, that would make students more perceptive than some judges. Of all the brief's elements, policy considerations appear least often—partly because some judges neglect or ignore the usefulness of placing their rulings in broader social, political, and economic contexts. Astute history students, however, should be aware of each case's greater context. To clarify, readers might consider what judges aim to achieve with their rulings. Justice Brown reinforced state police powers for promoting public safety by separating whites and blacks, limiting the natural tensions inherent between them. Warn students, though, that they do not have to make up policy considerations for the sake of their briefs. Only record them if the majority opinion seems to indicate such.

Concur: Most appellate cases, especially those coming from the U.S. Supreme Court, bear multiple opinions. Like herding cats, it is often difficult to get judges to come together on *how* to agree with each other, even when they *do* agree with each

other. The students' task here is not too difficult: Identify the grounds on which the concurring judge differs with the majority opinion. Sometimes differences are flagged clearly, especially when the judge writes something to the effect that "I concur in the results, but not in the rationale." In *Prigg v. Pennsylvania*, Chief Justice Roger Taney called attention to the loophole in Justice Joseph Story's ruling that the federal government had exclusive authority over fugitive slaves. Taney agreed with Story that the federal government had such authority, but wrote a separate opinion insisting that state officials also had an obligation to uphold federal fugitive laws and not sidestep them. Other times concurring justices are not so clear in their differences. For example, Justice Frank Murphy upheld discriminatory curfews for residents of Japanese descent during World War II in *Hirabayashi v. United States*, but he used his concurring opinion to warn the military and federal government that the policy went "to the very brink of constitutional power," noting the "melancholy resemblance to the treatment accorded to members of the Jewish race in Germany and in other parts of Europe." Whether judges use concurring opinions as vehicles for clarifying legal differences or as lofty soapboxes, student-briefers' roles are the same—explain how judges have set themselves apart from majority holdings. It usually takes no more than a line or two to distill the differences.¹⁶

Dissent: It took me roughly three semesters of law school to learn that some professors did not care if I read dissenting opinions. As non-binding opinions, dissents hold no controlling precedential value. However, we must teach our students that dissenting opinions often become argumentative fodder for later appeals and related lawsuits. Committed to reading all sides of an argument for objective analyses, thorough historians might find that dissents offer the best lenses for studying viable or fleeting alternatives to majority opinions. As *Plessy's* lone dissenter, John Marshall Harlan wrote his opinion to remind the Court and country that the Reconstruction Amendments had made the Constitution color-blind. He admonished the majority for drafting an opinion that would be just as inflammatory as the *Dred Scott* ruling, especially in dividing the nation and denying African descendants the blessings of citizenship. The legacy of Harlan's powerful opinion is undeniable. Students familiar with his dissent would recognize how clearly his dissenting spirit resonated in Chief Justice Earl Warren's unanimous 1954 opinion in *Brown v. Board of Education*, which effectively overturned the *Plessy* ruling.

The length of many dissents can discourage tired students, but we should push them to read entire cases. Although dissenting judges can be long-winded and self-righteous, there is little work for the students to do. Following the same rules as briefing concurring opinions, they need only record highlights from the dissent. Again,

¹⁶*Prigg v. Pennsylvania*, 41 U.S. 539 (1842). *Hirabayashi v. United States*, 321 U.S. 81, 111 (1943). I used these cases as illustrations, in part, because there was no concurring opinion for *Plessy v. Ferguson*.

why and how have judges set themselves apart from the majority? Students might need only a few lines of dissent if briefing a case for class discussion. However, if they are researching cases for writing assignments, they might need richer notes to capture the full weight of potential counterarguments.

As historians, we have a variety of resources from which to draw as we plan our courses. Judicial opinions should be included in these assigned readings and research materials. Not only do they offer useful snapshots of contemporary understandings of historical developments as they unfolded, but they can sharpen students' critical thinking skills and their understandings of citizenship. We have a responsibility as teachers to boost the confidence of our student readers. Legal writing can be arcane and alienating, but students should approach it with open minds. First, show them that learned judges and clerks are human too, prone to similar literary and textual hang-ups. After we humanize legal writing, we can teach students to read comfortably and efficiently. To do this, we must show them how to strip cases down to their essentials and record them in historical briefs. Distilling their notes can free them to read with more discipline and empower them for more dynamic class discussion and essay writing. If we push students to embrace judicial opinions as primary sources, I am hopeful we can mold them into well-rounded and objective citizen-scholars.

APPENDIX A: BRIEF MODEL

Plaintiff v. Defendant, xxx Cite xxx (Date)

Keywords: Subjects or topics addressed in opinion

Parties: π: Plaintiff (Civil Cases)/Complainant (Criminal Cases)
 Δ: Defendant
 3d: Any relevant third party

Facts: Brief summary of relevant facts
 –If helpful, describe case's procedural history: How did it get to *this* court?

Issue: Significant question(s) for court to address

Rule: Rule(s) of law used in/created by judicial opinion

Application/Reason: Judicial applications, reasons, or holdings related to cited rule(s) and relevant case facts (Limited to Majority Opinion)

Policy: Any policy considerations underlying the decision-making process
 –What did the judge hope to achieve with this ruling?

Concur: Any worthy or relevant distinctions from majority opinion

Dissent: Any worthy or relevant distinctions from majority opinion

APPENDIX B: SAMPLE BRIEF

Plessy v. Ferguson, 163 U.S. 537 (1896)

Keywords: Race, Segregation, Civil Rights

Parties: π: Homer Plessy, 1/8 black petitioner
 Δ: John H. Ferguson, NO Parish Dist Judge

Facts: “Octoroon” violated 1890 LA Sep Car Act to challenge its constitutionality under 13th/14th Ams

Issue: 1) Does t/Sep Car Act violate 13th Am’s prohibition of slavery?
 2) Does t/Sep Car Act violate 14th Am’s Due Process + Equal Protection Clauses?

Rule: -1890 LA Sep Car Act: Assigned sep but equal cars for whites/blacks, not to be violated
 -13th Am: Prohibits slavery, invol servitude in all American lands
 -14th Am: a) Defines all ppl born in US as US citizens
 b) Protects Privileges + Immunities of all US citizens by Due Proc
 c) Assures EP of all citizens under law

Application/Reason (Brown):

-Re 13th Am:

-Not every racial distinction has tendency to re-establish slavery
 -If law creates racial inequality, remedy must be found in 14th Am

-Re 14th Am:

-While 14th Am intended to uphold law’s equality, not designed to eradicate all distinctions based on race

-Laws requiring racial separation don’t imply racial inferiority
 -If they apply equally, separation laws do not deny blacks right to prop

-Separation laws limited to reasonable use of state’s police power for good faith promotion of public’s general welfare

- Separating blacks + whites on RR cars is just as reasonable as already accepted segregation policies, like schools
- Law is powerless to remove racial distinctions + instincts
 - If blacks feel sense of inferiority under LA law, it's their choice/perception
- Conclusion: Separate but equal policies don't violate 14th Am

Policy: Preserving state authority to regulate racial + commercial matters w/in state bounds, in particular, for maintaining peace + safety

Dissent (Harlan):

- Sep Car Act violates 14th Am by allowing pub services (such as trains) to discriminate based solely on race
 - Denies American citizens blessings of liberty, previously denied b/c of slavery
- Reconstruction Ams (13th, 14th, 15th) designed to make Constitution color-blind
- Common sense: law designed to protect dominant whites from socially-inferior blacks
- Opinion will have same strangling effect as *Dred Scott* had on race relations + sectional diffs
 - Creates legal partition not suffered by other non-dominant groups, such as t/Chinese (who aren't even allowed to be citizens)
 - Will rouse racial hatred + distrust