

# BOOK REVIEW

## THE TURN TO HISTORY

THE STRANGE CAREER OF LEGAL LIBERALISM. By Laura Kalman. New Haven, Conn.: Yale University Press. 1996. Pp. 375. \$55.75.

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### INTRODUCTION

Laura Kalman's *The Strange Career of Legal Liberalism*<sup>1</sup> is a rollicking romp through a half-century of law and legal scholarship. Suggesting that law professors read the book is something akin to asking playwrights to read their latest reviews. Kalman, a law-trained historian, tells us there was a time when she read law review articles to ease her to sleep, a strategy that failed her once the articles had "become too interesting."<sup>2</sup> Kalman's subjects, legal scholars, are likely to find her book equally engrossing, and for reasons that reach far beyond membership in a mutual admiration society.<sup>3</sup>

Although Kalman's thesis is interesting enough, it is the subtext of her book that deserves closest attention. *Strange Career* is the story

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<sup>1</sup> Laura Kalman, *The Strange Career of Legal Liberalism* (1996).

<sup>2</sup> *Id.* at 1.

<sup>3</sup> There is one technical aspect of the book law professors will not admire. That is Kalman's "notation" style. Drawing from her dual backgrounds as lawyer and historian, Kalman developed her own style of citation, "in which I have combined the aspects of law professors' and historians' citation practices." *Id.* at 9. Unfortunately, Kalman's unique practice makes it very difficult to locate the sources she is citing. After the initial citation of a source, she subsequently refers to it by a short title alone, without identifying where the source is originally cited. For example, footnote 4 to pages 231-35, appearing on page 354 of *Strange Career*, contains a reference to "Chemerinsky, Foreword: Vanishing Constitution, at 78-81." The reference is to Erwin Chemerinsky, Foreword: The Vanishing Constitution, 103 Harv. L. Rev. 43 (1989), which is cited for the first time, and the only time in full, some 60 pages earlier. See Kalman, *supra* note 1, at 261 n.43. Thus, a reader interested in the source cited on page 232 will turn to the footnotes and get a cryptic reference to Chemerinsky, but has as much chance of finding a full citation to the source as of finding the proverbial needle in a haystack.

of how the lamp of "legal liberalism"<sup>4</sup> remained lit long after its popular counterpart, political liberalism, was doused in the cynicism of the post-sixties era. According to Kalman, the greatest threat to legal liberalism is the inability of legal scholars to stem the tide of criticism aimed at judicial activism. Kalman, a self-avowed liberal, shares her hope that law professors turning to history, and historians turning to law, can help one another sustain the lantern of legal liberalism's promise.

While adamantly maintaining that there is a role for legal liberalism in modern (or postmodern) society, what *Strange Career* ultimately succeeds in doing is convincing readers that the old order of legal scholarship has passed and way must be made for a new one. Kalman's villain is "the countermajoritarian difficulty," that incessant demand that judicial review be reconciled with democratic government. Kalman's knights are the post-New Deal legal scholars who scatter far and wide through the realm of academia seeking their Grail, an answer to the countermajoritarian dilemma posed most forcefully by Alexander Bickel. If only judicial review can be united with democracy and countermajoritarian criticism quieted, Kalman and her cohorts believe, a new day of social reform spearheaded by courts may blossom. By the time Kalman's legal scholars get done ranging through the wilds of economics, literary theory, continental philosophy, and history, however, it is difficult to believe the home they create on their return will ever look much like the one they left behind. Perhaps without meaning to, *Strange Career* makes clear that legal scholarship's past is behind it, while the future is yet uncertain.

The true virtue of Kalman's book, albeit one even she seems to overlook, is its illumination of where we as legal scholars have been and what that might say about where we are headed. Speaking as an historian, Kalman at times questions "presentism," the practice of looking to the past to answer questions about the future.<sup>5</sup> But as Kalman herself recognizes, history does have a crucial role for the present.<sup>6</sup> The philosopher of history, Edward Hallett Carr, wrote that "the dual function of history" is "to enable man to understand the society of the past and to increase his mastery over the society of the present."<sup>7</sup> *Strange Career* serves these dual purposes well. Kalman

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<sup>4</sup> "Legal liberalism" is defined and discussed in Kalman, *supra* note 1, at 2-10. It generally refers to the ability of courts to effect social change. For a more complete definition, see *infra* note 9 and accompanying text.

<sup>5</sup> See Kalman, *supra* note 1, at 183-84.

<sup>6</sup> See *id.* at 198-208 (discussing contribution historians can make through amicus briefs).

<sup>7</sup> Edward Hallett Carr, *What Is History* 69 (1961).

makes poignantly clear that legal scholars have been wandering without direction for some time. By retracing our steps and placing guideposts along the way, Kalman succeeds at least in beginning seriously the venture of marking the path to where we are and what we are about.

This review proceeds in four parts. The first part tells *Strange Career's* own story of the emergence of crisis in the legal academy and the threat it posed to legal liberalism. This part criticizes Kalman for conflating two intellectually distinct problems born of the Legal Realist critique: the problem of objectivity and the countermajoritarian difficulty. The second part describes *Strange Career's* discussion of the turn to history in the world of law, and particularly the turn to civic republicanism. This part calls into question Kalman's understanding of why neorepublicanism emerged when it did and explains that civic republicanism can neither solve the countermajoritarian difficulty nor resolve the crisis of objectivity in the legal academy. The third part criticizes Kalman's own affinity for Bruce Ackerman's use of history to address the problems legal liberalism faces in a post-Realist world, explaining why Ackerman's theory also cannot solve the countermajoritarian difficulty nor save legal liberalism. Finally, the fourth part offers a different explanation than that offered by *Strange Career* as to why there has been a turn to history in the law and the legal academy. This part agrees that there has been the crisis in legal scholarship described in *Strange Career* and argues that when a discipline like law has lost its intellectual bearings, it is history that offers a way—by tracing the path of the past—to situate the present. Thus, *Strange Career's* greatest contribution is precisely its lucid history of the last half-century of legal scholarship, for by understanding where we have been, the legal academy can begin to understand where we are and what it is we are now about. The final part explains how history can be brought to law more effectively, not only in legal scholarship, but in constitutional interpretation.

This review has its own subtext. One of the threads running through *Strange Career* is the notion that for lawyers and legal academics the use of extra-legal sources is but a tactic, relied upon to support their advocacy. Thus, Kalman largely sees the legal academy's turn to history as strategic, and at times her advice is directed to better tactical use of history. As this review makes clear, however, history can provide its own reward—not tactical, but tangible. The turn to history in law *may* be but a tactic, but to reach this conclusion easily is to ignore the sincere exploration of history by legal academics, lawyers, and judges in an effort to situate the present and help us identify our most deeply held commitments.

## I

## THE STORY OF LEGAL SCHOLARSHIP

After the New Deal, says Kalman, there was liberalism, and it was good.<sup>8</sup> When Earl Warren ascended the throne of the Chief Justiceship, he ushered in an era of needed social change. What Congress and the President were unwilling or unable to do, courts would. Quoting Gerald Rosenberg, legal liberalism's greatest skeptic, Kalman describes legal liberalism as "the potential of courts, particularly the Supreme Court, to bring about 'those specific social reforms that affect large groups of people such as blacks, or workers, or women, or partisans of a particular persuasion; in other words, *policy change with nationwide impact*.'"<sup>9</sup> Kalman's story is "how law professors have kept the faith in what has been called 'the cult of the Court,' . . . in the ability of courts to change society for what judges believe is the better."<sup>10</sup>

The problem is that the very winds that blew the Warren Court to power contained the seeds of its undoing. Warren's Court was a by-product of the New Deal revolution that overthrew the "Old Court" and made room for a new one.<sup>11</sup> The Old Court's world was one of *laissez faire*, in which government was to play little role in alleviating the discomforts of its citizens and the ills of society.<sup>12</sup> The pre-New

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<sup>8</sup> Kalman is an unabashed advocate for legal liberalism, a point made clear not only by *Strange Career*, but also by her earlier works on Abe Fortas and *Legal Realism*. See generally Laura Kalman, *Abe Fortas: A Biography* (1990); Laura Kalman, *Legal Realism at Yale, 1927-1960* (1986).

<sup>9</sup> Kalman, *supra* note 1, at 2 (quoting Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 4 (1991)).

<sup>10</sup> *Id.* at 4.

<sup>11</sup> In a sense, the Warren Court was one generation removed from the New Deal because between the New Deal Court and the Warren Court was the short tenure of Fred Vinson as Chief Justice, a time when many who looked to the Supreme Court for progressive change despaired. See, e.g., Burton C. Bernard, *Avoidance of Constitutional Issues in the United States Supreme Court: Liberties of the First Amendment*, 50 *Mich. L. Rev.* 261, 265-78 (1951) (discussing problems with Vinson Court's failure to review First Amendment infringements); Eugene Gressman, *The Tragedy of the Supreme Court, The New Republic*, Sept. 3, 1951, at 10, 10 (arguing that Vinson Court was "slowly reading into the Constitution anti-libertarian attitudes that threaten the very foundation of our free society"); see also Fowler V. Harper and Alan S. Rosenthal, *What the Supreme Court Did Not Do in the 1949 Term—An Appraisal of Certiorari*, 99 *U. Pa. L. Rev.* 293, 305-22 (1950) (examining how case-by-case failures to grant certiorari frustrated attempts at meaningful constitutional protection); Fowler V. Harper and Edwin D. Etherington, *What the Supreme Court Did Not Do During the 1950 Term*, 100 *U. Pa. L. Rev.* 354, 367-80 (1951) (same).

<sup>12</sup> See, e.g., Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* 1-6 (1993) (describing commonly held *laissez faire* view of Old Court). Gillman challenges the *laissez faire* interpretation, arguing that the state and federal courts of the *Lochner* era simply continued a constitutional tradition of acting to protect the public good by striking interest group legislation. See *id.* at 10. But

Deal Court and its generational precursors had repeatedly blocked the efforts of progressive legislatures.<sup>13</sup>

The jurisprudential challenge to the Old Court was the Legal Realist critique that *laissez faire* interpretation was not immanent in the Constitution and that constitutional interpretation necessarily reflected some measure of the Justices' own predilections.<sup>14</sup> Justice Roberts offered perhaps the most memorable description of the Old Court's view of "mechanical" or "parallel column" interpretation: "[T]he judicial branch . . . has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."<sup>15</sup> The Realists debunked this interpretive philosophy, turning attention instead to the mutability of our foundational document and to the discretion resting in the judges who interpret it.<sup>16</sup> The language of the Constitution, it turned out, was broad and capacious enough to mean what New Deal society needed it to mean. The only stumbling block to progress was a Supreme Court that insisted on adhering to "horse

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see *Lochner v. New York*, 198 U.S. 45, 57 (1905) ("There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker."); *id.* at 75 (Holmes, J., dissenting) ("This case is decided upon an economic theory which a large part of the country does not entertain."); James W. Ely, Jr., *The Chief Justiceship of Melville Fuller: 1888-1900*, at 95 (1995) (arguing that Fuller Court developed idea of liberty of contract).

<sup>13</sup> The Supreme Court's record was by no means uniform, and state courts during the period often were seen as less progressive than the Supreme Court. On the Progressive Era battle over the judiciary, see William G. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937*, at 19-20 (1994) (discussing reasons for Progressive hostility towards courts).

<sup>14</sup> Likely it was the strong negative reaction of the public to the Supreme Court's decisions that ultimately undid the Old Court, although—as Kalman relates—the relationship between Justice Roberts's famous "switch in time" and the New Deal revolution is contested by historians. See Kalman, *supra* note 1, at 348-49 n.70 (noting general conflict in historians' opinions regarding relationship between New Deal and Supreme Court); see also G. Edmund White, *Cabining the Constitutional History of the New Deal in Time*, 94 *Mich. L. Rev.* 1392, 1412-15 (1996) (discussing debate over role of Roberts's "switch").

<sup>15</sup> *United States v. Butler*, 297 U.S. 1, 62 (1935).

<sup>16</sup> See Neil Duxbury, *Patterns of American Jurisprudence* 115 (1995) (noting Legal Realist critique of overreliance on formalist interpretation); Morton J. Horwitz, *The Transformation of American Law 1870-1960*, at 198-206 (1992) (discussing broad-based attacks by Legal Realists on overemphasis on categorical thinking); G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 *Va. L. Rev.* 279, 281 (1973) (discussing Legal Realism's repudiation of formalistic, deductive logic). The attack on formalism began as early as the 1890s. See T.W. Brown, *Due Process of Law*, 32 *Am. L. Rev.* 14, 20 (1898) (criticizing use of generic terms like "general rules of jurisprudence," "fundamental principles of liberty and justice," and "the principles of the common law" to justify judicial decisions). The critic with the sharpest tongue may have been Thomas Reed Powell. See, e.g., Thomas Reed Powell, *The Judiciality of Minimum-Wage Legislation*, 37 *Harv. L. Rev.* 545, 562-64 (1924) (arguing that invalidation of minimum wage laws and other categorical decisions are based upon mythical standards).

and buggy” interpretations of those broad phrases.<sup>17</sup> In 1937, that stumbling block was eliminated, as the Supreme Court came to be more deferential to the economic decisions of the more political branches.

By 1954, however, the Supreme Court was back in the business of striking down laws, albeit this time in the realm of personal (not economic) liberty. One generation’s progress is another’s inappropriate activism. At least in the eyes of some, it was one thing to sweep away old interpretations to enable the New Deal, but quite another to travel the path of reform taken by the Warren Court. The Supreme Court that sat between 1937 and 1952 refused to stand in the way of legislative efforts, saw its way past old precedents, and reinterpreted the Constitution to make way for broad new governmental powers.<sup>18</sup> When Earl Warren came to head the second New Court, however, that Court found room in the Constitution for yet more social change, this time not in the area of economics but in enhancing civil rights and liberties.<sup>19</sup> That a liberal court could turn the Constitution to the cause of civil liberty ought to have come as little surprise to the Legal Realists, who had taught the legal academy about the sweeping gener-

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<sup>17</sup> The phrase was Roosevelt’s, uttered in a news conference responding to the Supreme Court’s decision in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). See William E. Leuchtenberg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* 90 (1995) (noting Roosevelt’s “horse and buggy” comment). Although Roosevelt’s remarks were not well received at the time, see Arthur Krock, *Roosevelt Charged with Court Design in 1932*, *N.Y. Times*, Feb. 11, 1937, at 22 (critiquing Roosevelt’s attempt to alter Supreme Court’s structure), the idea that the Old Court was behind the times in interpreting the Constitution became a prevalent theme, see, e.g., 81 Cong. Rec. 2144 (1937) (speech of Senator Norris) (“Our Constitution ought to be construed in the light of the present-day civilization instead of being put in a straight-jacket made more than a century ago.”); *Ruling Disappoints Leaders Here*, *N.Y. Times*, June 2, 1936, at 19 (discussing reaction to decision in *Tipaldo v. Morehead*, 293 U.S. 513 (1936), which invalidated New York’s minimum wage law, and reporting regional NLRB member as saying that “[a]ll we want is a fair court—not a court remote and detached from the conditions in the world today”); *Address of Robert H. Jackson, New York State Bar Association, Proceeding of the Sixtieth Annual Meeting* 298 (1937) (“In dealing with a nation, whose genius is invention, we cannot outlaw every action that can not show a precedent.”).

<sup>18</sup> See generally James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* 119-34 (1992); Leuchtenberg, *supra* note 17, at 228-36 (1995). In this change Justice Roberts played roles both enabling and dissenting. His vote was the famous “switch in time that saved Nine.” See *id.* at 142-43 (discussing how Justice Roberts’s vote change enabled much New Deal legislation to pass by 5-4 vote). Yet he watched the overturning of precedents with some dismay; see *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting) (complaining constitutional decisions were coming “into the same class as a restricted railroad ticket, good for this day and train only”). Of course, whether Roberts actually “switched,” and the impact of any “switch,” are matters of hot dispute. See White, *supra* note 14, at 1412-15.

<sup>19</sup> See Kalman, *supra* note 1, at 3 (discussing Warren Court’s response to social challenges that set stage for future liberal decisions).

ality of the Constitution's majestic phrases and the power of this generality in the hands of judges. But some of those legal scholars who had applauded the first New Court, it turns out, saw the second New Court quite differently. Many of these scholars could neither explain nor accept the "double standard" they believed implicit in permitting judicial review for civil but not property rights.<sup>20</sup> They gave birth to a school of legal scholarship called Legal Process.<sup>21</sup> The lesson the Legal Process scholars had taken from the New Deal was not one of the potential for creative judicial interpretation, nor even one of the evolutionary nature of the Constitution, but rather a lesson regarding the danger of judicial overreaching.<sup>22</sup> Making an odd match with foaming segregationists and rabid anti-Communists,<sup>23</sup> the Legal Pro-

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<sup>20</sup> See, e.g., *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 648 (Frankfurter, J., dissenting) ("Our power does not vary according to the particular provision of the Bill of Rights which is invoked."). On the "double standard" debate, see Paul A. Freund, *The Supreme Court and Civil Liberties*, 4 *Vand. L. Rev.* 533, 535, 537-42 (1951) (addressing frequently asked question: "[D]oes the Court apply a double standard in the review of civil liberties questions . . . ?").

<sup>21</sup> On the Legal Process school generally, see Duxbury, *supra* note 16, at 205-99 (discussing Legal Process jurisprudence that focused on inconsistency in judicial review); Gary Peller, *Neutral Principles* in the 1950s, 21 *U. Mich. J.L. Reform* 561, 573-88 (1988) (discussing roots of Legal Process school); Anthony J. Sebok, *Reading The Legal Process*, 94 *Mich. L. Rev.* 1571, 1571-79 (1996) (describing tenets of Legal Process school); see also William N. Eskridge, Jr. and Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 *Mich. L. Rev.* 707, 709-21 (1991) (discussing Legal Process scholarship).

<sup>22</sup> See, e.g., Erwin N. Griswold, *Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 *Harv. L. Rev.* 81, 87-91 (1961) (discussing problems of judicial activism in specific civil rights cases); Henry M. Hart, Jr., *Foreword: The Time Chart of the Justices*, 73 *Harv. L. Rev.* 84, 95-105 (1959) (questioning differing level of judicial activism based on study of petitions for certiorari); Phillip B. Kurland, *Foreword: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*, 78 *Harv. L. Rev.* 143, 149-53 (1964) (discussing dangerous nature of Warren Court's power); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *Harv. L. Rev.* 1, 21-27 (1959) (discussing problematic differing attitudes in judicial review of discrimination cases and property rights cases). The Legal Process scholars were not alone in their concern about Warren Court activism. Indeed, they followed in the tradition of (and may well have been influenced by) Justices Jackson and Frankfurter, and Judge Learned Hand, all old-line Progressives who cautioned against judicial activism. See Felix Frankfurter, *John Marshall and the Judicial Function*, in *Government Under Law* 19-20 (Arthur E. Sutherland ed., 1956) (noting that "judicial review is a deliberate check upon democracy through an organ of government not subject to popular control"); Learned Hand, *The Bill of Rights* 24-30 (1958) (discussing problems that arise when judges ignore text); Robert H. Jackson, *The Supreme Court in the American System of Government* 76 (1967) (warning that judicial decisions protecting "individual or minority rights" may unfairly impinge upon rights of majority).

<sup>23</sup> The Legal Process scholars struggled mightily to distance themselves from popular antipathy to the Warren Court among groups such as segregationists, and claimed sympathy with the merits of the Warren Court decisions. See, e.g., Alexander M. Bickel, *Mr. Justice Black: The Unobvious Meaning of Plain Words*, *New Republic*, Mar. 14, 1960, at 13, 13:

cess scholars challenged the activism of Earl Warren's crusade, questioning its craftsmanship and even its propriety.

The legal world realized soon enough that the Legal Realists had deprived us of our innocence. If conservative judicial interpretations that impeded economic reforms were not "objective" readings of the Constitution, then wasn't the same true of liberal interpretations that promoted civil liberty? It is this loss of innocence and its aftermath that forms the heart of Kalman's story: "Once the legal realists had questioned the existence of principled decision making, academic lawyers spent the rest of the twentieth century searching for criteria that would enable them to identify objectivity in judicial decisions."<sup>24</sup>

The path from where we were to where we are is not nearly so simple, however, for as Kalman explains, a strange thing happened on the way to present judicial philosophy. In the aftermath of two world wars and widespread persecution of those who appeared different or held different views, political theorists struggled with the fundamental question of what it meant to be a "democracy." Society was deeply concerned about minority rights. Everyone, it seems, was not possessed of the same vision of the good. Democracy, political scientists concluded, was "pluralist," a struggle among competing groups who would work at forging alliances on matters of policy.<sup>25</sup> "Minorities rule" became a common explanation of how politics worked. In such an intellectual climate, the judiciary could have been understood as the governmental institution that provided a voice for particular minorities.<sup>26</sup>

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There are two separate debates going on about the Supreme Court of the United States. One is deafening, interminable . . . ; it is the shouting match that the segregationists and security-mongers engage in. The other is muted, constant and timeless; it is the effort, old as the Court itself, to subject to critical professional re-examination the nature of the Court's function and its performance.

Attempts to place distance between academic debate and popular attacks on the Supreme Court were not always successful, however, as Judge Learned Hand learned when his Holmes Lectures became a focal point in the debate over the Jenner-Butler bill, which would have stripped the Supreme Court of some of its jurisdiction. The story is recounted in Gerald Gunther, *Learned Hand: The Man and the Judge* 661-62 (1994). On the attempted separation between academic and popular debates, see generally Barry Friedman, *A History of the Countermajoritarian Difficulty* (Mar. 28, 1996) (unpublished manuscript, on file with the *New York University Law Review*).

<sup>24</sup> Kalman, *supra* note 1, at 5.

<sup>25</sup> See *id.* at 38-39. See Donald C. Blaisdell, *American Democracy Under Pressure* 68-70 (1957) (discussing competitive and pluralistic nature of democracy); David B. Truman, *The Governmental Process: Political Interests and Public Opinion* 98-101 (1951) (same).

<sup>26</sup> This in part seemed to be the vision of judicial review in Justice Stone's famous footnote four of the *Carolene Products* decision. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting that legislation may be subjected to higher judicial scrutiny if it restricts political processes or prejudices "discrete and insular minorities").

Amidst this rosy picture, however, emerged Alexander Bickel, “the most influential scholar of his generation in the field of constitutional law.”<sup>27</sup> Bickel, Kalman tells us, “made no bones about expressing his opposition to activist judicial review and realism.”<sup>28</sup> Although political scientists were engaging in sophisticated studies of what it meant to be a democracy, “Bickel’s concept of democracy was both populist and simplistic. . . . Without any evidence, Bickel assumed that the legislature pursued a majoritarian perspective, reflective of the popular will.”<sup>29</sup> That being so, judicial interference with legislative pronouncements, and even with the work of other officials ostensibly under the watchful eye of popular representatives, could not be squared with democracy. According to Bickel, judicial review was at bottom “undemocratic,” a “deviant institution.”<sup>30</sup> According to Kalman, “Bickel had spoken, and suddenly democracy ‘became a central legitimating concept in American constitutional law,’ and ‘democratic legitimacy’ a concept threatened by judicial review.”<sup>31</sup>

Kalman is correct that Bickel was a seminal figure, although she joins most of legal academia in improperly weighting the first half of Bickel’s argument, the part that stressed the undemocratic nature of judicial review.<sup>32</sup> After all, much of Bickel’s book favored the work of the Warren Court.<sup>33</sup> In this sense Bickel was truly transitional, a translator from the Legal Process scholars who were his teachers to

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<sup>27</sup> Kalman, *supra* note 1, at 37 (quoting Anthony Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* 24 (1993)).

<sup>28</sup> *Id.* at 37.

<sup>29</sup> *Id.* at 39.

<sup>30</sup> See Alexander M. Bickel, *The Least Dangerous Branch* 18-19 (1962); Kalman, *supra* note 1, at 38-39.

<sup>31</sup> Kalman, *supra* note 1, at 40 (quoting Morton J. Horowitz, *Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 *Harv. L. Rev.* 30, 57, 63 (1993)).

<sup>32</sup> Kalman does acknowledge the point: “Ironically, within pages of introducing that epigram, Bickel came around to the pluralist view that judicial review *was* democratic.” *Id.* at 40. She also seems incorrect in suggesting that Bickel’s pronouncement led immediately to concern about the countermajoritarian difficulty. In fact, academic discussion of the countermajoritarian difficulty predated Bickel. See, e.g., Henry Steele Commager, *Majority Rule and Minority Rights* 28-49 (1943) (discussing problematic notion that judicial review is democratic); Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 *Harv. L. Rev.* 193, 194-201 (1952) (discussing democratic and undemocratic aspects of judicial review). Moreover, as Kalman herself recognizes, that concern did not emerge full bloom until a decade later, after the decision in *Roe v. Wade*, 410 U.S. 113 (1973). See Kalman, *supra* note 1, at 58-59.

<sup>33</sup> See Stephen M. Griffin, *American Constitutionalism: From Theory to Politics* 106 (1996) (“It is important to understand that scholars like Bickel were not interested in using this argument as a tool to abolish judicial review or even to significantly restrict its scope. Bickel’s concern was ultimately to specify the proper function or role for the Supreme Court in American democracy.”)

the constitutional theorists who were his students. Unlike scholars such as Henry Hart and Herbert Wechsler, to say nothing of Learned Hand—who at most could work up a good ambivalence about the Warren Court—Bickel saw much in it to admire.<sup>34</sup> Bickel's place in history may well rest in the eras he straddled—one foot in the Legal Process camp skeptical of the power of judicial review, another foot in the liberal camp applauding the Warren Court.<sup>35</sup>

More fundamentally, Kalman misses the point that Bickel's criticism of judicial review as undemocratic did not necessarily follow from the Realist critique. The enduring problem let loose by the Realists—whether it is possible to find objectivity in law—remains a problem whether or not democracy is equated with majority rule. True, there is a connection between the two: one response to a lack of determinate answers to constitutional questions is simply to defer to the will of the political branches. But, *the* debate during the Warren era was about objectivity and neutrality in constitutional law, not about the countermajoritarian difficulty.<sup>36</sup> The countermajoritarian difficulty took center stage somewhat later.

Even while popular consensus crumbled, the Warren Court and its academic admirers nonetheless remained faithful to the cause of legal liberalism. By 1968, the election of Richard Nixon signaled the end of national liberalism. A centerpiece of Nixon's campaign was an appeal to a nation frightened of crime and unrest in the streets, and in electing him and his anti-Court platform, the people indicated they had had enough.<sup>37</sup> Yet, as Kalman explains, the Court and legal aca-

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<sup>34</sup> Hand's reaction to the Warren Court's early work was to question the legitimacy of judicial review altogether. See Hand, *supra* note 22, at 4-15. Wechsler claimed to admire the outcome of decisions such as *Brown v. Board of Education*, 347 U.S. 483 (1954), but could not justify them. See Wechsler, *supra* note 22, at 25-30. Henry Hart was biting about the craft of the Warren Court, finding in it little to admire. See Hart, *supra* note 22, at 95. Bickel defended the Warren Court, see, e.g., Alexander M. Bickel, *Court-Curbing Time*, *The New Republic*, May 25, 1959, at 10, 10-12, although it is widely acknowledged that later in life Bickel became more hostile, see Alexander M. Bickel, *The Supreme Court and the Idea of Progress* 44-70 (1978) [hereinafter Bickel, *The Supreme Court*] (discussing severe subjectivity problems in Warren Court jurisprudence); see also John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 71-72 (1980) (discussing transformation in Bickel's views).

<sup>35</sup> At least in his younger years. See *supra* note 34.

<sup>36</sup> See Barry Friedman, *Neutral Principles: A Retrospective*, 50 *Vand. L. Rev.* 503 (1997) (discussing debate over neutral principles).

<sup>37</sup> See Alexander M. Bickel, *Crime, the Courts, and the Old Nixon*, *The New Republic*, June 15, 1968, at 8, 8 (discussing Nixon's attack on Supreme Court criminal procedure decisions); *Nixon Denounces Humphrey Views*, *N.Y. Times*, Sept. 7, 1968, at 1 (reporting that law and order was a "sizable portion" of speech); Robert H. Phelps, *Humphrey's Dilemma*, *N.Y. Times*, Sept. 13, 1968, at 52 (reporting that crime in streets is one of two issues that matter to voters).

demics hewed to their liberal path undaunted: “[d]espite Warren’s retirement, then, the Warren era continued.”<sup>38</sup>

Crisis came for liberal legal academia when the post-Realist concerns about objectivity in law again reared their head in reaction to the Supreme Court’s decision in *Roe v. Wade*,<sup>39</sup> this time accompanied by a heavy dose of the countermajoritarian difficulty. *Roe*, which constitutionalized a right to choose abortion, was decided after Warren Burger had succeeded Earl Warren as Chief Justice. Kalman argues that although *Roe* was a decision that pleased liberals, the ideological makeup of the federal courts was shifting to the right, posing a problem for liberal scholars who once had championed an activist judiciary, but who now worried about conservative activism undoing what the Warren Court had done. According to Kalman, “[t]hrough *Roe* might have turned out all right substantively, who knew what else the Nixon appointees had up their sleeves?”<sup>40</sup> Legal scholars could not find a good constitutional home for *Roe*, recalling images of the *Lochner* era: “Legal realism had become too closely associated with the judicial activism that underlay the Warren Court’s liberalism.”<sup>41</sup> “In short, since so many law professors continued to believe in the power of courts to effect social change of which they approved, the counter-majoritarian difficulty loomed larger than ever. *Roe* plunged constitutional theory into ‘epistemological crisis,’ rekindling interest in judicial review and in the alleged conflict between judicial review and democracy.”<sup>42</sup>

The sudden prominence of Bickel’s countermajoritarian difficulty seems to have more to do with Bickel’s audience of legal academics than with contemporary criticism of the Supreme Court. Assuredly the judiciary had been attacked throughout the first half of the twentieth century on the ground that judicial review was undemocratic. Such criticism was particularly prominent during the Progressive

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<sup>38</sup> Kalman, *supra* note 1, at 57.

<sup>39</sup> 410 U.S. 113 (1973).

<sup>40</sup> Kalman, *supra* note 1, at 58. Kalman’s claim about crisis in the academy as a result of concern about conservative Justices imposing their own values may be overstated. Although the claim surely finds support, long after the “Nixon Court” was well-established, liberal scholars continued to argue for broad judicial review, while conservative scholars worried about unfettered judicial subjectivity. Compare Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204 (1980) (arguing in favor of “nonoriginalist” judicial review), with Joseph D. Grano, *Judicial Review and a Written Constitution in a Democratic Society*, 28 Wayne L. Rev. 1, 6 (1981) (arguing against noninterpretivist judicial review to avoid “constitutional anarchy”).

<sup>41</sup> Kalman, *supra* note 1, at 57.

<sup>42</sup> *Id.* at 59.

Era.<sup>43</sup> Typically, however, the claim was laid by liberals against a conservative Supreme Court they perceived as interfering with progressive legislation. The tables turned when conservatives attacked the liberal Warren Court on countermajoritarian grounds, creating an intellectual crisis for the Court's liberal defenders. In the past battles against a conservative Supreme Court, a common response was that the Supreme Court's role was not to foster majoritarianism but to stem it in the name of other values embedded in the Constitution.<sup>44</sup> However, this response failed the Court's defenders, because they believed *both* in the Supreme Court's liberal results *and* in majoritarian government.<sup>45</sup> For many of the liberal Court's defenders, as for Kalman, the countermajoritarian difficulty seems to have become an obsession simply because they believed strongly in both halves of the equation and had difficulty reconciling them in their own minds.<sup>46</sup> As Alex Bickel presciently observed, commenting on the Supreme Court's own aggressive majoritarianism, "Majoritarianism is heady stuff. . . . The tide could well engulf the Court itself also."<sup>47</sup>

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<sup>43</sup> See, e.g., James B. Weaver, *A Call to Action* 122 (1892) (commenting on *Granger* decisions, "What responsibility could this judge assume? Both he and the Court for which he was speaking were beyond the reach of the ballot box."); L.B. Boudin, *Government by Judiciary*, 26 *Pol. Sci. Q.* 238, 264 (1911) ("The essence of despotism is the right of a few to make the laws or to control their making, without being responsible to the people."); W. Trickett, *Judicial Nullification of Acts of Congress*, 185 *N. Am. Rev.* 848, 851 (1907) (complaining that "nine men can quash the legislation of the representatives of ninety millions of people"). See generally Ross, *supra* note 13, at 110-29 (describing attempts by critics of courts in early 1900s to institute judicial recall to make courts more responsive to popular will). I argue in Friedman, *supra* note 23, at 73, that the tone of criticism during the Populist-Progressive Era was more countermajoritarian than the New Deal. During the latter period the complaint was more that the Court was behind the times, not so much that it was interfering with the will of the people.

<sup>44</sup> See, e.g., Nicholas Murray Butler, *Why Should We Change Our Form of Government?* 40 (1912) (stating that judges are "the servants not of the people, but of the law"); J. Hampden Dougherty, *Power of Federal Judiciary Over Legislation* 106-15 (1912) (arguing against recall of judges because of importance of judicial independence to defeat passing majority will); J. Allen Smith, *The Spirit of American Government* 69 (1907) (noting aim of "non-elective judiciary" to "diminish popular control over the government" and attacking undemocratic nature of Constitution).

<sup>45</sup> Thus, prominent defenders of the Warren Court such as Charles Black and Eugene Rostow authored defenses of judicial review in a democracy, attempting to reconcile the two. See, e.g., Charles L. Black, Jr., *The People and the Court: Judicial Review in a Democracy* 106-07 (1960) (arguing that final power belongs to people, but that judicial review is people's institutionalized means of self-control); Eugene V. Rostow, *The Supreme Court and the People's Will*, 33 *Notre Dame Law.* 573, 576 (1958) ("Popular sovereignty is a more subtle idea than the phrase 'majority rule' sometimes implies.").

<sup>46</sup> One product of this tension, perhaps the most famous, was John Hart Ely's *Democracy and Distrust*, which—building upon footnote four of the *Carolene Products* decision—fashioned a theory of judicial review as democracy-enhancing. See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 73-104 (1980).

<sup>47</sup> Bickel, *The Supreme Court*, *supra* note 34, at 111-12.

After *Roe*, in the legal world's equivalent of the Big Bang, legal scholarship fragmented, sailing in every direction at once. Kalman's story at this point is itself a bit of a jumble, defying common conceptions of historical scholarship as proceeding chronologically. Instead, *Strange Career* explores the 1970s and 1980s again and again as Kalman struggles to describe the birth of one "law and" movement after another: law and moral philosophy, law and economics, law and political theory, Critical Legal Studies.<sup>48</sup> *Strange Career's* difficult organization at this point stands as a metaphor for what happened to legal scholarship throughout these two decades. Signaling the self-reflexiveness of the postmodern era, in 1981 the Yale Law School hosted a conference on legal scholarship itself: "[s]cholars ranging from Richard Posner on the right to Mark Tushnet on the left used the occasion to voice their fears that legal scholarship was 'drifting.'"<sup>49</sup>

Of course it was drifting. The search was for objectivity in law and for an answer to the countermajoritarian difficulty, yet neither could be found. Liberal Ackermans, Dworkins, and Michelmans tried political philosophy, but "Rawls did not make idiosyncrasy in the decisional process or the counter-majoritarian difficulty go away."<sup>50</sup> On the right, law and economics blossomed in the hands of the likes of Bork, and especially Posner, the movement's popularity growing out of law professors' quest for "objective foundations of justice."<sup>51</sup> Although the movement fostered conservatism and sparked calls for judicial restraint in the academy, "why promote judicial restraint when law and economics offered no acceptable substitute for courts," especially when paired with its "cousin, public choice"?<sup>52</sup> Some disenchanted liberals moved to the left, Trubeks, Kennedys, and Tushnets giving birth to the Critical Legal Studies movement, which tossed in the rag and just recognized that "law was forever 'manipulable and indeterminate.'"<sup>53</sup> Still other liberals held out. Scholars such as John Hart Ely spun grand theories to constrain judges yet tie them

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<sup>48</sup> See *id.* at 60-93, 101-31.

<sup>49</sup> *Id.* at 94.

<sup>50</sup> *Id.* at 67.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 81. It is unclear that a conservative vision of judicial review is what necessarily ought to follow from public choice theory, which, after all, provides a critique of the majoritarian nature of the political process. For a discussion of the role public choice theory ought to play in defining the scope of judicial review, see Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review*, 101 *Yale L.J.* 31, 33-35 (1991) (arguing that interest group theory does not justify more intrusive judicial review).

<sup>53</sup> Kalman, *supra* note 1, at 83.

to liberal results, “[b]ut according to most reviewers, Ely himself had provided no objective and determinate foundations of justice.”<sup>54</sup>

For all its chronological jumble, *Strange Career* is at its best in describing the shattering of consensus that led to the fragmentation of legal scholarship. Not only does Kalman relate with great insight the internal politics and intellectual struggles of the legal scholars, she displays great breadth of knowledge in tying the intellectual history of constitutional theory to similar developments in many other disciplines. In this sense *Strange Career* is also a metaphor for the blurring of disciplinary lines that has taken place over the last decades. As these lines have blurred, and in some cases even disappeared, disciplinary scholars have learned from one another, but have also shared similar afflictions.

Yet *Strange Career* disappoints in mirroring rather than challenging the legal academy’s continued inability to separate out two analytically different demons that have plagued it: the search for objectivity and the need to reconcile democracy with judicial review. Kalman’s story is primarily about the search for objectivity, a search that followed directly from the Realist critique and became all the more pressing in light of the linguistic turn that fueled the Critical Legal Studies movement. If texts (especially the constitutional text, which is an easy case) are relatively indeterminate, and if the judges have wide discretion in choosing outcomes, then what is to say that one or another judicial decision is right or wrong? Perhaps more important, what—if anything—properly serves as a basis for deciding constitutional cases? But questions of this sort can be addressed separately and apart from any question of judicial legitimacy in a democracy. The two were yoked together because of the insecurity of post-Warren Court scholarly defenders who could not reconcile their own commitment to majoritarian governance with their equal commitment to social reform. Much of the scholarship in the wake of the Warren Court was driven by a felt need to solve the countermajoritarian difficulty, distracting attention from the interesting path marked initially by the Realists. Failing to separate out the two, Kalman repeatedly finds her way back to hoping that if the countermajoritarian difficulty could be solved, liberalism could be saved, distracting from the important and ultimately more interesting question of how judges should go about interpreting the Constitution.<sup>55</sup>

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<sup>54</sup> Id. at 90.

<sup>55</sup> See, e.g., id. at 71, 89, 149, 159, 220-21 (explaining various theories offered to justify liberalism despite countermajoritarian difficulty).

By the mid-1980s, according to Kalman, legal scholarship was in crisis, and with it legal liberalism. Law professors managed to continue their liberal path even with Ronald Reagan in the White House,<sup>56</sup> but it was the crisis of legitimacy that brought legal liberalism tumbling. In 1986, a “despondent” Owen Fiss gave the Stevens Lecture at Cornell, attacking both law and economics and Critical Legal Studies for abandoning law as the “embodiment of ‘public morality’ or ‘public values.’”<sup>57</sup> His special target was the nihilism of the critical legal scholars, whose “favorite term” was “indeterminacy.”<sup>58</sup> Fiss’s lecture was called, appropriately, *The Death of the Law*, a sentiment Kalman, surveying legal liberalism, echoes: “Whereas legal liberalism seemed fragile in 1980, by the middle of the decade it appeared dead, a historical relic.”<sup>59</sup>

## II

### THE TURN TO HISTORY (I)

Appearances can be deceiving. In this case it turns out the requiem was premature. Hope was in sight, and it should come as little surprise, given her training, where Kalman finds it. “Almost precisely at this point,” Kalman writes, “history came to the rescue.”<sup>60</sup>

Although it is understandable why Kalman herself would turn to history,<sup>61</sup> it is more than a little mystifying why she reaches some of the conclusions she does. In her zeal to find a role for history, answer her liberal tendencies, and resolve the countermajoritarian difficulty, Kalman somehow manages to reach tenuous conclusions about the relationship between history and civic republicanism, and to pick an odd champion in Bruce Ackerman, all the while walking right past the best of possible explanations for the turn to history in the legal academy. This section describes Kalman’s understanding of the turn to history; the next explains her own wrong turn to Ackerman; the final section discusses what role both Kalman’s book and history can play in resolving the crisis that has plagued constitutional law and the legal academy.

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<sup>56</sup> See *id.* at 88 (noting impact of several legal publications on legal theory during otherwise conservative Reagan era).

<sup>57</sup> *Id.* at 127.

<sup>58</sup> *Id.* at 128.

<sup>59</sup> *Id.* at 131.

<sup>60</sup> *Id.* at 131.

<sup>61</sup> Indeed, as a legal historian, Kalman floats in and out of her own history. See, e.g., *id.* at 167 (“We historians (for as a historian, I now explicitly become one of the subjects of my story) . . .”); *id.* at 195-96 (discussing her ability to separate use of history as “activism” from study of history).

*Strange Career's* discussion of the turn to history begins with originalism,<sup>62</sup> which appears superficially to satisfy two of Kalman's three concerns: it offers a role for history in the law and it offers a solution to the countermajoritarian difficulty. When confronted with constitutional questions, lawyers and judges (and historians too) need only search for what the founders of the Constitution<sup>63</sup> would have said about the problem. By confining judges to these original understandings, originalism restrains judges from imposing their own views on the Constitution.<sup>64</sup>

In practice, however, originalism accomplishes neither of these things, while trampling on the liberalism Kalman holds dear. For one thing, it only replaces one countermajoritarian difficulty with another. If the root problem with judicial review is that it interferes with the will of present majorities, it is difficult to see how the situation is improved by supplanting present majority will on the basis of what people thought some two hundred years ago. That surely is the dead hand ruling from the grave.<sup>65</sup> For another, this problem inevitably leads to conservative results any progressive or liberal is likely to find troubling. If all the Constitution means is precisely what it meant two hundred years ago, the Constitution is not likely to be a font of new liberties.

While Kalman touches on these points, she is on stronger ground discussing how originalism, at least as currently practiced, is bad history. This, after all, is Kalman's home turf. *Strange Career* describes the Reagan administration's turn to originalism and is sharp in identifying the problems with actually implementing an originalist strategy in any credible way.<sup>66</sup> For example, Kalman notes that "[t]he adminis-

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<sup>62</sup> See *id.* at 132-39.

<sup>63</sup> It is becoming fashionable to say "Founders" rather than "Framers," the change in terminology indicating that it is the entire generation that ratified the Constitution whose interpretation we take into account, not merely those who were at the Convention in Philadelphia. Although the change in terminology solves some of the problems of originalism, not the least of which is that the framers intended the proceedings in Philadelphia to remain secret, expanding the groups of individuals whose intent matters increases exponentially the problems associated generally with discerning *an* original intent.

<sup>64</sup> See generally Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 143-60 (1990) for a defense of originalism on the grounds that it avoids the problems of the countermajoritarian difficulty. For a critique of Bork's views, see Richard A. Posner, *Overcoming Law* 240-55 (1995).

<sup>65</sup> For discussions of this problem, see Michael J. Klarman, *Antifidelity*, 70 *S. Cal. L. Rev.* 381 (1997); Christopher L. Eisgruber, *The Living Hand of the Past: History and Constitutional Justice*, 65 *Fordham L. Rev.* 1611, 1613-17 (1997) (describing "fallacy" of argument that "the *purpose* of the Constitution is to empower the dead hand of the past"); Keith Whittington, *The Text, Judicial Review, and Constitutional Change* 3, 19 (unpublished manuscript, on file with the *New York University Law Review*).

<sup>66</sup> See Kalman, *supra* note 1, at 132-35.

tration's originalist offensive seemed ridiculous to historians inside and outside the law schools, who could easily show that originalism was probably not the original understanding, and that, in any event, the surviving record was too fragmentary to permit definitive conclusions about the Founders' intent."<sup>67</sup>

Most of Kalman's attention, however, is directed not at originalism but at the republican revival.<sup>68</sup> It is here that she draws some of her weaker conclusions. Kalman is undoubtedly accurate in her description of republicanism, and her discussion of historians' difficulties with the republican revival is cogent and informative. Yet she reaches dubious conclusions about the impetus to republicanism, and gets trapped in the very mistake neorepublican scholars have made, thinking that using history as a *tactic* can solve the problems of judicial review.

First, Kalman works too hard to make the probably incorrect point that neorepublicanism was a reaction to originalism,<sup>69</sup> missing republicanism's real relationship to contemporary political events. Conservatives' use of history in promoting originalist interpretation, Kalman seems to reason, led the left to "fight fire with fire."<sup>70</sup> "We will go back," the neorepublicans might have said, "and show that the Constitution was really about something very different than you originalists think." But this explanation is contradicted by other evidence Kalman offers that neorepublicans cared little for their historical predecessors except as a pedigree, as well as by her candid admission that "[t]here was no historical pedigree" for neorepublicanism.<sup>71</sup>

Whether or not neorepublicanism was a response to originalism, republican scholars read very much like a reaction to Reagan-era politics. The motivating forces seem to have been a disenchantment with liberalism and a concern with the conservative Supreme Court.<sup>72</sup> Neorepublicans disfavor liberalism's self-centered focus on rights at the

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<sup>67</sup> Id. at 134.

<sup>68</sup> See id. at 143-60.

<sup>69</sup> See id. at 155-56, 211-12.

<sup>70</sup> Id. at 211.

<sup>71</sup> Id. at 175 ("By mooring their vision in the Founding, law professors believed they could make a more powerful case" for whatever vision of the social order they wished to promote); see also id. at 210 (quoting Cass Sunstein, *The Idea of a Useable Past*, 95 *Colum. L. Rev.* 601, 606 (1995), to effect that "though 'there is a freestanding, nonhistorical argument for deliberative democracy as a central political ideal,' constitutional lawyers' argument in favor of it 'draws substantial support from historical understandings'").

<sup>72</sup> Michael Klarman has suggested to me that civic republicanism also may have been a reaction to the pluralist theory of John Hart Ely's *Democracy and Distrust* (1980).

expense of responsibilities and community.<sup>73</sup> And some neorepublicans join other frustrated liberals in seeking to de-emphasize a conservative judiciary by sidestepping a court-centered jurisprudence in favor of dialogue and deliberation among the population at large.<sup>74</sup> It is not too much to suppose that the neorepublicans (former liberals all), frustrated with a failed ideology and a Supreme Court turning to the right, sought new solutions in republicanism. This interpretation, at any rate, seems far more consistent with neorepublican writings than Kalman's account of republicanism as a response to originalism.<sup>75</sup>

Second, and more important, Kalman fails to focus attention on the fact that the neorepublican turn to history does no better a job than originalism in addressing concerns about judicial legitimacy. The very same problems that haunt originalism also haunt republicanism. At the level of a broad understanding of the Constitution, it is as diffi-

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<sup>73</sup> One of the most forceful examples of this argument is Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* 76-144 (1991) (tracing evolution of current rights dialectic); see also Michael J. Sandel, *Democracy's Discontent* 28-32 (1996); Michael J. Sandel, *Liberalism and the Limits of Justice* 59-65 (1982); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 Va. L. Rev. 543, 574-79 (1986) (arguing that influx of women into public sphere will tip balance away from liberalism toward communitarian values of classical paradigm). Kalman aptly catches the tension between liberalism's focus on rights and republicanism. See Kalman, *supra* note 1, at 209.

<sup>74</sup> See, e.g., Cass R. Sunstein, *The Partial Constitution* 145-53 (1993) (arguing that Congress, not courts, should be principal vehicle for interpretation and enforcement of Fourteenth Amendment). Although it is difficult to know whether to put the republican hat on any specific scholar, included among those who would de-emphasize the role of the judiciary are: Girardeau A. Spann, *Race Against the Court* 161-71 (1993) (arguing that Supreme Court functions to perpetuate subordination of racial minorities); Robin West, *Progressive Constitutionalism* 190-210 (1994) (distinguishing moral from legal questions, and calling for increased citizen participation in debate on moral issues); Robert M. Cover, *Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 4, 25-26, 28, 43 (1983) (asserting that certain insular communities create law "as fully as does [a] judge"); Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 Mich. L. Rev. 245, 249 n.14 (1995) (calling for broader distribution of constitutional authority). Kalman joins me in reading Frank Michelman as not of one mind on the subject. See Kalman, *supra* note 1, at 158 (discussing Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 Harv. L. Rev. 4 (1986)).

In neo-neo versions of republicanism, liberalism is again finding favor, as the neoneorepublicans seek to rescue what was good about liberalism and merge it with republicanism. See, e.g., Cass R. Sunstein, *Beyond the Republican Revival*, 97 Yale L.J. 1539, 1566-71 (1988) ("Republican thought, understood in a certain way, is a prominent aspect of the liberal tradition."); see also Kalman, *supra* note 1, at 212, 346 n.55. Kalman even argues persuasively that this interpretation is more faithful to founding era republican tendencies. See Kalman, *supra* note 1, at 174.

<sup>75</sup> Kalman actually comes close to making this point herself. See Kalman, *supra* note 1, at 174 ("But since so many law professors believed liberalism—be it classical, political or legal—had outlived its usefulness, some continued to think in terms of the 'binary reading' and to work at retrieving republicanism.").

cult to argue that the Founders intended a republican Constitution as it is to argue that historian Charles Beard was necessarily right about the foundation of the Constitution in the economic self-interest of its framers,<sup>76</sup> or for any other approach. This Kalman clearly recognizes.<sup>77</sup> But the same is true at the level of constitutional interpretation required to resolve specific constitutional problems. To say that the Founders were republican, and that republicanism emphasizes community and deliberation, still fails to provide us with determinate answers about how the Founders would have resolved difficult questions regarding pornography, education, or (worse yet) the constitutionality of recent telecommunications legislation. History is every bit as indeterminate in the hands of neorepublicanism as it is in the hands of originalists.

Moreover, history creates as many problems for neorepublicanism as it solves, a fact Kalman also recognizes.<sup>78</sup> Neorepublicanism is related to classical republicanism in only the most general of ways. Classical republicanism rested on homogeneity of the body politic and the suppression of difference. “[I]t was not the civic humanists to whom women, blacks, Jews, and the marginalized groups of modern times have been able to turn to for solutions.”<sup>79</sup> Or, as Kalman quotes Gordon S. Wood, “even in 1776 republicanism ‘possessed a decidedly reactionary tone.’”<sup>80</sup> Kalman herself is dubious at times of whether republicanism really will do better than liberalism at protecting the values she holds dear.<sup>81</sup>

If neorepublicans did not turn to history to fight fire with fire, and if the pedigree for republicanism is so awkward anyway, then the really pressing question is why there is concern for a pedigree in the first place.<sup>82</sup> This is a question with which Kalman flirts on and off,<sup>83</sup> as do

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<sup>76</sup> See *id.* at 23.

<sup>77</sup> See *id.* at 174 (noting view that Founders were not making conscious choice between republicanism and liberalism).

<sup>78</sup> See *id.* at 176.

<sup>79</sup> *Id.* at 177 (quoting Linda K. Kerber, *Making Republicanism Useful*, 97 *Yale L.J.* 1663, 1672 (1988)).

<sup>80</sup> *Id.* (quoting Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, at 59 (1969)). Of course, to the extent civic republicanism really does have a pedigree resting in revolutionary thought, it too presents the problem of the dead hand.

<sup>81</sup> See *id.* at 209 (“[I]n our society, I suspect [*Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding Georgia’s antisodomy statute)] is all too consistent with majority rule and is just the sort of case we should fear under a republican revival.”).

<sup>82</sup> For a poignant musing as to why we search for a pedigree in the Founding period, see Jack N. Rakove, *Original Meanings* 366-68 (1996) (suggesting that intent of Founders represents political symbol coming closest to universal acceptance, and use of original intent is more than merely instrumental).

<sup>83</sup> See, e.g., Kalman, *supra* note 1, at 211 (noting that historians can show that debate over original intent is “stupid, fruitless, and anachronistic”).

the neorepublicans themselves.<sup>84</sup> As in love so in scholarship, however. Flirtation brings momentary satisfaction and may start one down the right road, but sustained attention might have brought something more lasting.

To Kalman, and to the neorepublicans themselves, the search for an historical perspective is a lawyer's *tactic*.<sup>85</sup> Kalman, quoting Sunstein, says "though 'there is a freestanding, nonhistorical argument for deliberative democracy as a central political ideal,' constitutional lawyers' argument in favor of it 'draws substantial support from historical understandings.'"<sup>86</sup> This is a repeated theme of Kalman's book. Lawyers are different than historians: historians ask questions out of curiosity about the past, lawyers use the past to score advocacy points in the present.<sup>87</sup> Presentism is a problem for the history academy; it is essential in the legal world.<sup>88</sup> Where constitutional law, and especially constitutional litigation, is concerned, we expect an historical pedigree. By all means, then, go out and get one.<sup>89</sup>

There is no doubt that the tactical use of history is a habit, but one might have wished that Kalman help us past the problem rather than exacerbate it. Kalman seems to have a deep appreciation for what constitutes good history. She shares the historian's disapproval of looking across history to find one's friends in support of present political arguments.<sup>90</sup> But one would like to think that there is a rea-

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<sup>84</sup> See *id.* at 210-11 (discussing Cass Sunstein's explanation for desire for pedigree).

<sup>85</sup> See also Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, 71 *Chi.-Kent L. Rev.* 909, 917-25 (1996) (criticizing quality of law-office history, but recognizing it is directed to different end than historians' history, namely advocacy).

<sup>86</sup> See Kalman, *supra* note 1, at 210 (quoting Cass Sunstein, *The Idea of a Useable Past*, 95 *Colum. L. Rev.* 601, 606 (1995)). Kalman simply equates lawyers and law professors, a point I resisted at first, but finally came to appreciate. Her perspective is that both lawyers and law professors do use available materials for advocacy purposes. See *infra* notes 144-47 and accompanying text (discussing legal academics as "graverobbers"). Of course, as *Strange Career* demonstrates, so does Kalman, probably a result of her training as a lawyer.

<sup>87</sup> Compare Kalman, *supra* note 1, at 180 (arguing that historians study past to understand how others "lived their lives" and thus do not understand "why republican revivalists sought a pedigree"), with *id.* at 185 (noting that lawyers use history for advocacy).

<sup>88</sup> See *id.* at 210-11 (discussing how historians and lawyers differ on need for pedigree).

<sup>89</sup> Thus, it is Kalman's ultimate prescription to historians to use their discipline in the service of greater social change, while it is her prescription to lawyers to use history carefully toward this same end. See *id.* at 198-208 (discussing historians in legal arena and how they might effectively aid social change); *id.* at 246 (urging academic lawyers not to abandon cause of social change).

<sup>90</sup> See *id.* at 197 ("Horwitz is surely right in stressing the danger of 'roaming through history looking for one's friends.'") (quoting Morton J. Horwitz, *Republican Origins of Constitutionalism*, in *Toward A Usable Past* 148 (Paul Finkelman & Stephen E. Gottlieb eds., 1991)). This is the same caution Judge Harold Leventhal offered about the use of legislative history. See *Conroy v. Anskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (relating Leventhal's observation that using legislative history is like "entering a crowded cocktail party and looking over the heads of the guests for one's friends"); Patricia M.

son for doing good history besides scoring debating points. Although Kalman surely knows this, her focus on the tactical use of history leads her to take a curious, and wrong, turn.

### III

#### THE WRONG TURN

If the use of history is but a tactic to solve the problems of constitutional law, then the way is clear: find the best history you can that supports the goals you wish to achieve. That, most assuredly, is what Bruce Ackerman has done. His primary project has been an enormously creative attempt to develop an "historical" way of interpreting the Constitution.<sup>91</sup> His goal appears to be the same as Kalman's: to preserve and justify the New Deal revolution and the subsequent work of the Warren Court.<sup>92</sup>

It is easy to see why Kalman was drawn to Ackerman, because superficially Ackerman's theory solves the puzzles Kalman presents. Working from history, Ackerman argues that our democracy is dualist: in times of normal politics, representative government will have its way, but at certain constitutional moments the people will manage to express themselves in "higher lawmaking."<sup>93</sup> When the people so act, these popular understandings are incorporated into the Constitution.<sup>94</sup> Judges who exercise the power of judicial review do nothing more than secure the people's will against their occasionally faithless elected representatives.<sup>95</sup> In exercising judicial review, judges may rely on all events of higher lawmaking, even if no specific constitutional text resulted. For Ackerman, there have been three constitutional moments: the Founding, Reconstruction, and the New Deal.<sup>96</sup>

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Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 *Iowa L. Rev.* 195, 214 & n.143 (1983) (same).

<sup>91</sup> See Bruce Ackerman, *We the People: Foundations* 5 (1991).

<sup>92</sup> Thus, Ackerman explains two of the most controversial Warren Court decisions—*Brown v. Board of Education*, 347 U.S. 483 (1954) and *Griswold v. Connecticut*, 381 U.S. 479 (1965)—with reference to the "amendment" of the Constitution that occurred during the constitutional moment that was the New Deal. See Ackerman, *supra* note 91, at 142-62. Ackerman likewise explains why the sometimes called "Reagan Revolution" did not represent a constitutional moment (which potentially might have undermined the work of the Warren Court). See *id.* at 51-53. Ackerman claims his goal is *not* to preserve the New Deal, see Bruce Ackerman, *A Generation of Betrayal* (Aug. 6, 1996) (unpublished manuscript, on file with the *New York University Law Review*), while other readers see it as I do. See, e.g., Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 *Const. Commentary* 115, 119-20 & n.15 (1994) (describing belief of constitutional moment theorists such as Ackerman that political principles of New Deal are "constitutionally entrenched").

<sup>93</sup> See Ackerman, *supra* note 91, at 266-94 (describing process of "higher lawmaking").

<sup>94</sup> See *id.* at 267.

<sup>95</sup> See *id.* at 7-10.

<sup>96</sup> See *id.* at 40-50.

Happily, when one triangulates from these three points the liberalism of the Warren Court is explained as good constitutional interpretation.<sup>97</sup> Thus, legal liberalism is embedded in the Constitution and there is no countermajoritarian difficulty, all from a theory itself rooted in history.

Although superficially appealing, the difficulty is that Ackerman is wrong at every turn.<sup>98</sup> First, the theory is only weakly rooted in history. Second, it does not solve (or "dis-solve," as Ackerman would say) the countermajoritarian difficulty. And third, it is liberal only by happenstance. In practice, Ackerman's theory's hold on liberalism must either be so tenuous as to make one wonder how "preservationist" the theory really is, or it is so enduring that one must wonder how it has any serious claim to solving the countermajoritarian difficulty.

Turning first to history, Ackerman's theory runs immediately into trouble. Kalman suggests historians have been approving of the "pedigree" of Ackerman's theory,<sup>99</sup> but the historical problems with the theory are altogether different than those recognized by historians. Ackerman's entire argument rests on the notion of "dualist" democracy: ordinary politics prevails except that elected representatives cannot violate the higher law of the Constitution.<sup>100</sup> When the people are mobilized sufficiently the Constitution is amended and elected representatives cannot violate these new constitutional principles. Thus far, there is nothing at all controversial in Ackerman's theory. In a general sense this dualism is what every schoolchild who has been taught civics would tell us about how the Constitution operates.<sup>101</sup> Surely every academic who works seriously in the field begins with the notion that the Constitution is special in that, particularly through the device of judicial review, it limits the freedom of elected representatives.

It is not Ackerman's argument for dualist democracy, but any claim that the Founders endorsed his peculiar brand of it, that seems historically contestable. In particular, it is Ackerman's theory of "constitutional moments" amending the Constitution by their own

<sup>97</sup> See *supra* note 91 and accompanying text.

<sup>98</sup> I explain, see *infra* notes 173-74 and accompanying text, why I believe Ackerman's project is nonetheless a worthy one.

<sup>99</sup> See Kalman, *supra* note 1, at 219 ("Ironically, Ackerman's history apparently has impressed . . . historians more than it did the law professors who branded it ahistorical.").

<sup>100</sup> See Ackerman, *supra* note 91, at 3-33.

<sup>101</sup> See Suzanna Sherry, *The Ghost of Liberalism Past*, 105 *Harv. L. Rev.* 918, 923 (1992) (reviewing Bruce Ackerman, *We the People: Foundations* (1991)) (identifying principle of constitutional dualism); Larry Kramer, *What's a Constitution for Anyway? Of History and Theory*, Bruce Ackerman and the New Deal, 46 *Case W. Res. L. Rev.* 835, 836-87 n.5 (1996) (describing "two track" system of American political practice).

force that is novel and controversial. Perhaps Ackerman's history does show us that whatever we all have thought for so long about founding era notions of the constitutional amendment process is wrong. But one is tempted to recall the point Daniel Farber makes in his challenge to grand theories generally: the reason they are wrong is that if they were both grand and correct, we would all have recognized them long ago.<sup>102</sup> Farber may overstate his case: there may well be times that theories are offered that do manage to explain things in a satisfying way that has not occurred to anyone before. This does not seem likely to be the case with *history*, however, and particularly not with a history that has been mined as endlessly as the founding era. It would be surprising to learn for the first time in the 1990s that the Founders intended constitutional amendment and interpretation to work in the novel fashion Ackerman suggests. Others have criticized as ahistorical Ackerman's view that the Founders intended even concededly dualist judges to interpret the Constitution in the way Ackerman explains.<sup>103</sup>

Second, Ackerman's theory is even less satisfying (both historically and practically) as a means of reconciling judicial review with democracy, one of his (and Kalman's) chief goals.<sup>104</sup> According to Kalman, interpreting Ackerman, "the counter-majoritarian difficulty may be counterfactual; they [the Founders] did not necessarily view judicial review as antidemocratic."<sup>105</sup> The phrase "not necessarily" in her description is a dead giveaway: this is a long way from saying that the Founders considered judicial review *democratic*. But even if they did, their views seem to have lasted about thirteen years, give or take a few. Surely by the time of Jefferson's election in 1800 and the

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<sup>102</sup> See Daniel A. Farber, *The Case Against Brilliance*, 70 *Minn. L. Rev.* 917, 920 (1986) ("In sum, if a brilliant theory is true, it should have been discovered in the marketplace; because it has not been discovered—or else it would not now be considered brilliant—it is very likely false.").

<sup>103</sup> See, e.g., Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 *Stan. L. Rev.* 759, 776-85 (1992) (reviewing Bruce Ackerman, *We the People: Foundations* (1991)) (criticizing Ackerman's choice of historical sources); Eben Moglen, *The Incomplete Burkean: Bruce Ackerman's Foundation for Constitutional History*, 5 *Yale J. Law & Hum.* 531, 542-43, 547 (1993) (reviewing Bruce Ackerman, *We the People: Foundations* (1991)) (describing how Ackerman avoids dangers of historiography); Sherry, *supra* note 101, at 924 (arguing that Ackerman ignores "massive historical evidence"). For example, Michael Klarman has made the point that it would have been highly unusual for the notoriously anti-democratic founders to endorse Ackerman's populist notion of judicial review. See Klarman, *supra*, at 782-83.

<sup>104</sup> See Ackerman, *supra* note 91, at 8-10; see also Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *Yale L.J.* 1013, 1016 (1984) (attempting to "dissolve" countermajoritarian difficulty).

<sup>105</sup> See Kalman, *supra* note 1, at 225.

Jeffersonian attack on the courts, that generation—which included many of those present at the founding—had grave doubts about reconciling judicial review with democracy.<sup>106</sup> This only serves to underscore the practical problems with Ackerman's theory. Even if judicial review was democratic in 1787, the chance of it being so for the same reasons in 1997 is extremely dubious. In 1787 the People had just ratified the Constitution and the principles it contained. Every year that passed since that time left them further from the original agreement and less willing to be bound by it.<sup>107</sup>

Ackerman's answer is that the Constitution can be and is updated by popular mobilization, but this answer fails as a solution to the countermajoritarian difficulty. Under Ackerman's theory, for example, *Brown v. Board of Education*<sup>108</sup> might have been incorrect as a matter of original understanding at the time of the Fourteenth Amendment's ratification, but when one takes the constitutional moment of the New Deal into account, the decision is a perfect embodiment of the people's will.<sup>109</sup> Putting to one side the problem others have observed with identifying constitutional moments,<sup>110</sup> Ackerman's theory suffers the same problems presented by originalism and republicanism for reconciling judicial review and democracy. At a general level judges (and it is judges, under Ackerman's theory) must decide when a constitutional moment has occurred. Then, judges must decide what the constitutional moment meant. Finally, judges must extrapolate (triangulate) from that and other moments to a solution for a present, pressing problem. This hardly seems determinate enough to square judicial review with popular will, if that is the problem to be solved. Indeed, in a sense Ackerman's solution is more problematic than the originalist one, for his constitutional moments do not even necessarily have to result in a text that can be interpreted by the judiciary.<sup>111</sup> And as with originalism, the further in time we get

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<sup>106</sup> See Charles Warren, 1 *The Supreme Court in United States History 1789-1835*, at 169-315 (2d ed. 1926) (discussing persistent attacks on judiciary as undemocratic during debate over repeal of Circuit Court Act of 1801, trial of Aaron Burr, and impeachment trial of Samuel Chase); see also Friedman, *supra* note 23, at 14-30 (same).

<sup>107</sup> See generally Paul W. Kahn, *Legitimacy and History* (1992).

<sup>108</sup> 347 U.S. 483 (1954).

<sup>109</sup> See Ackerman, *supra* note 91, at 146-48.

<sup>110</sup> See McConnell, *supra* note 92, at 142-43 (suggesting malleability of criteria for constitutional moments permits any number of historical events to be defined as such moments); Klarman, *supra* note 103, at 768-69 (arguing that Ackerman provides no clear means to identify constitutional moments).

<sup>111</sup> See McConnell, *supra* note 92, at 117 (suggesting interpretive difficulty of having constitutional amendment without any change to text). This obviously is true of the New Deal. Indeed, it is the courts that engage in the process of "codifying" the "higher lawmaking." See Ackerman, *supra* note 91, at 288-90.

from a constitutional moment, the more problematic Ackerman's theory becomes. *Brown*, after all, was not that far in time from the New Deal.<sup>112</sup> That is less true of many constitutional decisions today. The answer, one might suppose, is that the further we get from a momentous consensus, the greater will be the need for another. But in the interim, the pressure on Ackerman's theory mounts.

This last point underscores the third problem with Ackerman's theory, which is that there is an unbearable tension built right into it that undermines its utility in preserving a liberal agenda. Ackerman "dis-solves" the countermajoritarian difficulty because judges supposedly do nothing more than implement the people's will as embodied in the Constitution. But how frequent are constitutional moments to be, and how easy are they to achieve? The easier and more frequent the constitutional moments, the likelier that Ackerman has indeed reconciled judicial review and popular will. Make them frequent enough and there is absolutely no problem. On the other hand, the longer one holds off constitutional moments (or the less willing one is to recognize them) the longer the period since the Constitution has been revitalized with current views. If judges are limited to conforming the document to the last constitutional moment, inevitably as time passes the gap will increase between popular wishes and constitutional decisions, bringing the countermajoritarian criticism to bear.

Thus, Kalman cannot rely on Ackerman's theory to perpetuate a liberal agenda, because the theory seems to contain the inevitable seeds of its own destruction. By Ackerman's own account he escaped by a hair another constitutional moment, this one adopting the "Reagan revolution,"<sup>113</sup> when Robert Bork's nomination to the Supreme Court was defeated by the Senate. Fickle constitutional moments aside, surely the next moment will inevitably come, and it is unclear that Ackerman himself is likely to be very happy with what it spells for American constitutionalism.

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<sup>112</sup> Indeed, as my colleague Jim Ely and others have pointed out, the support for *Brown* may have rested on much more than forces originating in the New Deal. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518, 524-25 (1980) (emphasizing sociopolitical and economic factors leading to *Brown*); Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 Stan. L. Rev. 61, 68-98 (1988) (arguing for significance of World War II and postwar foreign relations); James W. Ely, Jr., *The South, the Supreme Court, and Race Relations, 1890-1965*, in *The South as an American Problem* 126, 133-41 (Larry J. Griffin & Don H. Doyle eds., 1995) (discussing societal changes in World War II and emergence of skilled litigation groups such as NAACP Legal Defense Fund); Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 Va. L. Rev. 7, 14-75 (1994) (suggesting role of foreign relations and changing Southern economic and demographic trends).

<sup>113</sup> See Ackerman, *supra* note 91, at 56.

Today's federalist revival presents questions of precisely this sort. In decisions such as *United States v. Lopez*<sup>114</sup> and *New York v. United States*,<sup>115</sup> the Supreme Court is returning to themes reminiscent of pre-New Deal days. A Republican Congress, elected under the somewhat revolutionary "Contract with America," recently dismantled the national welfare system, which some, including Ackerman, see as a chief accomplishment of the New Deal.<sup>116</sup> It could be that another subtle constitutional moment has occurred, that the American population has backed off from the New Deal, or perhaps transcended it.<sup>117</sup> Would Kalman (or Ackerman) be content with Ackerman's theory if constitutional politics have shifted again?

Ultimately, Ackerman fails Kalman, just as he fails in his central mission. The theory is an undoubtedly creative one, and creative contributions such as Ackerman's enrich our understanding of the Constitution and constitutional interpretation. Even wrong ideas may lead us down the path to right answers, especially if the ideas are as breathtaking as Ackerman's. But the shame is that Kalman traveled down that wrong path when she was so close to one that at least offers the beginnings of a more plausible understanding of history's value to constitutional interpretation and legal scholarship.

#### IV

#### THE TURN TO HISTORY (II)

"Those who turn to other disciplines should remember why they did so."<sup>118</sup>

When Kalman sent her scholarly knights away, she knew why she did so. Legal liberalism was in trouble, and its greatest threat was the countermajoritarian difficulty. If only judicial activism could be reconciled with democracy, legal liberalism could be saved and the world shaped in the image Kalman desired. And so they departed to seek

<sup>114</sup> 115 S. Ct. 1624 (1995) (holding that federal "Gun-Free School Zones Act" exceeded Congress's commerce clause authority).

<sup>115</sup> 505 U.S. 144 (1992) (holding that federal government may not commandeer states into service of federal regulatory purposes).

<sup>116</sup> See Burton F. Natarus, *Should We Trot Out The New Deal Again?*, *Chi. Trib.*, Aug. 22, 1996, at 29 (arguing that welfare bill is biggest change to welfare since New Deal). Mark Graber and Bruce Ackerman discuss the constitutional significance of the repeal of welfare in recent manuscripts. See generally Ackerman, *supra* note 92; Mark A. Graber, *The Clintonification of American Law and Liberal Constitutional Theory*, 58 *Ohio St. L.J.* (forthcoming 1997).

<sup>117</sup> Mark Tushnet examines this very question. See Mark Tushnet, *Living in a Constitutional Moment?: Lopez and Constitutional Theory*, 46 *Case W. Res. L. Rev.* 845, 845-46 (1996) (suggesting that 1994 congressional elections and *Lopez* could be viewed as constitutional moments).

<sup>118</sup> Kalman, *supra* note 1, at 239.

the Grail, an answer to the problem Alex Bickel put. But like the Grail, there was no answer to be found. Kalman knows this too, although she is wont to admit it, finding encouragement that “[t]here are . . . signs that the preoccupation with the Siamese twins of judicial power and counter-majoritarianism may be waning” while at the same time maintaining the hope that history “can assist in diminishing the counter-majoritarian difficulty.”<sup>119</sup>

There is no answer because the countermajoritarian difficulty was an illusion.<sup>120</sup> It was built on peculiar premises from the start, not the least of which was that a judiciary could transform a nation unwilling to be transformed. A new generation of legal scholars has succeeded in amply revealing the illusion, disrobing it from every direction. While public choice scholars have thrown into question the odd majoritarian description of government that Bickel thrust upon us,<sup>121</sup> other political science and constitutional scholars have challenged the other side of the equation, the notion that judges could lead a countermajoritarian revolution.<sup>122</sup> Ultimately, as Bickel well knew,

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<sup>119</sup> *Id.* at 232, 236.

<sup>120</sup> Kalman seems to recognize this, tentatively, at the end of *Strange Career*. See *id.* at 232 (describing “eclipse of the obsession with judicial review and countermajoritarianism”). Joyce Appleby has suggested to me that the countermajoritarian difficulty persists because of a tension in our own thinking between the poles of majoritarianism and constitutionalism. See Letter from Joyce Appleby to Barry Friedman 1 (Jan. 29, 1997) (on file with author). Michael Seidman makes this point splendidly in Louis Michael Seidman, *Ambivalence and Accountability*, 61 *S. Cal. L. Rev.* 1571, 1571-74 (1988) (describing contradictory paradigm in which public wants judges to transcend politics while remaining politically accountable, and concluding that profound ambivalence is only possible response to irreconcilable tension).

<sup>121</sup> For a brief overview of the argument, see Barry Friedman, *Dialogue and Judicial Review*, 91 *Mich. L. Rev.* 577, 637-43 (1993) (presenting Bickel’s “chain-of-accountability” argument for majoritarianism and critiquing premises of that argument). For an introduction to public choice theory, albeit laden with some skepticism, see generally Daniel A. Farber and Philip P. Frickey, *Law and Public Choice* (1991).

<sup>122</sup> There are significant differences in the work of these commentators, but all share a skepticism that the judiciary can or does effect social change contrary to popular will. See Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 336-43 (1991) (concluding that courts are constrained in their abilities to produce significant social reform, and that such reform takes place only when broad precedents for change exist in legal and political culture); Girardeau A. Spann, *Race Against the Court: The Supreme Court and Minorities in Contemporary America* 161-71 (1993) (arguing that racial minorities must abandon efforts to obtain protection from Supreme Court, whose “true institutional function is to perpetuate the subordination of racial minorities for majority gain”); Friedman, *supra* note 121, at 581 (“[C]ourts are a vital functioning part of political discourse, not some bastard child standing aloof from legitimate political dialogue.”); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *Stud. in Am. Pol. Dev.* 35 (1993) (characterizing courts not as wholly separate entities but as participants in constitutional dialogue between American governing institutions); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 *Va. L. Rev.* 1, 31-66 (1996) (arguing that Supreme Court decisions in areas of race discrimination, free-

the judiciary can only take society where it chooses to go.<sup>123</sup> If liberalism, legal or otherwise, is in trouble, it is not the fault of the law or of legal scholars.

Kalman is surely correct, however, that the failed search for an answer to the countermajoritarian difficulty resulted in a shattered consensus in legal scholarship and a turn to other disciplines. It is probably too much to ascribe to a causal relationship. After all, as *Strange Career* documents, what is happening in law is also happening in the other disciplines.<sup>124</sup> But Kalman laments this development in the law, admiring the advocacy of academic lawyers and evidently wishing that what has happened elsewhere could be avoided in the law.<sup>125</sup> As *Strange Career* comes to a close, legal scholarship is lost. The final pages are full of woe expressed by those within and without the legal academy that legal scholarship has lost its way and its relevance. In turning to other disciplines legal scholars have lost their bearing. Kalman regrets this:

Perhaps we cannot expect academic lawyers to remain at the barricades valiantly holding culture together, while those outside the law schools pick it apart. But it would be unfortunate if law professors desert the barricades just as academics in other fields, such as historians, begin to show signs of appreciating what legal scholars are doing, and wanting to help.<sup>126</sup>

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dom of speech, Establishment Clause, and criminal procedure were not countermajoritarian); Steven L. Winter, *An Upside/Down View of the Countermajoritarian Difficulty*, 69 *Tex. L. Rev.* 1881, 1885 (1991) (suggesting that "constitutional [decisionmaking] reflects and transposes . . . normative orientations into legal outcomes with distinctively majoritarian overtones"); Steven L. Winter, *Tennessee v. Garner and the Democratic Practice of Judicial Review*, 14 *N.Y.U. Rev. L. & Soc. Change* 679, 683-86 (1986) (positing that recent cases exemplify Supreme Court's democratic reliance on normative expressions of other societal decisionmakers when fashioning constitutional rules).

<sup>123</sup> See Bickel, *supra* note 30, at 251 ("When we say, as we often do, that government should not try to enforce morality by law, we mean that in our system it cannot enforce it, if it is merely an idiosyncratic morality or a falsely professed morality, not the generally accepted one."); Bickel, *The Supreme Court*, *supra* note 34, at 91 ("The effectiveness of the judgment [of the Supreme Court] universalized depends on consent and administration.").

<sup>124</sup> See Kalman, *supra* note 1, at 98 ("The fascination with theory, culture, and language that led so many different individuals and movements to postmodernism in the 1970s and early 1980s blurred disciplinary boundaries in the very fields from which law professors sought guidance."); *id.* at 110 ("The promise of 'real' interdisciplinarity that made the interpretive turn so tantalizing to law professors, anthropologists, philosophers, and others also jeopardized their control over their own disciplines."); see also Erik H. Monkkonen, *Introduction to Engaging the Past: The Uses of History Across the Social Sciences 1-3* (Eric H. Monkkonen ed., 1994) (describing increase in disciplinary "boundary crossing" since 1960s and methodological confusion and conflicts caused by such interdisciplinary forays).

<sup>125</sup> See Kalman, *supra* note 1, at 239.

<sup>126</sup> *Id.* at 246.

Kalman's hope is that a turn to history can rouse the legal scholars from their lethargy. In making this plea, however, Kalman displays that she is as much lawyer as historian. Kalman is an advocate, and her history has an agenda—the restoration of liberalism as it was in the days of the Warren Court. But as an historian, Kalman should know that recreating the past through history is not the same as re-living it. The Warren Court succeeded, and success for a time it was, not because legal liberalism triumphed apart from society, but because the society in which it operated was amenable to hearing what the Court had to say, or at least some of it. Today's society is a very different one, calling for a very different Court.

History does have a critical role here, but it is not the role Kalman envisions. The pressing epistemological debate in history, as in other disciplines, has been over the possibility of objectivity.<sup>127</sup> Is it possible to “know” the past? The question is of particular importance in the historical academy because, to take historians at their word, they do history simply to learn about and accurately describe the past.<sup>128</sup> Indeed, “presentist” use of history is frowned upon.<sup>129</sup> Kalman recognizes this, even as she is perhaps overly optimistic about the extent to which historians have dealt with the crisis of objectivity. “If objectivity has receded as a problem for historians, presentism has not,” she writes.<sup>130</sup>

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<sup>127</sup> See *id.* at 181-83. Recent works in the objectivity debate include Joyce Appleby et al., *Telling the Truth About History* (1994) (arguing that skepticism and relativism have dethroned intellectual absolutism); Peter Novick, *That Noble Dream: The “Objectivity Question” and the American Historical Profession* (1988) (mapping history of objectivity in last century); Keith Windschuttle, *The Killing of History 177* (1996) (contending that impact of individuals and their decisions precludes “one central or fundamental explanation for history”).

<sup>128</sup> This is a constant theme of Windschuttle. See, e.g., Windschuttle, *supra* note 127, at 1, 177, 216. Novick's work is a history of historians' focus on objectivity; thus, the early part of the work explains the singular focus of history to describe the past accurately. See Novick, *supra* note 127, at 39 (describing view during early part of century that it was possible to produce “definitive, objective, re-creation of the historical past”). As the purpose of doing history expanded, Novick tells us, the discipline began to lose its way. See *id.* at 584 (“The expansion of historians' interests produced work of great interest and originality, but the discipline gradually came to recognize that the price of lateral expansion was a loss of definition for the venture as a whole.”). David Hackett Fischer has developed an elaborate logic of history aimed at just this end. See generally David Hackett Fischer, *Historians' Fallacies: Toward a Logic of Historical Thought* (1970) (urging collaboration between historians, logicians, and epistemologists and formulating focused logic-based approach to historical inquiry).

<sup>129</sup> Kalman, *supra* note 1, at 183.

<sup>130</sup> *Id.*

As some philosophers of history have recognized,<sup>131</sup> however, and as many historians seem tacitly to understand, one value of history is in helping us to situate ourselves in the present. This seems to be the point made in the words of Edward Hallett Carr quoted at the outset of this review,<sup>132</sup> and it is the theme of Arthur Danto's brilliant work of analytical philosophy about history.<sup>133</sup> Danto's ultimate point is that the past is always being created in light of the present.<sup>134</sup> Thus, we cannot understand the significance of the present until it is past and historians have a go at it.<sup>135</sup> But by the same token, our unceasing study of history is an attempt to understand our present. "It is impossible to overestimate the extent to which our common ways of thinking about the world are historical,"<sup>136</sup> Danto writes. "[O]ur experience of the *present* is very much a matter which depends upon our knowledge of the past."<sup>137</sup> While focusing their energies on knowing the past, or on debating whether the past can be known, this is the sort of insight that some historians tacitly acknowledge: "What historians do best is to make connections with the past in order to illuminate the problems of the present and the potential of the future."<sup>138</sup>

Legal academics are indeed turning to history of late. As recently as 1981, Morton Horwitz could say, "By and large, the dominant tradi-

<sup>131</sup> By "philosophers of history" I do not mean works such as Hegel's *Philosophy of History*, which attempted to discern the greater movements of history, thereby essentially predicting the future course of history. Rather, the reference is to analytical philosophers such as Arthur C. Danto or R.G. Collingwood. See *infra* notes 133-38.

<sup>132</sup> See *supra* note 7 and accompanying text.

<sup>133</sup> See Arthur C. Danto, *Narration and Knowledge* (1985), which incorporates Danto's 1965 *Analytical Philosophy of History*.

<sup>134</sup> See *id.* at 92-93, 284, 297 (suggesting that past events are best understood in present conditions, from which vantage point historians may observe effects and therefore full meaning of those events).

<sup>135</sup> See *id.* at 284.

Philosophies of history attempt to capture the future without realizing that if we knew the future, we could control the present, and so falsify statements about the future, and so such discoveries would be useless. We capture the future only when it is too late to do anything about the relevant present, for *it* is then past and beyond our control. We can but find out what its significance was, and this is the work of historians: history is made by them.

*Id.*

<sup>136</sup> *Id.* at xv.

<sup>137</sup> *Id.* at 94.

<sup>138</sup> Appleby et al., *supra* note 127, at 10. The point of the exercise, of course, is to know ourselves. This was the theme of R.G. Collingwood's classic work on history, *The Idea of History*: "Man, who desires to know everything, desires to know himself." R.G. Collingwood, *The Idea of History* 205 (1946). "We study history . . . in order to attain self-knowledge." *Id.* at 315.

tion in Anglo-American legal scholarship today is unhistorical."<sup>139</sup> Little more than a decade later, in his 1993 Harvard Foreword, Horwitz would observe the "revival of interest in American constitutional history within the legal community."<sup>140</sup> Horwitz's observation is surely correct. Law professors are not only writing more history,<sup>141</sup> they are worrying about writing it properly rather than as "law office historians."<sup>142</sup> Academic conferences are being planned around historical themes.<sup>143</sup> The allure of Clio once again is felt throughout the legal academy.

Where Kalman goes astray is in seeking the use of history in law as but a tactic, a tool of advocacy. Assuredly legal academics, like all lawyers, are graverobbers, but that may not explain the present turn to history among legal academics.<sup>144</sup> Lawyers do tend to search for any support we can find to bolster current positions, earning the approbation attached to "law office history." Both historians and law professors have called us "natural scavengers,"<sup>145</sup> a point Kalman makes repeatedly in her book. At times Kalman joins historians in criticizing legal academic graverobbing for doing history poorly;<sup>146</sup> at other times she applauds it as she admires lawyers for advancing a substantive and political agenda with whatever tools are at hand.<sup>147</sup> What *Strange Career* misses is that perhaps the turn to history in this instance is attributable not simply to trendiness or to a "tactic" of legal advocacy.

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<sup>139</sup> Morton J. Horwitz, *The Historical Contingency of the Role of History*, 90 *Yale L.J.* 1057, 1057 (1981).

<sup>140</sup> Horwitz, *supra* note 31, at 39.

<sup>141</sup> See William E. Nelson and John Phillip Reid, *The Literature of American Legal History* 304 (1985) (describing growth since 1960 in American legal history).

<sup>142</sup> See, e.g., Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 *Colum. L. Rev.* 523, 549-56 (1995) (assessing growth of historical research and methodology in modern American constitutionalism).

<sup>143</sup> I refer here to the recent Fordham conference on "Fidelity in Constitutional Theory," see 65 *Fordham L. Rev.* 1247-1854 (1997), and in particular, papers by Jack Rakove, see *id.* at 1587, Christopher Eisgruber, see *id.* at 1611, and Larry Kramer, see *id.* at 1627.

<sup>144</sup> It is worth stressing here that the suggestion relates to the value of history to law, not necessarily to the discipline of history generally. Persistent claims of historians that their task is only to get the record straight seem to beg the question of the role of history as a discipline, but that is a question better left to those immersed in the discipline. The claim here relates only to the use of history by those engaged in the study of law and constitutional interpretation.

<sup>145</sup> Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 *J. Am. Hist.* 11, 33 (1992) (quoting Kathryn Abrams, *Law's Republicanism*, 97 *Yale L.J.* 1591, 1591 (1988)).

<sup>146</sup> See, e.g., Kalman, *supra* note 1, at 111, 125; Morgan Cloud, *Searching through History; Searching for History*, 63 *U. Chi. L. Rev.* 1707, 1710 (1996) (explaining "lawyers' histories" are result of lawyers' use of history for advocacy purposes).

<sup>147</sup> See, e.g., Kalman, *supra* note 1, at 180, 184, 186.

Unlike historians who worry about presentism, legal academics today seem intuitively to be coming to understand that the best use of history is in making sense of the present.<sup>148</sup> Kalman walks right past this understanding in her discussion of the debate between historians and law professors over the pedigree of the republican revival. Joyce Appleby, an historian, was critical: "Like so many earlier organizing themes in American historiography, the wildfire success of republicanism began to illuminate contemporary concerns of historians more than the past, demonstrating anew the special tensions present when writing the history of one's own country."<sup>149</sup> But Frank Michelman, as Kalman tells it, "took the offensive . . . 'Without the past . . . who am I?' he asked Appleby. 'Who are we? . . . Without a sense of our identity, how do we begin to make a case for anything? Without *mining* the past, where do we go for inspiration?"<sup>150</sup>

The legal turn to history makes perfect sense in light of the "crisis" in constitutional law and scholarship that *Strange Career* documents so well. In the course of its failed search for an answer to both Bickel's and the Legal Realists' challenges, legal scholarship *has* fragmented, and many *do* feel it has lost its way. As Morton Horwitz observed, "[H]istory usually becomes the arbiter of constitutional theory only as a last resort in moments of intellectual crisis."<sup>151</sup> Crisis is perhaps too strong a word for what is, after all, a natural evolutionary process. Hyperbole is a common reaction from those uncomfortable with change. But surely we all are aware that something is changing, and the turn to history is simply a way of trying to find out where we are by looking back and understanding from where we have come.

History is vital because it gives us a chance to retrace our steps, to mark out the path we have taken. Many metaphors might apply here. Studying history is like a surveyor putting down stakes, or the geometric marking of points to delineate a line. By going back to our past we can get a running start on understanding where we presently stand. History roots us. By the same token, by asking historical questions

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<sup>148</sup> See Calvin Woodard, *Escape Into History*, N.Y. Times Book Review, Sept. 15, 1996, at 33 ("Lawyers tend to look to the past to accomplish present purposes, and historians out of endless fascination for strange contexts.")

<sup>149</sup> Kalman, *supra* note 1, at 173-74 (quoting Joyce Appleby, *A Different Kind of Independence: The Postwar Restructuring of the Historical Study of Early America*, 50 *Wm. & Mary Q.* 245, 264 (1993)).

<sup>150</sup> *Id.* at 175 (quoting Frank Michelman, *Republicanism in Legal Culture*, Address Before the Association of American Law Schools (Jan. 1987) (second and third ellipses in original)).

<sup>151</sup> *Id.* at 192 (quoting Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 *Harv. L. Rev.* 30, 40 (1993)).

today, we define that history. We use history to smooth out our past. History provides continuity to our lives, perhaps even more than actually exists.

It is in this light that *Strange Career* serves its most vital function, as a chronicle of the evolution of legal scholarship over the last half century. Although one of Kalman's goals is the impossible one of rescuing legal liberalism in 1960s terms, another which she accomplishes quite well is helping us understand precisely how we came to be where we are. After all the turmoil Kalman documents, the legal academy is in need of taking stock. The impetus to do so is strong. *Strange Career* does an exemplary job not only of describing the evolution of legal scholarship, but of *situating* it within the broader framework of other academic studies. Disciplinary lines are blurring, in law as elsewhere. Kalman helps us see that what is happening in law is not a peculiar fetish of legal academics, moving us relentlessly further from attention to the workaday business of law. Rather, it is part of a broader phenomenon taking place across disciplinary lines, one of which we must take account and come to understand.<sup>152</sup>

In the present climate, history has two related roles to play. The first, to which *Strange Career* contributes, is in understanding the place of current legal scholarship. There are recent indications that legal scholars who have wandered in wildly different directions are suddenly reaching out to one another for common ground, just as is the case across disciplinary lines. In his recent book, *Overcoming Law*, Richard Posner brings under the umbrella of pragmatism such unlikely counterparts as Mark Tushnet, Stanley Fish, Cornel West, William Eskridge, Daniel Farber, Phillip Frickey, Thomas Grey, Frank Michelman, Martha Minow, Margaret Jane Radin, Cass Sunstein, and others.<sup>153</sup> In a recent piece in the *Harvard Law Review*, Edward Rubin accomplishes the seemingly impossible task of uniting insights of law and economics and Critical Race Theory.<sup>154</sup> After the fragmentation Kalman describes, there are signs of interest in a coming together, but for this to succeed it is necessary to reconstruct our history and understand where we have been, in order to begin to comprehend where we are.

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<sup>152</sup> See Monkkonen, *supra* note 124, at 3 (stating that dissatisfaction with scholarship in humanities and social studies has led to "an interdisciplinary quest for methodological tools, concepts, and differing kinds of empirical evidence").

<sup>153</sup> See Posner, *supra* note 64, at 13, 389.

<sup>154</sup> See Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 *Harv. L. Rev.* 1393, 1424-33 (1996) (detailing methodology and substance of proposed synthesis).

History has an equally, if not more valuable role to play in helping us in the essential business of understanding constitutional meaning. A recent conference at Fordham Law School raised the question whether we owe, or ought to owe, fidelity to the Constitution.<sup>155</sup> The question, which on its face is rather startling, simply reflects the inevitable tension of governing society by a document over two hundred years old.<sup>156</sup> The changes Kalman observes in legal scholarship merely reflect the “revolutions” of constitutional law itself.<sup>157</sup> Constitutional law has taken several turns since the turn of the century, from the *Lochner* Court to the New Deal Court and its aftermath, to the Warren Court and a gradual backlash. The more turns in the road, the more difficult it seems to be to maintain the idea of the Constitution’s continuity.

History’s vital function of helping us situate ourselves in the present also can assist us in uniting the founding Constitution with today’s Constitution. Strict originalism is an interpretive methodology doomed to failure, but cutting the Constitution completely loose from its historical moorings does not seem any more tenable to lawyers who “value text, continuity, and prescription.”<sup>158</sup> Originalism does not deserve special antipathy because of its failure to constrain judges and thus to solve the countermajoritarian difficulty. Its proponents were grasping at straws even to offer it for this purpose. The appropriate criticism of strict originalism is that it fails to the extent it purports to offer concrete solutions to modern problems. It simply defies common comprehension to believe the Founders solved, let alone could anticipate, our problems. But for those who “value continuity,” and lawyers join the rest of society in this natural yearning, the idea of a “living Constitution,” which fails altogether to integrate our past, is not much more appealing.<sup>159</sup>

History can help us understand that our Constitution is *sedimented*, that the choice need not be between founding era originalism

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<sup>155</sup> See, e.g., Jack N. Rakove, *Fidelity Through History (Or To It)*, 65 *Fordham L. Rev.* 1587 (1997); Larry Kramer, *Fidelity to History—And Through It*, 65 *Fordham L. Rev.* 1627 (1997).

<sup>156</sup> Increasingly, theorists are dealing with the problem of constitutional change. See *supra* note 155; see also Lawrence Lessig, *Fidelity in Translation*, 71 *Tex. L. Rev.* 1165, 1173 (1993) (suggesting that changed readings of Constitution may be understood as “translations” rather than “infidelities”); Whittington, *supra* note 65.

<sup>157</sup> See, e.g., Charles Fried, *Revolutions?*, 109 *Harv. L. Rev.* 13, 73 (1995) (arguing 1994 Term was characterized more by continuity than change).

<sup>158</sup> Kalman, *supra* note 1, at 180.

<sup>159</sup> Cf. Nelson & Reid, *supra* note 141, at 307 (describing how importance of history waned in light of 1960s emphasis on social change).

or historical interpretation.<sup>160</sup> Constitutional interpretation should be rooted in our past, but it cannot be based solely upon understandings formalized two centuries ago. Like sedimented deposits that over time form hard rock, only to serve as the base for further sedimentation, events since the founding have layered over original understandings and given them new form.<sup>161</sup> Some original understandings have prevailed relatively unchanged; some are dramatically different.<sup>162</sup> In order to make sense of today's Constitution, it is not enough merely to study original understandings. Rather, it is essential to study how those understandings have been layered over with time, and to trace the course of change over the decades. We are the product of a past recent and distant.<sup>163</sup> To move from 1787 directly to 1997 is not to describe *our* past nor to root constitutional interpretation in it. Our Constitution is the product of constant reinterpretation since the founding.

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<sup>160</sup> For further discussion of this idea, see Barry Friedman & Scott B. Smith, *The Sedimented Constitution* (Apr. 8, 1997) (unpublished manuscript, on file with the *New York University Law Review*).

<sup>161</sup> This is the point of Larry Kramer's excellent contribution to the Fordham Conference on Fidelity and Law. See Kramer, *supra* note 155, at 1631-32. Kramer argues that originalists overvalue the founding, and that we are "[f]ounding obsessed." *Id.* at 1628. Rather, argues Kramer, we should see the development of constitutional interpretation as dynamic and evolving: "[T]o conceive the Constitution as a dynamic framework of evolving institutions and restraints makes history central to the interpretive enterprise." *Id.* at 1638. But, "it would be irresponsible to consult only the [f]ramers' understanding . . . . The [f]ounding is a starting place, not a fixed reference point." *Id.* at 1639. Hear, hear.

This also is the point of William Nelson's description of "neutral principles" adjudication. See William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 *Va. L. Rev.* 1237, 1262-86 (1986). "Neutral principles" judges "examine[ ] not the history of a constitutional text's adoption, but the history of the concepts in that text, as they have been understood since its adoption." *Id.* at 1268. Thus, Nelson explains *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Roe v. Wade*, 410 U.S. 113 (1973), as appropriate in light of evolved constitutional meaning. See Nelson, *supra*, at 1270-75.

<sup>162</sup> Recognizing that constitutional law is an evolutionary and ongoing process, David Strauss encourages us to see constitutional law as common law, at times privileging evolving doctrine over the written text. See David A. Strauss, *Common Law Constitutional Interpretation*, 63 *U. Chi. L. Rev.* 877, 885 (1996) (arguing that "the common law—rather than any model based on the interpretation of codified law—provides the best way to understand the practices of American constitutional law"). Although Strauss's attention to the evolving nature of the Constitution is correct, and his emphasis on constitutional doctrine is important, his focus on judicial decisions alone is still too narrow to capture the sedimented nature of constitutional development.

<sup>163</sup> This is not unlike what Holmes seems to have had in mind when he said that the "rational study of law is still to a large extent the study of history." Oliver Wendell Holmes, *The Path of the Law*, 10 *Harv. L. Rev.* 457, 469 (1897). Holmes, however, was critical of relying on old ideas simply because of their antiquity, cautioning "our only interest in the past is for the light it throws upon the present." *Id.* at 474.

This sedimented approach to constitutional interpretation does not, of course, solve the objectivity problem.<sup>164</sup> It accepts that determinate answers are elusive. Yet, it provides a way of beginning to discuss interpretive questions in light of our complete constitutional history, not just events now over two hundred years old. Although the problem of the countermajoritarian difficulty is somewhat illusory, the problem of objectivity in interpretation is very real. So long as judges bring their own perspectives to bear on interpretive questions, there will be differences of opinion. As historians themselves understand, this objectivity problem is present even when studying history.<sup>165</sup> By separating the countermajoritarian problem from the objectivity problem, however, it becomes possible to eschew defensiveness about judges engaging in the act of interpretation, and to begin to ask "what makes for good interpretation?" To this question, the sedimented nature of constitutional history suggests judges must engage in historical inquiries that look significantly beyond the founding.

Judicial decisions that have been subject to great criticism find support in this sedimented understanding of constitutional change. Examples include the much maligned joint opinion in *Planned Parenthood v. Casey*<sup>166</sup> and Justice Scalia's equally maligned opinion in *Michael H. v. Gerald D.*,<sup>167</sup> two examples chosen by Kalman of the recent turn in case law to history and tradition.<sup>168</sup> Both decisions have been criticized as being too backward-looking, too resistant to constitutional evolution.<sup>169</sup> But whether or not either decision reached the right conclusion, both were attempts to ground decisions in a constitutional past that looked beyond the moment of the founding. Justice Scalia, for example, has come under fair criticism for insisting that in order to obtain constitutional protection, a constitutional right must have been recognized by the founders at the narrowest level of speci-

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<sup>164</sup> See Nelson, *supra* note 161, at 1285-86 (arguing that constitutional interpreters can be guided by neutral principles, even if there is no objectivity to be found).

<sup>165</sup> See *supra* note 61.

<sup>166</sup> 505 U.S. 833, 860-65 (1992) (turning to history to determine appropriateness of overruling particular decision).

<sup>167</sup> 491 U.S. 110, 122-23 (1989) (holding that liberty interest protected by due process clause deemed fundamental only if it is "rooted in history and tradition").

<sup>168</sup> See Kalman, *supra* note 1, at 192-93.

<sup>169</sup> See, e.g., Rebecca L. Brown, Tradition and Insight, 103 Yale L.J. 177, 204 (1993) (criticizing use of tradition to define constitutional liberties for its tendency to "narrow the scope of potential protections for liberty even in the face of increasingly tolerant societal mores"); Horwitz, *supra* note 31, at 99 (discussing *Casey* joint opinion's "hostility to change").

ficity.<sup>170</sup> However, Scalia's decision in *Michael H.* at least tried to paint itself into an evolving idea of constitutional law.<sup>171</sup> The *Casey* plurality similarly recognized that constitutional decisions must be embedded in the evolving constitutional structure to retain legitimacy, and that whether or not *Roe v. Wade* was correctly decided in 1973, the intervening twenty years had brought legitimacy to that decision.<sup>172</sup>

Here too rests the real virtue of Bruce Ackerman's work. As a search for objectivity or a solution to the countermajoritarian difficulty, Ackerman's project is destined to be a disappointment, just as it is destined to fail at preserving New Deal liberalism. Turning to history will not guarantee objectivity any better than it will solve the countermajoritarian difficulty. But by at least trying to account for the dramatic constitutional changes that have occurred since the founding and since Reconstruction, Ackerman is engaging in the right project. He goes astray in accounting only for the most "momentous" of changes, but he shows the way by insisting that constitutional law synthesize what has come before.

For all its faults great and small, *Strange Career* is a bold project of intellectual synthesis. As demonstrated by both Ackerman and Kalman, it may be that the boldest of projects are destined to run into serious difficulty. Yet it is also the case that broad projects of synthesis give way to smaller ones, and when all is said and done we have done a better job of re-creating our past. Synthesis, at any rate, is surely the correct project of constitutional theory and constitutional law. It is true, as Arthur Danto recognized, that "[t]he present is

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<sup>170</sup> See Brown, *supra* note 169, at 202 & n.133; Laurence H. Tribe & Michael C. Dorf, Levels of Generality in the Definition of Rights, 57 U. Chi. L. Rev. 1057, 1086 (1990) ("[E]ven if Justice Scalia's program were workable, it would achieve judicial neutrality by all but abdicating the judicial responsibility to protect individual rights.").

<sup>171</sup> See *Michael H.*, 491 U.S. at 125-27 (considering not only common law but current sources of law, and examining development of law).

<sup>172</sup> See *Planned Parenthood v. Casey*, 505 U.S. 833, 860-61 (1992) ("An entire generation has come of age free to assume *Roe's* concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions . . ."). Admittedly, there were difficulties with the specific arguments advanced by the joint opinion. For example, rather than describing the shift from the old Court's *Lochner* decision to the New Deal Court's decisions as a result of changed factual circumstances, see *id.* at 862, the joint opinion was probably closer to the truth in simply recognizing that the *Lochner* Court was wrong because "[t]he older world of *laissez faire* was recognized everywhere outside the Court to be dead." *Id.* (quoting Robert H. Jackson, *The Struggle for Judicial Supremacy* 85 (1941)). The point is that, whether or not *Roe* was right as explained at the time it was decided, by the time of *Casey*, the right identified in *Roe* had become embedded in our constitutional culture. The *Casey* joint opinion seemed to recognize this, even though some of its arguments were made in more traditional terms and, frankly, failed in those terms.

cleared of indeterminacy only when history has had its say; but then, as we have seen, history never completely has its say. So life is open to constant re-interpretation and assessment."<sup>173</sup> Nonetheless, "what we do can only have the meanings we suppose it to have if it is located in a history we believe *real*. If our beliefs in that history are shattered, our actions lose their point and, in dramatic cases, our lives their purpose."<sup>174</sup> By turning to history, legal academics ensure continuity in, and aid understanding of, our constitutional tradition. For this reason the turn to history is both a good and a sensible one. It is not a tactic, but an attempt to understand.

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<sup>173</sup> Danto, *supra* note 133, at 341.

<sup>174</sup> *Id.*





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1948-1997

