ARTICLE

THE ARRIVAL OF HISTORY IN CONSTITUTIONAL SCHOLARSHIP

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A "turn to history" by American constitutional scholars was one of the familiar chapters in accounts of late twentieth-century legal scholarship. But despite a widespread assumption within the legal academy that historical inquiry has become a central and statured dimension of contemporary constitutional scholarship, the causes of the arrival of history in constitutional jurisprudence have not yet been fully explored. The historical turn in constitutional scholarship has been commonly pictured either as another example of the decline of law as an autonomous discipline, or as a product of the late twentieth-century emergence of "originalist" methodologies in constitutional discourse. This Article advances an alternative explanation for the historical turn.
That explanation is centered in the relationship between contemporary culture and perceptions of past and present time among late twentieth-century members of the American academy. For most of the twentieth century, American legal scholarship was taken by those engaging in it, and by others within the academy, to be a largely present-minded enterprise. It was also considered to be a largely normative enterprise. Even when legal scholars drew upon the contributions of other disciplines, they enlisted them for contemporary normative purposes, employing the interpretive criteria of a scholarly community that views scholarship as a form of advocacy. The use of historical inquiry by legal scholars and judges was regularly cited as an example of this tendency. For many years legal scholars and judges were chastised by twentieth-century professional historians for engaging in “lawyers’ history,” the selective distortion of historical data to buttress contemporary policy outcomes.4

Building on this tradition, current accounts of the historical turn in late twentieth-century constitutional scholarship have emphasized the disciplinary conflict embodied by “lawyers’ history.” These narratives posit a contrast between the normative, policy-oriented canons of legal scholarship and those of professional historians, which censure such postures as “presentist” and lacking in sufficient “objectivity” toward the past. The contrast assumes that the different approaches toward historical data by legal scholars and historians are products of fundamentally different interpretations of the core scholarly functions of the two groups. The core function of legal scholars is seen as producing cogent and potentially influential arguments about contemporary policy issues; that of historians is seen as producing authoritative renderings of the past.

Much discussion of the historical turn in legal scholarship has centered on these contrasting scholarly functions, and has implicitly asked whether an accurate understanding of the nature of historical inquiry can ever be achieved if the primary purpose of

those engaging in it is to fashion contemporary policy arguments.\(^5\) I believe that centering discussions of the arrival of history in current constitutional scholarship on this issue directs attention away from the principal reasons why that phenomenon has surfaced.

In my view, the posited contrast between the core scholarly functions of legal scholars and historians follows from long-entrenched conceptions of the relationship between past and present time and from a complementary theory of the course of historical change. When historians are said to censure "presentism" or to embrace a stance of "objectivity" toward the past, and legal scholars are said to reduce historical data to fodder for contemporary policy arguments, both groups are being treated as actors situated in one segment of time (the present) who investigate data from a radically separate and qualitatively different other segment (the past). The difference between the two segments is taken as obvious and inevitable, because history itself is seen as a process of qualitative change over time.

A purported contrast between present scholars who try to faithfully render data from the past and present scholars who try to subsume that data in their present-minded arguments does not capture the thrust of many of the historical inquiries that have surfaced in contemporary constitutional scholarship. I would describe those inquiries neither as primarily directed toward a faithful, authoritative rendering of the past, nor as primarily interested in enlisting historical evidence in the service of contemporary policy. I would describe them, rather, as efforts to combine those undertakings, treating them as complementary rather than radically incompatible pursuits. I would describe them as efforts to establish ideas, practices, or institutional arrangements from the past as constraints on contemporary constitutional decisionmaking and at the same time as starting points for the reconsideration of current constitutional issues.

I believe that scholars currently pursuing historical inquiries in the course of addressing contemporary constitutional issues are assuming that historical data can serve to clarify such issues, rather than simply functioning as selectively introduced evidence in the service of contemporary normative agendas. I would characterize

\(^5\) Kalman, supra note 1, at 167–71.
this line of work as *neohistorical* in its thrust. Neohistorical constitutional scholarship can be best understood as a product of an altered conception of the nature of historical change that surfaced in late twentieth- and twenty-first century American higher education. That conception represents a modification of the orthodox theory of historical change that has prevailed for most of the twentieth century, in which “history” was seen as a process of qualitative change over time, moved and altered by human-generated novelty. The orthodox conception of historical change, which I will be labeling *historicist*, presupposes that the course of time is segmented, being divided into the discrete entities of “past,” “present,” and “future.” It also presupposes that present time is never a replication of past time. When combined with an optimistic interpretation of human capacity to generate change in the universe, a historicist conception of historical change yields a melioristic, progressive vision of historical development in which the present is treated as qualitatively “better” than the past, and the future anticipated as qualitatively better still.

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6 The primary purpose of this Article is to explain the “historical turn” in late twentieth-century American constitutional scholarship rather than to analyze current examples of “neohistorical” work. I will, however, offer some examples of such work in the concluding Part of the Article.

7 See Dorothy Ross, *Introduction to Modernist Impulses in the Human Sciences 1870-1930*, at 7 (Dorothy Ross ed., 1994). As Ross suggests, it is possible to hold a view of history as a continuous progression of qualitative change without particularizing the origins. Id. But, in my view, the version of historicism that became dominant in American academic life in the early twentieth-century was a modernist-inspired version, one which identified the sources of historical change primarily with willful human conduct. A crucial element of American modernism, I have argued elsewhere, was the assumption that the principal locus of causal agency in the universe was purposive human conduct. Humans, rather than omnipotent external forces, controlled the future destiny of humankind. G. Edward White, *The Constitution and the New Deal* 5 (2000).

8 A recent article by Chief Judge Richard Posner exhibits the orthodox twentieth-century theory of historical change. Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. Chi. L. Rev. 573 (2000). In that article, Posner refers to a “historicist approach to law,” to the “historicism” of a particular legal thinker whose scholarship engages with history, and to “historicist,” as distinguished from “pragmatic,” judges. Id. at 573, 583, 593. For most of the article he uses the term “historicist” as a synonym for “historically oriented.” Posner’s use of the term “historicist” does not capture its central meaning. Only once does Posner use “historicist” in a manner which approximates that meaning. In setting forth one of Nietzsche’s criticisms of historical inquiry, that it “leads an age to
The revised conception of the course of historical change animating the arrival of neohistorical constitutional scholarship can be said to treat the past and present as interconnected rather than starkly separate segments of time. Because the past is seen as not fully separable from the present, it can be treated as more accessi-

imagine that it possesses ... justice, to a greater degree than any other age," Posner remarks that "[t]he concept of moral progress, which is definitionally historicist, invariably makes us look good in comparison to our predecessors." Id. at 575. In that sentence "historicist" is not being used merely as the equivalent of "historically oriented," but as reflecting a particular conception of history as a continuous progression of qualitative change. A "historicist" approach to history considers the past against a backdrop in which past time is treated as separate from, and evolving into, present time.

Posner is representative of many twentieth-century American intellectuals in associating a historicist approach to the past with the idea that the present always represents a moral improvement on the past. But one can be a historicist without accepting the melioristic assumption that the path from past to present to future is one of continuous improvement in the human condition.

Posner’s equation of "historicist" with "historically oriented" is particularly telling because it reveals his assumption that all the scholars and judges he describes as exhibiting a "historical sense" must necessarily be adopting a historicist approach to history. He believes that "historicist" legal scholars and judges are aware that they stand, at the time they explore the past, in a different realm of time from it. Consequently, those actors should recognize that the past does not control the present, but merely flows into it, and so their respect for the past is either misplaced or strategic.

For an alternative conception of the relationship between past and present, see Jed Rubenfeld, Freedom and Time: A Theory of Constitutional Self-Government (2001). In that book Rubenfeld seeks to establish a "common root" from which the "constitutional texts" of the 1780s, including the Constitution, and "the computer codes of the year 2000" spring. Id. at 17. That root lies in the connected propositions that humans live only in the present, so that the only meaningful temporal baseline for explaining or assessing human behavior is the "present generation," and that the central representation of "the imperative to live in the present" is individual self-expression. Id. at 25-26. Rubenfeld associates these propositions with the emergence of modernity. Id. at 23-26.

Rubenfeld’s definition of “modernity” has a much broader chronological sweep than the version I will employ in this Article. This is in keeping with his general perspective in Freedom and Time, which more resembles that of a political theorist than an intellectual historian. My analysis of changing conceptions of time in American historical and legal thought, and of the relationship between those changing conceptions and the emergence of modernity in American culture, differs significantly from Rubenfeld’s. Nonetheless, Rubenfeld’s conclusion (rendered in the terms of this Article) parallels mine: American twentieth-century constitutional jurisprudence was, until the close of that century, both modernist-inspired and temporally fixated on “the present.” Rubenfeld finds this fixation troubling, and views it as an obstacle to effective constitutional theorizing in the twenty-first century, but he does not attempt to connect it to the arrival of history in constitutional scholarship.
ble and more relevant to present actors than as portrayed in historicist-based accounts of historical change. And because the past and present are regarded as not fully distinct entities, a stark disciplinary division between historical inquiry, oriented toward the discrete segment of data called the past, and legal inquiry, primarily concerned with issues arising in the present, no longer seems natural and necessary. I will be arguing that the arrival of history in contemporary American constitutional scholarship can, at bottom, be traced to the disintegration of a fully historicist conception of the course of history.

The disintegration of a conception of history as a continuous process of qualitative change can be linked to a growing sense of cultural instability that has characterized the turning of the twenty-first century. A historicist theory of history presupposes that its adherents have a clear understanding of the distinctive attitudes and values that define their “present,” so that a contrast between “present” and “past” can be easily discerned, and the historical process of change easily marked. When contemporary actors feel that they can comfortably identify the defining features of their current culture, and are, on the whole, sanguine about their present existence, they not only hold clearer visions of their past, but they are also less inclined to find past attitudes and values relevant to their present concerns. When contemporary actors are more puzzled and troubled by the conditions of their current existence, however, they not only have less confidence that their present is a qualitative improvement on the past, they also have a less clear sense of what their present “is,” and thus a hazier impression of the discernible differences between “past” and “present.”

The existence of a strong or a weak sense of the differences between past and present also affects the promulgation, within the historical profession, of strong or weak canons of scholarly objectivity. The more vivid and discernible a conception of the “present” historians hold, the more confidently they can observe contrasts between their current attitudes and those of the historical actors they investigate. Such contrasts are perceived as enhancing the capacity of historians to be “objective” toward their subject matter, since they serve as reminders of the differences between the present and various pasts.
Strong or weak senses of the differences between past and present also have implications for historical interpreters' sense of the ongoing connection between their present worlds and the pasts about which they are writing. A robust sense of the present engenders confidence in interpreters' ascribed abilities to faithfully record and make sense of the past. Such interpreters may be said to hold an optimistic view of the totality of their interpretive visions, and, given that totality, their capacity to render the (necessarily different) past "objectively." In contrast, a weak sense of the differences between past and present is consistent with a feeling among interpreters that their own interpretations are situated within the contours of past time as well as present time and space. The situation of present actors helps give history meaning, but it also undermines a strong belief in historical objectivity.9

Thus the twentieth-century emergence of the canon of objectivity within the American historical profession can be seen as related to the growth of a historicist conception of history. It can also be seen as related to the disciplinary identity of the historical profession itself. Historians assumed that an attitude of scholarly objectivity toward historical sources distinguished them from scholars, including legal scholars, who investigated those sources.

If the above hypothesis about the relationship of cultural instability to historicist theories of history and the canon of objectivity is sound, one should expect that in periods when contemporary actors have a clear and sanguine vision of their "present," both historicist theories of history and the objectivity canon would be robust. This could be expected to produce a disassociation of the scholarly work of legal academics from that of historians. Legal scholars could be expected to find the past less relevant to their work as normative contemporary policymakers, and historians could be expected to attribute to themselves an objectivity not shared by other observers of the past. Conversely, in periods when contemporary actors were less certain about what defined their present, and less comfortable with their current existence, one might expect them to hold less well-defined impressions of the

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boundaries between past and present and correspondingly weaker historicist conceptions of historical change and canons of scholarly objectivity. This could be expected to produce an integration of scholarly work in law and in history, as legal scholars looked to the past as a possible source of values or policies for the present, and historians felt less confident in maintaining the scholarly objectivity which they had hitherto taken as distinguishing their work from that of other observers of the past.

I will be arguing that a more detailed version of the above hypothesis, with special attention to developments in the literature of late twentieth-century constitutional jurisprudence in the legal academy, can provide an explanation for the arrival of history in contemporary American constitutional scholarship. Fleshing out the hypothesis will initially take me quite far away from the late twentieth-century developments typically emphasized in conventional narratives of the "historical turn."

I will first set forth a brief narrative of the growth of a fully historicist conception of historical change among the social science disciplines, which came to include history, as they established themselves in American higher education in the late nineteenth and early twentieth centuries. That narrative demonstrates the extent to which the approved techniques practiced by American historians, as the discipline of history became professionalized, were derived from governing theories of historical change. It associates the emergence of historicist theories of historical change with the arrival of modernity in late nineteenth-century American culture and contrasts those theories with the "prehistoricist" conceptions of change over time, which preceded them.

The narrative also suggests that the emergence of historicist conceptions of historical change fostered the adoption of methods of historical inquiry modeled on the investigative techniques identified with Darwinist evolutionary science. Those techniques, which emphasized the disinterested posture of the scientific investigator and the continuously changing nature of historical time, encouraged the development of a canon of "objectivity" among American historians at the close of the nineteenth century. The objectivity canon, which was entrenched among American historians for much of the twentieth century, reinforced the idea that scholars engaging in historical inquiry were situated in a qualitatively different seg-
ment of time from that which they were investigating. In contrast, pre-modern methodologies assumed that the past, as a source of universal principles, had a direct application to the present.

I then will turn to a brief review of analogous intellectual developments within the American legal academy at approximately the same point in time.10 Those developments featured the late nineteenth-century emergence of models of legal analysis and scholarly inquiry similar to those surfacing in social science fields as they became professionalized. The models that emerged in late nineteenth-century American legal education sought to establish secular foundational sources of legal authority and to facilitate the “scientific” investigation of those sources. As in my narrative of the American historical profession, I will emphasize the initial coexistence of those new models of “legal science” with prehistoricist conceptions of change over time. This development briefly resulted in the emergence of a genre of legal scholarship, embodied by the “casebooks” of Dean Christopher Columibus Langdell and his contemporaries, whose subject matter consisted primarily of past common law cases that the books’ editors presented as embodiments of foundational legal principles.

I will next describe the gradual collapse of Langdell’s conception of legal science in early twentieth-century American legal education, and the parallels between that development and the collapse of an analogous project in the discipline of history. I will associate the abandonment of Langdell’s version of legal science with the same set of variables, centering on the advent of modernity and the emergence of historicist theories of historical change, which ultimately resulted in the surfacing of a canon of objectivity among historians. But I will conclude that within the early twentieth-century American legal academy, the application of “scientific” techniques of inquiry inspired by historicist theories of historical change resulted in a radical separation of the work of legal scholars from that of historians.

Instead of being associated with inquiries that consistently made use of historical data to derive authoritative general principles of law, early twentieth-century legal “science” became associated

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10 This review rests primarily on scholarly contributions with which I assume the audience for this Article is familiar, and it will thus be truncated.
with inquiries that focused upon the current policy consequences of legal decisions, as illuminated by the techniques of modern social scientists. In private law scholarship this produced an emphasis on the contemporary "functional" (political, economic, or sociological) consequences of common law doctrine. In constitutional law scholarship it produced an emphasis on explaining contemporary Supreme Court decisions not through historical inquiry, but through application of the salient themes of early and mid-twentieth-century political science, such as behavioral models of judicial interpretation, interest group models of American politics, and institutional theories of the Court's role in a modern constitutional democracy.

I will then take up the culmination of those trends in constitutional scholarship between the close of the Second World War and the late 1960s: the tacit organization of the entire field of constitutional jurisprudence within an interpretive matrix centering on what Alexander Bickel called the "countermajoritarian difficulty." Recent efforts to place that line of mid-twentieth-century constitutional scholarship in a historical context have stressed its connection to a heightened sense that the foundational values of American society were embodied in democratic theory and majority rule. I am more interested in two other features of

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11 I will not discuss parallel trends in American history practiced by historians in the same time period. The focus of this Article is on explanations for the historical turn among constitutional scholars within the legal academy. For efforts to historicize "consensus history" (the dominant interpretive matrix of American historians from the close of World War II to the late 1960s), see several of the essays in New Directions in American Intellectual History (John Higham & Paul K. Conkin eds., 1971) [hereinafter New Directions], especially Dorothy Ross, The Liberal Tradition Revisited and the Republican Tradition Addressed, in New Directions, supra, at 116.


"countermajoritarian difficulty" scholarship: its tendency to describe the domain of American constitutional law in terms consistent with the dominant models of mid-twentieth-century political science, and its markedly present-minded, ahistorical character. In my view, those features of mid-twentieth-century "countermajoritarian difficulty" scholarship demonstrate its compatibility with a fully historicist theory of historical change, which, in application, had the effect of eliminating searching historical inquiry from constitutional interpretation and analysis.

The late twentieth-century turn toward history in America has thus required, in my view, the estrangement of commentators from the countermajoritarian difficulty matrix and, more fundamentally, from its historicist assumptions. I will consider four groups of late twentieth-century constitutional scholars who detached themselves from countermajoritarian-inspired inquiries, each of whom demonstrated a renewed interest in historical inquiry. Instead of following conventional narratives of the turn to history in emphasizing the ideological orientation of those groups of scholars, I emphasize their epistemological assumptions, particularly their tacit conception of the relationship between past and present time and their theory of historical change. I will suggest that, viewed from this perspective, the groups have more in common with one another than with any of the work that emerged within the countermajoritarian difficulty matrix.

The collective work of those groups of scholars represents a transition between the countermajoritarian-inspired scholarship of the mid- and late twentieth century and the neohistorical constitutional scholarship whose current ubiquity I am seeking to explain. On the one hand, the scholarship produced by the first wave of post-countermajoritarians who turned to history has not yet crystallized into a matrix of comparable analytical or normative dominance to that of the countermajoritarian difficulty matrix. On the other hand, the simultaneous estrangement from the countermajoritarian difficulty matrix and turn toward historical investigation, which characterized the first late twentieth-century post-countermajoritarians, has also characterized the work of con-

14 This observation is fleshed out infra text accompanying note 344.
temporary neohistorical scholars. The turn toward history initiated by the post-counter-majoritarians has broadened and deepened over time, especially with respect to the methodologies of historical inquiry employed by contemporary constitutionalists. That last development, and the reasons for it, serve to illustrate the central themes of this article.

I. HISTORICISM AND THE CANON OF OBJECTIVITY IN AMERICAN HISTORICAL WRITING: A BRIEF HISTORY

The next two Parts of this article provide a brief intellectual history of the growth of historicist theories of historical change to a position of dominance among twentieth-century American elites, with special emphasis on the emergence of those theories in history and in law. Taken together, these Parts attempt to lay the foundation for subsequent connections drawn between the late twentieth-century disintegration of established canons of historicist-inspired historical inquiry and the recent emergence of expanded historical inquiries by legal scholars.

A. Prehistoricist Conceptions of Historical Change

The view of history as a continuous progression of qualitative change has been so entrenched within the American scholarly community for most of the twentieth century that it may be hard to imagine educated Americans holding to an alternative view. But the American Constitution was drafted and interpreted for at least fifty years by individuals who did not believe that history could best be understood as the constant evolution of the past into the present and ultimately into the future.\(^1\)\(^5\) Moreover, when educated Americans began to think of history as a continuous flow of qualitative changes, they did not immediately equate observed changes with social progress.\(^1\)\(^6\) Only when most educated Americans began to conceive of history as a continuous process of progressive change, so that the future could be seen as always having the po-


The Arrival of History

The potential to be an improvement on the past, did the separation of historical time into discrete segments become entrenched. The transformation of historical time from a continuum on which pre-ordained cycles of birth, decay, and renewal played themselves out to a process by which one segment of time evolved into another was based not only on a view of history, but on a view of causal agency in the universe: one in which the policy decisions of humans holding power were ascribed great causal significance and incorporated into the progressive unfolding of history.17

I refer to the conception of historical time in which elemental external forces were seen as producing cycles of birth, decay, and renewal and as controlling the destinies of humans and the course of events, as prehistoricist.18 A prehistoricist conception of historical change over time produced a particular view of historical inquiry. Investigations of the past by present actors were tacitly treated as efforts to place historical data into frameworks demonstrating the existence of ubiquitous external forces, thereby confirming their fundamental and universal character. Historical inquiry was thus designed to produce a series of narratives demonstrating the will and power of God; the birth, maturity, and decay of human societies; or the recurrent laws of political economy or social status that accompanied human social organization.

One can find numerous examples of prehistoricist-inspired historical inquiries in late eighteenth- and early nineteenth-century America. A central inquiry, for elite commentators at the time of the Marshall Court, originated from the increased commercial development of the early nineteenth century, which commentators simultaneously recognized as novel in its pace and scope and attempted to fit into cyclical theories of historical change. This resulted in some commentators picturing the growth of commerce as a harbinger of the inevitable presence of “luxury” and corruption that marked the beginnings of social decay; others described commercial development as a series of “improvements” that they associated with the maturation of the still youthful American re-

17 White, supra note 7, at 5–6.
18 See Dorothy Ross, The Origins of American Social Science 8–9, 16–17 (1991); 3 & 4 White, supra note 15, at 5–9; Ross, supra note 15, at 910.
Whatever implications were drawn from the phenomenon of expanded commerce, however, it was placed within a cyclical framework for historical change. Even when some early nineteenth-century Americans began to use the word "progress" as a rough synonym for "improvement," they thought of progress as the elaboration and extension of preexisting institutions.

Chief Justice John Marshall's theory of constitutional interpretation over time proceeded from similar prehistoricist assumptions. His celebrated dictum, in the 1819 case of *McCulloch v. Maryland*, that the Constitution was "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs," did not presuppose that the meaning of the Constitution was to change with time. On the contrary, it presupposed that the principles embodied in the Constitution, which could be derived not only from the Constitution's text but also from such fundamental sources as the first principles of republican government or natural justice, would be reasserted in the application of constitutional provisions to new cases. For Marshall, constitutional interpretation, like historical investigation, would be a continual process of reaffirming the fundamental principles undergirding human societies.

**B. The Persistence of Prehistoricism in the Nineteenth-Century American Academy**

Professor Dorothy Ross has shown that prehistoricist views of history continued to be dominant among literate American elites long after those views had come to be perceived as problematic in

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19 Compare the sources analyzed in J.E. Crowley, This Sheba, Self: The Conceptualization of Economic Life in Eighteenth-Century America 99–110 (1974) (emphasizing the association by late eighteenth- and early nineteenth-century Americans of the growth of commerce with "luxury" and corruption), with Justice Joseph Story, An Address delivered before the Members of the Suffolk Bar, at their anniversary, on the fourth of September, 1821 at Boston, 1 Am. Jurist 1, 2 (1829) (regarding commercial ventures as symbols of cultural "improvements").

20 Welter, supra note 16, at 8.


22 Id. at 415.

23 Compare Marshall's view with the "living constitution" theory described in White, supra note 7, at 205–09, in which the Constitution was taken to be changing its meaning over time.
late eighteenth- and early nineteenth-century Europe. Ross associates the advent of historicist conceptions of historical change with the emergence of secularization and scientific models of intellectual inquiry, which placed considerable pressure on religious-based explanations for observable change. By the early nineteenth century, European intellectual elites had come to regard change as the normal state of human existence, and history as a procession of qualitative change. But that conception of history threatened the stability of social institutions, so European intellectuals continued to associate historical inquiry with a search for universal stabilizing concepts or states of being, such as reason, natural justice, or law through the middle of the nineteenth century.

An example can be seen in the celebrated declaration of Professor Leopold von Ranke that historians should present the past "wie es eigentlich gewesen." Ranke's use of "eigentlich" was closer to "essentially" than "really." Although American historians subsequently treated Ranke as the source of a mandate to study history "as it really was," Ranke's phrase meant something more like "search for the essences of German culture." In short, "scientific" history, as practiced by Ranke and his contemporaries, was not incompatible with a belief in universal covering laws. Its "scientific" character came from its emphasis on deriving such laws from empirical observation, rather than from preordained belief.

25 Id. at 20–21.
26 Id. at 19.
27 Peter Novick, That Noble Dream: The "Objectivity Question" and the American Historical Profession 28 (1988) (explaining that the phrase has been habitually translated to "as it really was" or "as it actually was").
28 Id.
29 Id. at 26–29.
30 For the purposes of this Article, the term empiricism is used to describe the view that the only relevant basis of knowledge is that which humans derive from direct sensory observation of data. As employed by late nineteenth- and early twentieth-century scholars who were enthusiasts for "scientific" approaches to fields of knowledge, empiricism signified the rejection of a priori, externally derived theories of knowledge, such as theories based on the omnipotence of a deity. But it did not necessarily signify the rejection of prehistoricist conceptions of time. Although empiricism urged that historical data be examined through methods of inquiry employed by natural scientists, it was equally compatible with prehistoricist or historicist theories of historical change.
In America, prehistoricist conceptions of historical change persisted longer than in Europe, Ross maintains, because of the presence of two parochial traditions that combined to form an ideology of American exceptionalism. The first tradition was exemplified in the millennialist doctrines of a series of American religious sects, extending from the Puritan colonists through the evangelical congregations that proliferated in the nineteenth century. Millennialist doctrines portrayed the course of history as taking place across a distinctive time continuum, one in which eventually God's truth would be revealed, sin would disappear, the fall of man would be redeemed, and the "end of history" would be achieved in a millennial state of grace. The tradition of millennialism characterized the American republic as having cast off the corrupt tyranny of European governmental systems, and by so doing raised the prospect that it would eventually break the cycles of social maturity and decay and establish itself as a permanent, perfectible entity capable of existing in millennial time. The other tradition was captured in Frederick Jackson Turner's famous 1893 essay, "The Significance of the Frontier in American History." It emphasized the unique abundance and vastness of the American continent, which was thought to permit the perpetuation of republican institutions by their continuous renewal in virgin territory. By moving frontier settlements westward, and thereby creating new economic and political opportunities, Americans could allegedly prevent hierarchical European models of social status and political and economic power from taking root. Those

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31 Ross, supra note 18, at 23–27.
32 On American millennialism, see Ross, supra note 18, at 23–25 and sources cited therein.
34 Frederick J. Turner, The Significance of the Frontier in American History, in The Early Writings of Frederick Jackson Turner 183 (Everett E. Edwards ed., 1938). Note that the essay, written in 1893, illustrates that the culmination of a frontierist gloss on prehistoricist theories of history came just as the frontier itself was disappearing.
35 See generally id. (describing the continuing rebirth of America and the evolution that recurred with the expansion of the territories).
models were thought of as inexorably leading to corruption and the decay of republican institutions, but the abundant supply of vacant land in America was perceived as allowing those developments to be postponed, perhaps indefinitely. Thus the course of the American nation lay across space as much as over time.36

The millennialist and frontierist strands of American exceptionalism made the retention of prehistoricist conceptions of time, in the face of increasingly vast external changes in the landscape of nineteenth-century America, a more palatable exercise.37 The millennialist strand substituted a sanguine continuum of Christian, republican time for the darker, more fatalistic cycle of social birth, maturity, and decay; the frontierist strand suggested that in America comparatively youthful forms of republican government might be perpetuated indefinitely, given the capacity of citizens to escape social and economic hierarchies for the virgin territory of the frontier and a chance to renew their independence.38 Thus when the disciplines that described themselves as "social sciences"—initially, history, political science, and economics—first began to self-consciously adopt scientific methodologies in the last three decades of the nineteenth century, they emerged within a climate in which prehistoricist conceptions of history were still epistemologically orthodox. The initial result was an approach toward historical inquiry that in some respects mirrored that of Ranke. It can be best captured in a label employed by some members of the first generation of Americans to think of history as a social science discipline: "historico-politics."39


37 Compare the changes in territory, population, and transportation in America between 1830 and 1870. The area of land increased from 1,749,462 square miles in 1830 to 2,969,640 square miles in 1870. 1 Bureau of the Census, U.S. Dep't of Commerce, Historical Statistics of the United States: Colonial Times to 1970, at 428 (1975). America's total population went from 12,901,000 to 39,905,000. Id. at 8. Urban population increased from 1,127,000 to 9,902,000. Id. at 12. The total mileage of railroad operations increased from 23 in 1830 to 52,922 in 1870. 2 id. at 731.

38 Ross, supra note 18, at 270–73 (explaining Turner's frontier thesis).

39 Id. at 64–77.
C. The Project of "Historico-politics"

In the 1880s, American higher education started to become secularized and organized around separate disciplines, and history began to be treated as one of the social sciences. At this time, all of the new social science disciplines employed what their practitioners described as historically-oriented and "scientific" methodologies. The first versions of those methodologies continued to proceed from prehistoricist conceptions of historical change. Historians, political scientists, economists, and sociologists engaged in what they considered "scientific" research into the antecedents of their respective fields, with the goal of extracting universal principles and covering laws rather than of describing the continuous evolution of political, social, or economic phenomena.

The term historico-politics embodied this distinctive combination of secularized and specialized methods of intellectual inquiry with prehistoricist conceptions of history. Historico-politics was an effort to employ the empirical methods of "scientific" historical investigation, applied to political organization, economics, or social relations, in the service of deriving fundamental principles of political economy and social organization. Dorothy Ross describes the epistemological stance of those who saw themselves as practicing historico-politics:

Faced with mounting evidence of historical change and no longer able to call on providential power, they had to confront the possibility that changes could alter the exceptionalist course of American history . . . . But on a more fundamental level, they remained wedded to the exceptionalist vision and its prehistoricist conceptions of time. They redrew the lines of American uniqueness and turned natural law and historical principle into unchanging bases for the established course of American history. So far as possible, change was contained and history rendered harmless.


41 Ross, supra note 18, at 64–97.

42 Id. at 60–61. For comparable descriptions of this epistemological attitude, see Raymond Seidelman & Edward J. Harpham, Disenchanted Realists: Political Science and the American Crisis, 1884–1984 (1985); Dorothy Ross, The Liberal Tradition
Because the methods of intellectual inquiry employed by the first generation of American social scientists distanced them from traditional religious-based epistemological premises, successive generations of scholars were to characterize them, as they characterized Ranke, as disciples of a "scientific" approach to their subjects which emphasized the recording of facts as distinguished from the promulgation of comprehensive normative principles.\(^4\) This was a misreading of their scholarly stance. They assumed, as the historian Herbert Baxter Adams wrote to a Johns Hopkins colleague in 1890, that "[h]istory is past politics, and politics are present history."\(^4\) Similarly, history was past economics and past sociology. The founders of those disciplines in America also wanted to fuse secularized empirical inquiry with a search for universal economic or social laws associated with a republican polity.\(^4\)

In sum, the secularization of American higher education in the late nineteenth century, and the attendant emergence of new "social science" disciplines committed to the use of empiricist methodologies in intellectual inquiry, did not fully transform pre-historicist conceptions of historical change into historicist conceptions. The social scientists who began to fuse empiricist techniques for observing and analyzing data with historical investigations of the subject matter of their disciplines did not think of themselves as occupying a distinctly separate segment of time (the present) from the segment of time (the past) that was the subject of their investigations. They continued to think of the historical and contemporary data of their fields as being located on a continuum of time, so that general governing principles revealed by investigations of historical data were equally applicable to contemporary issues in their fields.

Revisited and the Republican Tradition Addressed, in New Directions, supra note 11, at 116.

\(^4\) See Novick, supra note 27, at 25–26; Ross, supra note 18, at 261.

\(^4\) See Dorothy Ross, On the Misunderstanding of Ranke and the Origins of the Historical Profession in America 158, in Leopold von Ranke and the Shaping of the Historical Discipline 154 (Georg G. Iggers & James M. Powell eds., 1990) (describing the misreading of Ranke and the generation of scholars who were inspired by "historico-politics").

\(^4\) Ross, supra note 18, at 64–88 (discussing political scientist John W. Burgess, political economist Francis Walker, and sociologist William Graham Sumner).
D. The Triumph of Historicism and the Reformulation of Historical Inquiry

The efforts of the founding generation of late nineteenth-century American social scientists to enlist empirical inquiry in the service of reaffirming the universality of republican social and political principles came to be perceived by their immediate successors as requiring reformulation. In contrast to the founders, the generation of social science scholars who came to maturity between the close of the nineteenth century and the First World War eventually embraced a fully historicist theory of history, one which led to the conclusion, as one economist put it in 1903, that "the American of the future will bear but little resemblance to the American of the past."46

That conclusion signified a conceptual transformation of the course of time from a continuum to an evolutionary process containing discrete time segments: the past, present, and future. This transformation, we shall see, was to precipitate the emergence of the canon of objectivity in the discipline of history. It would also lead to the creation of an ongoing tension between objective renderings of the past by professional historians and the professed relevance of historical inquiry to the contemporary issues which were the focus of the twentieth-century social science disciplines and of law. The canon of objectivity had been originally designed to demonstrate the continued relevance of historical inquiry to contemporary affairs in a scholarly universe that was beginning to abandon prehistoricist assumptions about the course of time. But it also served to reinforce the growing view of scholars in fields once associated with historico-politics that properly conducted historical inquiry illuminated only the past and was thus irrelevant to contemporary social issues. Establishing those propositions requires further attention to the context in which the canon of objectivity first surfaced in the American historical profession.

1. The Emergence of Modernity in America

Another recent line of historical scholarship is helpful here. It emphasizes the comparatively late appearance in American culture of modernity, which Dorothy Ross defines as "the actual world brought into existence by democracy, capitalism, social differentiation, and science."\(^{47}\) Ross sees the same intellectual forces that perpetuated prehistoricist conceptions of history in nineteenth-century America as retarding modernity's emergence. The strong presence of religious-based theories of cultural change and of spatially-based theories of political and economic development, she argues, resulted in republican civic ideals. Those ideals emphasized limited political participation, the corrupting tendencies of industry and commerce, a hierarchical social order, and scientific knowledge as a branch of moral philosophy,\(^{48}\) and persisted, along with prehistoricist theories of history, deep into the nineteenth century.\(^{49}\)

When modernity was acknowledged to have emerged—by the early twentieth century American intellectuals had begun to speak of "modern life" and to describe themselves as "moderns"—it appeared to be a demonstrably powerful force. Suffrage restrictions had been obliterated for most white males, and populist rhetoric had become common in American politics.\(^{51}\) The massive growth of industrial enterprise had been organized on capitalist economic principles.\(^{52}\) Status distinctions had become more fluid, but class conflict had become a more familiar theme of American political discourse.\(^{53}\) Science, and scientific methods of intellectual inquiry, had become openly separated from theology and theological methods. In sum, all of the elements in Ross's definition of moder-

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\(^{47}\) Ross, supra note 7, at 8.
\(^{48}\) Ross, supra note 18, at 36–37.
\(^{49}\) Id. at 138–40.
\(^{50}\) For examples, see Seligman, supra note 46, at 59–60; Albion Small, The Significance of Sociology for Ethics, in Decennial Publications of University of Chicago 5–6, 23–24 (1st ser., No. 4, 1903) quoted in Ross, supra note 18, at 147–48.
\(^{53}\) See Alan Dawley, Class and Community: The Industrial Revolution in Lynn (1976); Lawrence Goodwyn, Democratic Promise: The Populist Moment in America (1976); Howard H. Quint, The Forging of American Socialism: Origins of the Modern Movement (1953); Ross, supra note 18, at 98–102.
nity were conspicuously present in early twentieth-century American life.

If one emphasizes the potential impact of modernity on the methods of intellectual inquiry that were becoming dominant in American higher education at the close of the nineteenth century, one can see why the early twentieth-century generation of scholars that succeeded the founders of “historico-politics” would have found the methodologies of their predecessors suddenly dissonant. They shared with the founding generation a commitment to secular, empiricist intellectual inquiries. They also, however, confronted tangible evidence that the political, economic, and social world of early twentieth-century America was radically different from the world of the 1870s, when members of the founding generation had launched their scholarly careers. For them, the idea that history is a continuous procession of qualitative change was empirically verifiable.

So the social scientists that came to maturity at the close of the nineteenth century began to reframe the approach of their predecessors. In some fields, such as economics and sociology, developments associated with modernity threatened the established assumption that close analysis of the economy or of social relations would confirm the universality of republican principles of political economy or social organization, which posited a minimal role for the state as an economic actor and a hierarchical model of social status. Sharp debates surfaced in those fields about whether studies of the American economic and social orders should now include class conflict and statist theories of political economy. Meanwhile the central assumption of those engaged in historico-politics—that history was past politics, and politics present history—came to be seen as problematic in the face of the observable changes associated with modernity in America. This was to result in a disciplinary split between historians and scholars who began to call themselves political scientists.

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54 See Ross, supra note 18, at 106–40.
55 This split was reflected in the formation of the American Historical Association in 1884 and the American Political Science Association in 1903. Id. at 76, 282–83.
2. The Dissolution of the "Historico-Politics" Project

When the American Historical Association was founded in 1884, its founders were identified with historico-politics. But by the time of the founding of the American Political Science Association in 1903, the scholars who joined that organization described their enterprise as principally devoted to developing sound models of governance for the present. Their interest in historical inquiry was limited to showing the gaps between the form of traditional American governmental institutions and the way those institutions actually functioned.  

Meanwhile, historians had begun to distance themselves from historico-politics. One can see these trends beginning to surface in an 1896 discussion at the annual meeting of the American Historical Association on the relationship between political science and history. That discussion was touched off by the comments of Professor John W. Burgess of Columbia, who chaired a joint department of history and political science and retained an allegiance to historico-politics. Burgess described history as the "residuum which has been left when one group of facts after another has been taken possession of by some science." This claim underscored the conception held by the founders of the American social sciences that all those disciplines could derive their basic "covering laws" from historical analysis, because history was a repository of essential truths. Political science, in particular, was likely to draw most of its conclusions about the forms of government from history. Historical inquiries demonstrated which forms were enduring and universal, and which temporary and contingent.

Burgess's assertion that scientific readings of history could continue to yield guiding principles for contemporary political life drew a series of rejoinders. One historian maintained that "[w]e should study history with the endeavor to find out the truth, not... for the purpose of justifying any particular theory of government." Another, although believing that a study of history

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56 Id. at 274, 282–86.
58 Id.
59 H. Morse Stephens, Remarks Upon Professor Burgess’s Paper in Burgess, supra note 57, at 213 (following Burgess’s Paper).
could help reveal "the chief tendencies of the present," insisted that historians concern themselves with subjects that did "not in any way concern us... in our politics." At the same time, political scientists began to distinguish their work from historical inquiry. One political scientist, writing two years after Burgess made his comments, claimed that if the purpose of historical scholarship was primarily to trace the differences between the present and the past, political scientists should not engage in historical work unless tracing such differences engendered useful predictions of the future. Otherwise, historical inquiry would be little help to scholars whose goal was to derive theories of contemporary governance.

Once a historicist theory of historical change had become entrenched among sociologists, economists, and political scientists, scholars in those disciplines shifted their inquiries from the past to the present. The evidence of modernity that they observed not only confirmed a view that the past was continually evolving into the present, but furnished them with abundant data for studying the economic, social, and political character of modern America. But the impact of modernity and historicism on late nineteenth- and early twentieth-century historians was potentially more unsettling. As modernity confirmed the ubiquity of qualitative change, historians began to abandon the idea of history as a continuum of time and to replace it with the idea of history as a collection of discrete time segments. Further, by the turn of the nineteenth-century, the overwhelming number of American historians were secularists, so they could no longer describe historical change as being providentially inspired. These developments raised the question of what connecting links continued to exist between present time, in which historians were situated, and past time, which was the subject of their professional inquiries.

3. History and the Methodology of Evolutionary Science

A conception of history as continuous, secular qualitative change required late nineteenth- and early twentieth-century historians to

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61 Jesse Macy, Twentieth Century Democracy, 13 Pol. Sci. Q. 514, 514 (1898). For a discussion of Macy’s perspective, see Ross, supra note 18, at 258–64.
62 Macy, supra note 61, at 514.
rethink the nature of their scholarly inquiries. If history was no longer to be treated as an embodiment of preordained, essentialist principles, but as a collection of data situated in another time frame, how should a set of present actors whose aspirational role was that of scientifically-oriented professionals, but whose subject matter was the past, approach that data? Political scientists, economists, or sociologists, on positing a gap between the “past” and the “present,” could turn to an analysis of contemporary issues in their fields. But the field of inquiry for historians was the past itself. And a fully historicist conception of the course of time threatened to make the past irrelevant.

At this point, the idea of the historian as scientist provided some solace. Those employing scientific methods of observation and analysis, in a Darwin-inspired world, did not merely collect data. They eventually reasoned inductively from the data to some predictive generalizations. Following a similar logic, early twentieth-century historians distinguished their mission from that of the first generation. They recognized that the inevitability of historical change required the abandonment of historico-politics in its prehistoricist versions, thus parting company with the founders. At the same time they developed a strategy for retaining the usefulness of the past to the present. Drawing upon both a historicist conception of historical change and the methodology of Darwinist evolutionary science, they recharacterized the narrative of history as a continuous progression of change, which, on careful investigation, could be made into the progressive accumulation and refinement of historical truth. The collective derivation of that truth, however, required that the historian investigator assume the detached posture of the scientific observer. It required that historians be objective.

4. Scientific Inquiry and the Canon of Objectivity

In this redefinition of historical inquiry the ubiquitous process of qualitative change over time became capable of being translated by scientific, professional, and objective historians into incremental understandings about the past—understandings that might, because of their truth, have some direct utility to present actors. This

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63 See Ross, supra note 18, at 261–74.
reframing of the narrative of history, as presented by trained historians, gave new meaning to the data of the past. Although such data could only induce generalizations about past segments of time, as distinguished from providing proof of universal principles, its extraction and refinement could be undertaken by successive generations of scholars who subscribed to the same canon of objectivity as their predecessors and built upon their scientific work. Through this technique, a more complete and accurate understanding of the past could be realized, which might lead to a more complete and accurate understanding of the present. Just as the details of evolution were designed not only to illuminate changes in life forms but also the present condition of the human species, the details of history might offer a comparable illumination. The role of the historian seemed modest in comparison to that anticipated by the original advocates of historico-politics, but it was not merely that of an antiquarian. It was analogous to that of an evolutionary scientist.  

5. Historicism and the Canon of Objectivity in the American Historical Profession: A Summary

The emergence of the canon of objectivity in history can be associated with four interconnected phenomena that combined to change late nineteenth- and early twentieth-century historians’ understanding of the course of historical change and the nature of historical inquiry. The prevailing epistemological assumptions of American intellectuals in the late nineteenth century became secularized, resulting in natural science and Darwinist theories of evolution, which replaced providential theories as explanations for historical change. At the same time, the dramatic advent of modernity in America, as personified by advanced industrial capitalism, the broadening of the base of political institutions, and more fluid,
but more contested, models of social status, reinforced the belief that qualitative historical change was a continuous and endemic phenomenon and undermined the established view of history as a continuum of time. Within the American academy of higher education, the social science disciplines began to abandon their previous emphasis on historical data, orienting themselves toward the application of scientific methods to contemporary politics, economics, and social relations. Those developments combined to create a new, historicist view of history, that of a narrative of discrete time segments in which the past was separated from, and posited as continuously evolving into, the present and future.

The emergence of historicism placed pressure on late nineteenth- and early twentieth-century historians to justify the relevance of the past to the present, and thus the relevance of their professional work. They responded by recharacterizing the nature of historical inquiry in America, making the methods of the historian akin to those of the natural scientist. Historical scholarship was no longer an exercise in recovering the universal, providentially inspired principles of a republican social order, but an exercise in scientifically recovering and charting historical truth. Historical truth was associated not only with accurate representations of the past, but with accurate descriptions of how the past evolved into the present. The canon of objectivity was designed to facilitate the rendering of historical truth.

E. Historicism, the Canon of Objectivity, and Evolutionary Change as "Progress"

At this point, we can begin to understand the principal epistemological struggle engaged in by early twentieth-century historians who had embraced modernity and the ubiquity of historical change, had subscribed to the canon of objectivity, and had recharacterized their function as that of collecting data and formulating ever-refined generalizations about the past in the hope that such generalizations might illuminate the present. Their struggle was to develop an approach to historical inquiry that would faithfully render the past and thereby make it useful for the present, without confirming, by the very scrupulousness of its objective descriptions of the past, the distance between past and present and hence the potential irrelevance of the past to present actors.
This struggle was accentuated by yet another intellectual offshoot of the emergence of modernity and the development of fully historicist theories of historical change in late nineteenth- and early twentieth-century America. Some features of the culture that early twentieth-century American intellectuals had come to characterize as "modern," such as the rapid pace of industrialization, increased urbanization, a massive influx of immigrants from southern and eastern Europe, and the infiltration of collectivist political ideologies into American public discourse, not only dramatized the ubiquity of historical change but also caused anxiety about its pace and scope. The arrival of modernity raised the possibility of sudden, dramatic, cultural changes that might transform American institutions beyond recognition.6

Once again, evolutionary science offered solace. The methods of the Darwinist natural scientist featured human observation of the external world, the formulation of inductive generalizations based on those observations, and, ultimately, human-derived conclusions about the process by which life forms change over time. Those methods suggested that properly trained scientists could make sense of the course of fundamental changes in the universe. They also suggested that scientific models had some capacity to predict future changes. By applying analogous scientific methods to social, rather than natural, phenomena, the new academic disciplines of the late nineteenth and early twentieth century were also seeking to make sense of their subjects. And if the process of making sense of an academic subject included the possibility of establishing methods of scholarly inquiry that had some predictive value, the new applications of evolutionary science offered the promise that properly trained social scientists could exercise some control over the qualitative state of cultural changes. In short, humans applying proper scientific techniques had the potential to harness the forces of modernity to ensure progress.

Not all early twentieth-century historicists were meliorists. Not all those who embraced the ubiquity of historical change believed that purposive human agency and scientific methods could make change the equivalent of progress, so that the future would necessarily be better than the present. But enough early twentieth-

6 Ross, supra note 18, at 147–49.
The idea of change as progress gave a normative dimension to the historicist separation of the course of time into discrete segments. Not only was the present qualitatively different from the past, it was an improvement on the past. How, then, was the past relevant to present actors except as a negative example? Alternatively, how could present actors avoid either judging the past, and finding it wanting, or transforming it into an entity they found more palatable?

At first blush the early twentieth-century role of the historian as an objective, scientific recorder of historical truth might be seen as proceeding from a chastened conception of scholarly inquiry that had very little to do with social engineering in the service of progress, especially when compared with the earlier role as participant in historico-politics. But it was clear that early twentieth-century historians thought that their role as scientists was based on a more ambitious conception of the function of scholarship. They saw the canon of objectivity in historical inquiry as connected to an expansive view of purposive human activity, including scholarship, as a force of causal weight in the universe. They believed that scientific history could also be made a basis for human policies designed to further progress.

Professor Peter Novick has shown that in the period from the opening of the twentieth century until the onset of World War I, many American historians easily made a connection between the adoption of a "scientific" posture toward historical inquiry, featuring the canon of objectivity, and the idea that qualitative historical change could be described as progress. That connection was made easy by the assumption that scientific knowledge, which included the knowledge of history gained by objective studies of the past, was constantly improving. All of the versions of scientific inquiry were cumulative: Practitioners built on the findings of their predecessors. Thus as techniques by which objective scholars retrieved the past improved, readers of history in the present would get an increasingly better sense of the continuities and discontinuities between past and present—the evolutionary character of historical change. With that information, present actors would be in a better
position to retain or discard elements of the past that they found congenial or discordant. 66

Two early twentieth-century historians, with quite different degrees of enthusiasm for broadening the topics of historical inquiry, articulated that position in 1912. Professor William M. Sloane, a former disciple of historico-politics who objected to "the establishment of elaborate courses in the history of thought and culture" at Columbia, 67 defined history as "concerned not with the past as a whole but only with so much of it as accounts for the present." 68 "What is still alive" in the past for present actors, Sloane felt, is what "explains the present." 69 From a different angle, Professor James Harvey Robinson, whose Columbia course in intellectual history had prompted Sloane's comments, declared that "the practical value of history has... been obscured," by "recalling facts that have no assignable relation to our needs" as present actors. 70 "The present," Robinson thought, "should turn on the past and exploit it in the interests of advance." 71

Over time, the integration of scientific history, the canon of objectivity, and a meliorist view of the relationship between the past and the present was not so easily accomplished in the twentieth-century historical profession. Novick has demonstrated that in the years between World War I and the 1960s, American historians constantly struggled to make intelligible connections between the canon of objectivity and theories of historical change that equated change with progress, thereby privileging the present where it had been shown to diverge from the past.

That struggle focused on two sets of issues. One set centered on the intelligibility of the objectivity canon itself. The other centered on a possible logical consequence of "exploiting" the past in the name of the present and future: Historical change as progress made

67 Richard Hofstadter, The Department of History, in R. Gordon Hoxie et al., A History of the Faculty of Political Science, Columbia University 235–36 (1955) (quoting Memorandum from William M. Sloane, to President Nicholas Murray Butler and the Board of Trustees (Apr. 20, 1915)).
69 Id. at 248.
71 Id. at 24.
scientific renderings of historical truth antiquarian or irrelevant exercises. Novick portrays the struggle as resulting in the canon of objectivity being established, sharply criticized, and reconstructed in the American historical profession in a fifty-year period beginning around 1915.\textsuperscript{72}

Novick's history of the changing twentieth-century status of the canon of objectivity advances two related hypotheses to explain rising and lowering tension among historians over both sets of issues. His first hypothesis posits a causal connection between periods of relative social stability and ideological consensus—periods in which twentieth-century American intellectuals can be seen as cohering around certain social attitudes and professional norms—and relatively strong adherence to both the canon of objectivity and meliorist theories of historical change.\textsuperscript{73} His second hypothesis is the flip side of that causal connection. He associates periods of social instability and ideological discord with skepticism about both the possibility of achieving an objective scholarly posture and of ensuring that historical change will be the equivalent of progress.\textsuperscript{74} Although Novick insists that his purpose is not to intervene in debates on the efficacy of the objectivity canon,\textsuperscript{75} the structure of his analysis serves to accentuate the professional dilemmas faced by its twentieth-century adherents. In Novick's analysis, periods featuring a strong commitment to the canon of objectivity within the historical profession also feature a strong sense of the separation of past from present time, and thus a relatively marginal role for history as a basis for contemporary social policymaking. In contrast, periods in which weaker adherence to the objectivity canon results in the more active use of history by contemporary policymakers have also been marked by less confidence that the future will necessarily be an improvement on the past.

Novick's history of the "objectivity question" can be seen as supporting the proposition that once American intellectuals began to embrace a fully historicist theory of historical change, the role of history as a constraint on contemporary policymakers was fundamentally altered. Prehistoricist theories of historical change

\textsuperscript{72} See generally Novick, supra note 27.
\textsuperscript{73} Id. at 85, 320.
\textsuperscript{74} Id. at 111-12, 320-21.
\textsuperscript{75} Id. at 6-7.
assumed that since history was the embodiment of universal principles of governance, historical inquiries were always relevant and necessary to clarify contemporary issues. A historicist conception of historical change, however, ushered in the epistemological dilemmas associated with historical inquiry that are highlighted in the relationship between the objectivity canon and perceptions of sharp or blurred divisions between past and present segments of time. Those dilemmas can be seen to pivot on the question of whether the past is, or can be, any constraint on present actors.

If one integrates Novick's historical findings about the shifting role of the objectivity canon in the twentieth-century historical profession and Ross's findings about the changing disciplinary goals of American social scientists in the same time frame, one can see in sharp relief that the twentieth century witnessed a massively altered role for history. American social science disciplines had first declared their disciplinary identities, in the late nineteenth century, against a backdrop in which history, as a source of universal principles about politics, economics, and social relations, was the primary repository of the data from which the covering laws governing those fields would be drawn. By the advent of the First World War all of the social science disciplines save history had redirected their attention toward contemporary empirical data as the basis for deriving the general field theories of their subjects. Historico-politics and historically oriented political economy and sociology had been replaced with modernist political science, economics, and sociology. Meanwhile, historians also embraced "scientific" methodologies, which they associated with the objective recording of data from the past that would factor out presentist biases in scholars and permit the cumulative gathering of historical truth.

In short, all the early twentieth-century American social science disciplines, including history, began their core scholarly inquiries by positing a sharp separation between the experience of the American past and that of the present. Although history retained the aspiration that true recordings of the past were relevant to the present, they were relevant as points of contrast, baselines against which the experiences and issues of the present could be more clearly understood, and which served to confirm the evolutionary process of American history. In none of the social science disciplines, including history, were historical data, even if recorded and
accumulated by scrupulously objective scholars, treated as constraints on contemporary theorizing or policymaking.

II. HISTORICISM, SOCIAL SCIENCE, AND TWENTIETH-CENTURY CONSTITUTIONAL SCHOLARSHIP IN THE LEGAL ACADEMY

As these developments were occurring, analogous epistemological trends were taking place in the elite sectors of the American legal academy and legal profession. I have described those trends in detail elsewhere, and shall only note at this juncture the features they shared in common with late nineteenth- and early twentieth-century developments in history and the other American social sciences. First was the mid- and late nineteenth-century secularization of the sources of authoritative legal principles, as extratextual arguments based on natural justice or first principles of social organization began to recede in constitutional jurisprudence, and the explicit linkage of common law principles with religious precepts began to vanish from treatise literature. Next came the same distinctive mix of secularized, “scientific” methodologies with prehistoricist conceptions of historical change that I have noted in the founding generation of American social scientists. Throughout the nineteenth century and into the twentieth, legal scholars retained the assumption that legal principles, whether embodied in provisions of the Constitution or in the past
decisions of courts on common law subjects, remained constant over time, notwithstanding their application to new cases. The ascribed ubiquity of fundamental legal principles persisted even though both constitutional and common law scholars recognized that the central contested issues in their fields changed over time.\footnote{For evidence of the persistence into the early twentieth century of the view that fundamental common law principles endured over time—and could be “restated” for the American legal profession—and the related view that the Constitution’s “adaptivity” to new issues meant that the essential meanings of its provisions endured rather than changed, see White, supra note 7, at 176–207.}

Then came the surfacing, in the early twentieth century, of jurisprudential debates engaging both judges and commentators, and encompassing both constitutional and common law topics, in which participants on one side of the debates exhibited perspectives consistent with both a historicist theory of historical change and a conception of law as a social science (whose methodological inquiries should track those of modern sociologists, economists, or political scientists). In constitutional jurisprudence, the debates centered around whether the Constitution should be seen as a “living” document, the meaning of whose provisions changed over time and were synonymous with the successive interpretations of human judges, or whether constitutional adaptivity still amounted to the application of foundational constitutional principles to novel contexts.\footnote{Id. at 204–11.} In common law jurisprudence, the debates, precipitated by the American Law Institute’s production of massive “Restatements” of common law subjects, asked whether the methodologies of “legal science” should be directed toward a “science of law,” featuring the refinement and promulgation of essentialist common law principles, or a “science about law,” emphasizing the connections between common law doctrines and their changing social, political, and economic contexts.\footnote{See id. at 186–97 (common law jurisprudence), 207–18 (constitutional jurisprudence). The distinction between a “science of law” and a “science about law” was made in Thurman W. Arnold, Institute Priests and Yale Observers—A Reply to Dean Goodrich, 84 U. Pa. L. Rev. 811, 813 (1936).}

The debates ushered in new, historicist-inspired conceptions of the purposes of legal inquiry. In both common law and constitutional fields, some participants in the debates recharacterized the core analytical inquiries in which judges were engaged and upon
which academics commented as comparable to those being engaged in by American social scientists. The inquiries now central to common law adjudication were declared to be those that emphasized the “functional” (political, economic, and sociological) consequences of doctrines and the behavioral dimensions of judicial decisionmaking. The inquiries now central to constitutional adjudication were declared to be those most compatible with the “living” character of the Constitution, ones which would investigate the modification of the original design of American constitutional government to meet the altered character of modern American society. Both sets of inquiries tracked the disciplinary concerns of early twentieth-century political scientists, economists, and sociologists.

By the 1940s, historicist-inspired approaches to common law and constitutional issues had become established in the legal academy. As a result, “functionalist” inquiries had come to be treated by academics and some judges as central to the analysis of common law subjects, and some constitutional commentators had declared that the Supreme Court, responding to the significant political and economic realignments of the 1930s, had initiated a “revolution” in constitutional jurisprudence.

The historicist-inspired trends that have been detailed in the social sciences and law were to have a major effect upon the definition of scholarly inquiry in mid-twentieth-century American constitutional scholarship. As twentieth-century legal academics came to share their social science colleagues’ enhanced sense of the compatibility of modernity with a theory of history as a continuous process of qualitative change, they came to see their work as less concerned with history. They saw themselves as present actors commenting on decisions in present cases. They took the doctrinal

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83 For an analogous treatment of nonlegal sources, see Ross, supra note 18, at 303–89.
84 See, e.g., Leon Green, The Judicial Process in Tort Cases (1931); Leon Green, The Torts Restatement, 29 Ill. L. Rev. 582 (1935).
85 See, e.g., the analysis of Justice Roger Traynor in Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440–44 (Cal. 1944) (Traynor, J., concurring), and Judge Learned Hand in United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947).
principles associated with those cases to be primarily the products of contemporary attitudes and events. They assumed that since the present never duplicated the past, there was little point in attempting to resolve present legal issues by invoking principles extracted from a legal source remote in time. History came to be thought of as largely irrelevant in the analysis of current legal disputes.

One might think that this scholarly posture would have been resisted in constitutional law, where the authoritative status of a document initially drafted in the eighteenth century might have inclined scholars to treat historical exegesis as necessary to their inquiries. But historical inquiry receded from early twentieth-century American constitutional jurisprudence as well. Against a backdrop in which a “living Constitution” model of historicist constitutional interpretation challenged and eventually displaced prehistoricist-inspired models of constitutional adaptivity, twentieth-century constitutional law came to be seen as fundamentally about relationships among the traditional branches of American government, particularly relationships between the federal judiciary and the federal and state legislative branches in a modern society. Out of this reformulation of the appropriate locus of inquiry in constitutional scholarship would emerge the central analytical matrix of mid- and late twentieth-century constitutional jurisprudence, the “countermajoritarian difficulty.”

The emergence of the countermajoritarian difficulty matrix signaled the tacit relegation of historical inquiry in mid-twentieth-century constitutional scholarship to a marginal position. The marginalization of history in constitutional jurisprudence was itself an indication that American constitutionalism had shifted its central thrust. In order to appreciate how the countermajoritarian difficulty matrix was connected to both of those developments, it is necessary to recognize that the matrix simultaneously performed two functions in early twentieth-century American constitutional jurisprudence. It made sense of allegedly revolutionary changes in constitutional law, and it confirmed modernity’s compatibility with a historicist theory of historical change. The next Part of this Article elaborates these claims.
The arrival of history

III. The Countermajoritarian Difficulty Matrix and the Marginalization of Historical Inquiry in Twentieth-Century Constitutional Scholarship

The argument in this Part consists of three discrete and interrelated claims, each of which is derived from a central thesis. The thesis is that the late nineteenth-century social and intellectual developments previously associated with the emergence of modernity in America and the growth of historicist-inspired methods of inquiry in history, the other social sciences, and law, also served to reorient the ideology of mainstream American constitutional thought from republican to democratic in its thrust. American democratic constitutionalism in the early and mid-twentieth-century was composed of three core components: a structural component, a behavioralist component, and a historicist component. The structural component was most explicit: Democratic constitutionalism posited new roles for governmental institutions, including that of the United States Supreme Court in reviewing the constitutionality of acts of other branches of government. Commentators and judges came to think of most of the changes in American constitutional jurisprudence that took place in the years between the First and Second World Wars as compelled by the Court’s new approach to constitutional review in a modern democratic society.

My first claim addresses this structural component of American democratic constitutionalism. Academics and judges initially criticized a particularly visible set of the Court’s early twentieth-century decisions, its invalidation of a series of state minimum wage and maximum hours laws on the ground that they interfered with the “liberty of contract” of employers and employees. The logic of their criticism suggested that the Supreme Court’s review posture should be wholly deferential. But the countermajoritarian difficulty matrix, as it emerged, came to conceive of the Court’s new posture as bifurcated—deferential to the decisions of other branches in some constitutional areas, aggressively scrutinizing in others—rather than deferential across the board.

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87 The next few paragraphs sketch the contours of the argument in the form of some general claims. Those claims are subsequently elaborated upon and supported infra text accompanying notes 88–232.
Had wholly deferential review rather than bifurcated review become a defining structural element of twentieth-century American democratic constitutionalism, the countermajoritarian difficulty matrix might have been a less encompassing field theory. The great power of the matrix rested in its recognition that on some occasions, unchecked majoritarian policymaking retarded rather than promoted democratic goals, most prominently the goal of developing informed citizens who could participate broadly and express their views freely in a majoritarian political process. Thus the true "difficulty" of a countermajoritarian Supreme Court lay not just in its antidemocratic institutional character, but also in the fact that sometimes, in order to further democratic ideals, it needed to be a check on majoritarianism.

My next two claims focus on the remaining components of American democratic constitutionalism. One claim is that the countermajoritarian difficulty matrix was also designed to respond to the behavioralist premises of modernist constitutional jurisprudence. A fundamental dimension of the early twentieth-century critique of republican-inspired judicial review, which I call guardian review, was that it rested on a misguided view of judges as disinterested savants whose interpretations of the Constitution were simply derivations and applications of preexisting, fundamental legal principles. This view, according to critics, failed to recognize the extent to which Supreme Court justices were another species of purposive human actors using their positions of power to shape the content of law. In interpreting the meaning of constitutional language, especially in discerning the scope of indeterminate provisions such as "liberty" in the Due Process Clauses, judges infused their social and political preferences into the Constitution. Such judicial "lawmaking" was probably inevitable, given human nature, but, because of the limited degree of political accountability to which Supreme Court justices were subjected, it raised a series of problems.

The countermajoritarian difficulty matrix provided a framework for addressing those problems. First, the matrix suggested that in a society premised on popular sovereignty and majority rule, some checks on unelected judges with life tenure, analogous to the political checks that existed on other powerful governmental lawmakers, needed to be fashioned or the "difficulty" of willful po-
Political decisionmaking by the Supreme Court might be endemic. That suggestion followed from the behavioralist premise that the meaning of the Constitution would necessarily change with time as judges infused their contemporary social views into the process of constitutional interpretation. The inevitability of judicially-mandated constitutional change raised the question of the legitimacy of any interpretation of the Constitution’s text by unelected judges with life tenure in a democratic society. Thus a central focus of the countermajoritarian difficulty matrix was on the articulation and implementation of techniques for achieving judicial accountability in a democratic society.

As commentators began to center criticism of the Supreme Court’s performance in constitutional cases around the issue of a “countermajoritarian” Court’s accountability and legitimacy, they increasingly emphasized the importance of academic checks on the Court’s posture as a constitutional interpreter. Such checks were designed to provide the Court with justifications for selectively deferential or heightened review of majoritarian policies. Over a time frame stretching from the late 1940s through the 1970s, commentators inspired by the countermajoritarian difficulty matrix directed much of their energy to formulating such justifications.

My last claim relates to the third defining component of American democratic constitutionalism: its historicist assumptions about historical change. I argue that this component was reflected in the countermajoritarian difficulty matrix’s relentlessly ahistorical framework, a framework that has only recently been abandoned. The connections between the transformation of American constitutional theory from republican-centered to democratic-centered and the ahistorical orientation of constitutional inquiry in the years in which the discourse of that inquiry was framed by the countermajoritarian difficulty matrix will require further particularization.

The remainder of this Part fleshes out the thesis and arguments outlined above by analyzing the work of twentieth-century constitutional commentators. Some of its details may seem very familiar to contemporary constitutionalists, but the central thesis of this Part invites readers to consider those details from a different perspective.
A. The Transformation of Early Twentieth-Century American Constitutional Theory

In order for a "countermajoritarian difficulty" to exist, there needs to be a governing belief that constitutional interpretation in America should be responsive to the gravitational pull of affirmative efforts by the state to implement majoritarian policies and promote democratic goals. This belief—which can be encapsulated as an expectation that American constitutional jurisprudence should be democratic, rather than republican, in character—was initially advanced in academic literature in the early twentieth century, began to be reflected in a handful of judicial opinions before the 1930s, and became orthodoxy by the early 1940s. The origins of the countermajoritarian difficulty matrix lay in this transformation of mainstream early twentieth-century American constitutional theory from republican to democratic in its thrust.

Traditional republican constitutional theory, in its early twentieth-century formulations, was still anti-statist, antidemocratic, and prehistoricist in its orientation. It posited that the principal function of a republican government was to secure preexisting political rights rather than to create them. Among those rights were the liberties of citizens to be free from various species of tyranny, ranging from those embodied in undue concentrations of power in one governmental body (a liberty protected by the principles of separation of powers and checks and balances) and those embodied in legislative corruption or demagoguery (a liberty protected by constitutional limits on legislation, as declared by the judiciary). The republicanism of the American founders had been deeply suspicious of mass democracy and of leviathan government; the continual broadening of suffrage restrictions throughout the nineteenth century had not fundamentally altered those features of

88 Frank Tariello, Jr., The Reconstruction of American Political Ideology, 1865-1917, at 60-96 (1982).
89 The most conspicuous examples were Justice Oliver Wendell Holmes's dissents in "liberty of contract" cases, such as Coppage v. Kansas, 236 U.S. 1, 26-27 (1915) (Holmes, J., dissenting), Adair v. United States, 208 U.S. 161, 190-92 (1908) (Holmes, J., dissenting), and Lochner v. New York, 198 U.S. 45, 74-76 (1905) (Holmes, J., dissenting).
90 See Henry Steele Commager, Majority Rule and Minority Rights (1943); Carl Brent Swisher, American Constitutional Development (1943).
91 For a capsule summary of the transition, see Tariello, supra note 88, at 138-60.
republican political theory. Part of the reason late nineteenth-century American republicanism remained hostile to unrestricted popular governance and to an extensive role for government as a distributor of public benefits was its foundationalist premise that humans could not control their tendencies toward self-interest, licentiousness, and corruption. Government that reflected the wishes of the masses would embody those tendencies, ushering in its own decay.

American republican constitutional theory was thus predicated on the professed universality of corruptive tendencies in humans and their embodiment in governmental institutions. Neither those tendencies nor their effect on government were expected to change over time. The broadening of suffrage, for example, made it less, rather than more, likely that legislatures would pass laws that enhanced liberties or benefited more citizens equally. This was because social "classes" and "interests," manifestations of endemic human passion and self-interestedness, would seek to influence the course of legislation. The "public/private distinction," on which much of late nineteenth-century American constitutional police power jurisprudence pivoted, was designed to clarify which legislative acts truly favored all of the public and which merely benefited special interests. The distinction between the two classes of legislation marked the appropriate constitutional boundary between private rights and public power.

No "countermajoritarian difficulty" existed in American republican constitutional theory. This was because a number of

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92 Id. at 20-31.
94 Barry Friedman has identified a fair amount of critical commentary on Supreme Court decisions, stretching back to the early nineteenth century, that emphasized the Court's apparent unresponsiveness to "the people" or its tendency to promote the interests of "the capitalist classes" or other elites. Friedman labels this commentary "countermajoritarian." See sources cited supra note 13. But that labeling confuses claims that Supreme Court justices could be partisan figures, a view deeply embedded in American constitutionalism since the Founding, with claims that Supreme Court justices, being unelected officials with life tenure, were problematic interpreters of the law in a democracy and should defer to the lawmaking powers of more majoritarian branches. The latter set of claims was inconsistent with the premises of republican theory. One of the central goals of American constitutional republicanism was to
provisions in the United States Constitution were assumed to be countermajoritarian in their thrust, as was judicial review itself. Some provisions established specific limits on Congress and state legislatures,\textsuperscript{95} the interpretive principle that all nonenumerated legislative powers were reserved to the states established further limits on Congress's legislative authority;\textsuperscript{96} comparable limitations were imposed by the Constitution on the Executive branch.\textsuperscript{97} The Supreme Court's conclusion that it was the final arbiter of the constitutionality of challenges to the legislative power of Congress or the states\textsuperscript{98} was not perceived as inconsistent with the location of constitutional sovereignty in the American people at large. The Court had no power to reward itself financially for its work or to enforce its decisions, and its holdings in constitutional cases were only authoritative if they accurately discerned and applied legal principles whose sources were external to the views of those charged with discovering them. Republican constitutional theory did not treat Supreme Court justices as unaccountable decision-makers. As Justice David Josiah Brewer remarked in an 1893 address, judges "cannot corrupt nor arbitrarily control" because their functions "are limited to seeing that popular action does not trespass upon right and justice as it exists in written constitutions and natural law."\textsuperscript{99} They "make no laws," and "establish no policy."\textsuperscript{100} They were accountable to the fundamental principles of republican government itself.

At approximately the same time that Justice Brewer made his comment, members of the American academy were beginning to establish structural checks on majoritarian lawmaking. An independent federal judiciary, charged with interpreting the Constitution, was one of those checks.

\textsuperscript{95} U.S. Const. art. I, §10, cl. 1 (prohibiting states from emitting "bills of credit" or passing any "law impairing the obligation of contracts").


\textsuperscript{97} Tucker, supra note 96, at 382–84.

\textsuperscript{98} Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).


\textsuperscript{100} Brewer \textit{in} Gabriel, supra note 99.
suggest that the emergence of social phenomena, which they would subsequently associate with modern American life—advanced industrial capitalism, a broadened base of political participation, the surfacing of increased class conflict in the wake of those phenomena, and the emergence of secularized, "scientific" theories of the basis of human knowledge—could no longer be adequately addressed through traditional republican theory. In a variety of works that appeared between the 1890s and the First World War, they attacked the anti-statist and antidemocratic premises of republicanism, and revealed in the process that they had abandoned its prehistoricist assumptions about the course of historical change. They began to advocate the restructuring of twentieth-century American constitutional jurisprudence to conform to the conditions of modernity.\(^{101}\)

One could choose any of several trends in early twentieth-century constitutional jurisprudence to illustrate the transformation of republican to democratic constitutional theory. In the constitutional law of foreign relations, scholars advocated, and the Supreme Court began to support, an expansion of federal executive power through the mechanisms of treaties and executive agreements with foreign nations, at the expense of the reserved powers of the states.\(^{102}\) In the domestic arena, Congress began to delegate its powers to federal administrative agencies, to which it entrusted the tasks of regulating private economic activity and redistributing economic benefits. The constitutional legitimacy of those agencies (which were seen as combining executive, legislative, and judicial functions) was debated, and their supporters emphasized not only the agencies' expertise in dealing with the specific problems that were surfacing in the wake of a modern industrial economy but also the informality and inclusiveness of their procedures, which allegedly made them more responsive to an expanding class of industrial workers.\(^{103}\)

The Court's "liberty of contract" line of cases provides the most familiar illustration of the shift from republican-inspired to democratic-inspired constitutionalism. It should be stressed that the

\(^{101}\) Ross, supra note 18, at 217–18, 254–56, 297–300; Tariello, supra note 88, at 100–08.

\(^{102}\) For more detail, see White, supra note 7, at 53–93.

\(^{103}\) Id. at 94–116.
Court's analysis in "liberty of contract" cases was unexceptionable, from the point of view of orthodox republican constitutional theory, in two respects. First, although the efficacy of hours and wages legislation was an increasingly prominent topic in American political discourse in the early years of the twentieth century, the Court, consistent with its general approach to police power cases, did not treat legislation that sought to regulate economic activity or redistribute economic benefits any differently from legislation that sought to infringe on other constitutional "liberties," such as the liberty to choose private schooling, study or teach foreign languages, or procreate. All of those "liberties" were derived from the Fifth or Fourteenth Amendments' Due Process Clauses, all triggered the Court's distinction between "reasonable" and "arbitrary" police power legislation, and all precipitated the same level of constitutional scrutiny.

Comparably unexceptionable, under the traditional model of republican-inspired judicial review, was that the Court's discerned substantive content in an indeterminate constitutional provision such as "liberty." Although some late nineteenth-century commentators argued that "liberty" in the Due Process Clauses referred only to protection against the state's incarcerating or physically restraining a citizen without a formal notice or hearing, the mainstream view was that the Constitution's protection for "liberty" extended to a potentially large category of private rights against the state (including "liberty of mind" and "liberty of

107 Characterizing the level of constitutional scrutiny invites anachronism, because the practice of submitting different types of legislation to varying degrees of constitutional review (reflected in the terms "rational basis," "intermediate," and "strict" scrutiny) was not part of the Court's constitutional jurisprudence until the late 1930s. But it seems fair to say that republican constitutional theory presupposed that all cognizable constitutional challenges to any form of legislation created a presumption that the legislation was constitutionally defective. This was in contrast to the presumption of constitutionality Justice Harlan Fiske Stone was to ascribe to "legislation affecting ordinary commercial transactions" in United States v. Carolene Products Co., 304 U.S. 144, 152 (1938).
speech,” as well as “liberty of contract”), which were sometimes subject to restriction by the police power. It was not only the judiciary’s task to determine where the boundary lay between public power and private rights, it was its task to recognize and articulate the constitutional scope of provisions such as “liberty” in the Due Process Clause. That task was no different from determining the meaning of “commerce” in the Commerce Clause, or of “contracts” in the Obligation of Contracts Clause. It was an essential function of the institution charged with discovering the meaning of authoritative constitutional provisions and applying them to cases.¹⁰⁻¹²

But despite the orthodox character of the Court’s methodology in “liberty of contract” cases, early twentieth-century commentators and judges increasingly characterized it as an unjustifiable substitution of judicial for legislative ideology. This line of attack was encapsulated by a dissenting opinion of Justice Oliver Wendell Holmes in a 1930 “liberty of contract” case. “I cannot believe,” Justice Holmes wrote, “that the [Fourteenth] Amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions.”¹⁰⁻¹¹ “As the [“liberty of contract”] decisions now stand,” he noted, “I see hardly any limit but the sky to the invalidating of [legislation] if [it] happen[s] to strike a majority of this Court as for any reason undesirable.”¹¹ Seven years later, the Court repudiated “liberty of contract” as a constitutional right. Justice Charles Evans Hughes, invalidating a challenge to a state minimum wage law, announced for the Court that “[t]he Constitution does not speak of freedom of contract,” and that “regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.”¹²

The Court, however, did not transform its constitutional review stance from that of guardian review—where it intervened to protect the rights of republican citizens against various species of

legislative tyranny or demagoguery—to wholly deferential review. It transformed its stance, between the First and Second World Wars, from guardian to bifurcated review, developing levels of scrutiny that tracked its tacit placement of legislation into one of two classes. The first class was exemplified by legislation affecting “ordinary commercial transactions”; the second was exemplified by legislation affecting “indispensable freedoms,” of which freedom of speech and thought were the paramount examples. By the close of the Second World War, the Court had only roughly defined the scope of those categories, but its flirtation with the idea that freedom of speech occupied a “preferred position” in constitutional jurisprudence was symptomatic of its commitment to bifurcated rather than to wholly deferential review.

Of all the illustrations of the early twentieth-century shift from republican to democratic constitutional theory, the evolution of the Court’s stance from guardian to bifurcated, rather than wholly deferential, review is the most revealing. One of the bases for the critique of guardian review was that it was premised on a misguided and potentially dangerous assumption about judges. If one discarded Justice Brewer’s belief that judges’ work was limited to discerning preexisting principles of liberty and government and adopted Justice Holmes’s view that judges could embody their personal beliefs in the provisions of the Constitution, guardian review seemed something of a sham, since judges could substitute for abstract principles, such as “liberty,” particularized versions, such as “liberty of contract.” A more purposive, human-centered view of judging, then, served to undermine the idea that the judiciary could serve as a disinterested guardian of the people in interpreting the Constitution.

But the logic of that position seems to lead in the direction of wholly deferential review, not toward bifurcated review. How was it that the critics of “liberty of contract” did not treat the Court’s

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development of "liberty of speech" as a comparably unjustifiable judicial gloss? More generally, what gave the Court the discretion to "incorporate" some, but not all, of the provisions of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment? That project occupied the Court from the 1920s through the 1940s. It attempted to establish a criterion for provisions eligible for incorporation (those that were "the very essence of a scheme of ordered liberty" in the American constitutional order), but it never addressed the threshold question raised by the contrast between its abandonment of "liberty of contract" and its exercise in "selective" incorporation: Why was a judicial glossing of "liberty" in the Due Process Clause impermissible in the former line of cases and appropriate in the latter?

The implicit answer to that question lay in the connection between bifurcated review and democratic constitutionalism. If one thinks of bifurcated review as an effort to fashion a posture toward challenged legislation that most clearly identifies the Court with the promotion of democratic values, the choice of bifurcated, rather than wholly deferential, review suggests that mid-twentieth-century judges and commentators had come to believe that democratic goals were not invariably furthered by majoritarian policies in the American constitutional order. Democratic constitutional theory, as implemented by the Court through a posture of bifurcated review, retained the assumption of republican constitutionalism that individual citizens held some prepolitical liberties that were to be secured, not infringed, by government. As early twentieth-century democratic constitutionalism evolved from its republican predecessor, the liberties that were to be secured against state interference were redefined as liberties that promoted democracy itself. The principal examples of such liberties were those that facilitated participation in popular government, broadened the access of citizens to public issues and information, and expanded

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the opportunities of citizens to express themselves or to publicly af-
firm their beliefs. Those were the very liberties—freedoms of
thought, expression, and belief—that the Court, in the first stages
of the bifurcated review project, considered placing in a preferred
constitutional position.

No stance other than bifurcated review was comparably respon-
sive to democratic theory as it came to be defined in early
twentieth-century American constitutionalism. Guardian review,
insofar as it anticipated the judicial application of fundamental re-
publican principles such as the inviolability of vested property
rights, could be antidemocratic in its thrust. Wholly deferential re-
view gave too much power to legislative majorities to restrict
liberties that promoted democracy. A majority might want to re-
strict the expression of unpopular or allegedly dangerous minority
beliefs, even though the opportunity to express one's views freely
was one of the foundations of majoritarian policymaking. Only a
form of review that insulated most forms of majoritarian policies
from constitutional attack, but retained enhanced constitutional so-
licitude for challenges to majoritarian laws that undermined
"democratic" liberties, would suffice.

Here we encounter the first element of the "countermajoritarian
difficulty": its structural element. The structural "difficulty" pre-
sented by democratic constitutionalism is that in order to maintain
a system of constitutional jurisprudence that maximizes a commit-
ment to democratic values, the principal institutional organ of
participatory democracy, the legislature, has to be restrained when
its majorities seek to restrict constitutional liberties that are per-
ceived as embodiments of those values. Further, legislatures
restricting "democratic" liberties have to be restrained by an insti-
tution, the United States Supreme Court, which is neither elected
nor majoritarian, and which is charged with interpreting the Con-
stitution, a document whose provisions sometimes embody policies
or attitudes hostile to democracy. Thus the countermajoritarian
difficulty, in its structural versions, cannot merely be described as
the dilemma of having a politically unaccountable Court, whose
members have life tenure, occasionally invalidate the actions of po-
litically accountable majorities. It is a "difficulty" that captures a
paradox at the heart of democratic constitutionalism: For democ-
ritic goals to be fully achieved in the American constitutional
order, a subset of “democratic” constitutional rights needs special protection from legislative majorities, and no other branch of government except the judiciary—barring the rare process of constitutional amendment—is capable of regularly providing that protection.

**B. The Behavioralist Component of the Countermajoritarian Difficulty**

Bifurcated review thus assumed that the Court would still be participating in some glossing of the scope of indeterminate constitutional provisions in a world in which the essentialist institutional roles ascribed to courts and other branches of government by republican theory had broken down. It was no longer possible to think of changing judicial definitions of the content and scope of constitutional provisions as mere declarations of “right and justice as it exists in written constitutions.” They were a form of lawmaking. Judges, Justice Brewer notwithstanding, had entered into the domain of policy. But the judiciary, in a democratic constitutional order, was still expected to function as a necessary check on the occasional tendency of majoritarian institutions to undermine democratic goals and values. Thus one should anticipate some aggressive scrutiny of legislative and executive decisions by the courts, as well as some judicial redefinitions of the scope and content of rights, as the foundational premises of American constitutionalism shifted from republican to democratic theory.

This meant that the somewhat static structural map of American constitutional government associated with republican theory, in which courts and legislatures were conceived of as occupying radically different governmental spheres and performing radically different functions, would be replaced by a more fluid map, in which legislatures could be expected to expand the scope of their activity and, in response, courts could be expected to be more active in defining their posture of constitutional review, if not necessarily more active in scrutinizing legislative policies. In particular, if bifurcated, rather than wholly deferential, review was to be the Supreme Court’s approved posture in constitutional cases,

the growth of government could be expected to produce a growth in the corpus of constitutional law.\textsuperscript{177}

Here the behavioralist dimensions of American democratic constitutionalism began to overlap with its structural dimensions. The shift from republican to democratic constitutionalism had been fueled in part by the emergence, in the late nineteenth and early twentieth century, of altered conceptions of the nature of law and the role of judging. We have seen that the early twentieth-century legal academy was influenced by the same epistemological trends that emphasized the secularized and scientific basis of human knowledge and de-emphasized the ubiquity of essentialist external phenomena as causal forces in the universe. Those trends made it more difficult for legal scholars and judges to retain the view that in deciding cases, judges were simply discerning preexisting, essentialist legal principles and applying them to contemporary disputes. The structural map of American republican constitutionalism, however, had been predicated on just that view of law and judging.

In a period extending over the first three decades of the twentieth century, behavioralist field theories, applying scientific models of inquiry to various dimensions of human relations, swept through the academy.\textsuperscript{180} By the 1930s, those theories reached law in the form of the Realist movement\textsuperscript{119} and political science in the form of behavioralist interpretations of judicial performance.\textsuperscript{120} The Realists took for granted that judges "made law" and that subjective judicial biases affected the outcome of decisions, although their principal area of focus was common law rather than constitutional decisions. Behavioralist political scientists directed their attention to constitutional law, seeking to demonstrate how the political value orientation of Supreme Court justices affected their constitutional decisions. They asserted that, because the Constitution was interpreted by humans with political agendas, its undergirding

\textsuperscript{117} Compare, as an illustration, the relatively few cases on freedom of expression and equal protection issues decided by the Court in the 1920s with the larger number of such cases decided in the 1940s and 1950s.


\textsuperscript{119} See, e.g., Jerome Frank, Law and the Modern Mind (1930) (applying a Freudian analysis to the Court).

principles would (and should) necessarily change with the times.\footnote{See, e.g., Howard Lee McBain, The Living Constitution 2-3 (1927).} Behavioralist conceptions of judging figured prominently in the celebrated “Court-packing crisis” of 1937, when President Franklin Roosevelt, piqued at a Court majority's invalidation of several pieces of New Deal legislation, suggested that the majority's response was a function of the advanced age of several justices and introduced a bill providing for the appointment of an additional justice should a sitting justice decline to retire at the age of 70.\footnote{For the text of the bill, see 81 Cong. Rec. 877 (1937). The bill was introduced on February 5, 1937. A full discussion of the bill’s provisions can be found in Barry Cushman, Rethinking the New Deal Court: The Structure of a Constitutional Revolution 11-12 (1998).} The plan not only associated advanced age in a judge with a resistance to experimental legislation, it assumed that a President’s judicial nominees would bring with them political views that would eventually result in constitutional validation of that President’s legislative agenda.\footnote{See White, supra note 7, at 233–36 (arguing that the Court-packing crisis was a symptom, not a cause, of the constitutional revolution). For additional, and sometimes contrasting, treatment of many of the sources discussed in this Section, see Friedman, Part Five, supra note 13, at 11-32.}

Behavioralist theories of judging served to enhance the “difficulty” of judicial review in a democracy. Judges could no longer be characterized as savants bound by essentialist, universal principles of “law.” Such principles, which had become identified with an antiquated constitutional order and conceived of as disembodied entities whose meaning remained independent of those who discerned and applied them, may have lost their epistemological intelligibility. Judges needed to be seen as another class of human actors wielding the power of the state. Given the unelected status of the federal judiciary, as personified by the Supreme Court, it was not clear what justification existed for Supreme Court justices exercising the power, in constitutional cases, to override policies approved by a majority of the state’s citizens. The constantly changing meaning of the Constitution suggested that there were few universal and intelligible constitutional principles that required the Court to override majoritarian policies. And there was certainly no justification for unelected judges finding such policies constitutionally invalid simply because they disapproved of them.
Some early twentieth-century commentators, on determining that judicial review was "antidemocratic" and that federal judges were another species of policymakers, concluded that there should be virtually no constitutional scrutiny of state or federal legislation by the Supreme Court. But, in the 1940s, as the Court showed signs of eschewing a wholly deferential stance for one in which certain classes of legislation continued to be submitted to a high degree of scrutiny, commentators, and some Supreme Court justices, sought to address the behavioralist implications of this posture.

As the Court entertained various constitutional challenges to legislation in the 1940s and early 1950s, it was clear that its shifting majorities were not adopting a uniform stance in reviewing those challenges. In the same time period that the Court progressively relaxed its scrutiny of legislation regulating economic activity or redistributing economic benefits, it consistently subjected laws restricting expressive activity or religious belief to heightened scrutiny, and it began to suggest that laws making classifications on the basis of race would be also be subjected to strict judicial oversight when challenged as violations of the Equal Protection Clause.

Commentators, who had expected that the large number of Franklin Roosevelt's appointments to the Court between 1937 and 1943 would make it the most "liberal" institution in American

124 See, e.g., Commager, supra note 90, at 42–48.
125 By 1955, the Court was prepared to announce that "[t]he day is gone when this Court uses the Due Process Clause . . . to strike down state laws, regulatory of business and industrial conditions, because they may be unwise." Williamson v. Lee Optical, 348 U.S. 483, 488 (1955).
128 By 1943, eight of the nine justices were Roosevelt appointments, although Chief Justice Harlan Fiske Stone had originally been named to the Court by President Calvin Coolidge. Roosevelt actually appointed nine justices to the Court during his tenure as President, since one justice he appointed, James Francis Byrnes, resigned in 1942 after serving one term. Roosevelt named Wiley Blount Rutledge to replace him. In addition to Justices Stone, Byrnes, and Rutledge, Justices Hugo Lafayette Black, Stanley Forman Reed, William Orville Douglas, Felix Frankfurter, Frank Murphy, and Robert Hougwout Jackson were Roosevelt appointees. The only justice who
government,129 began to note two characteristics of the "Roosevelt Court."130 One was the increased number of cases in which the Court entertained, although it did not always invalidate, constitutional challenges to legislation restricting "civil liberties."131 The other was the open disagreement among allegedly "liberal" justices that such cases provoked,132 and the fact that the disagreement often focused on the proper scope of the Court's constitutional review powers.133

Meanwhile, some sitting justices had expressed their own views on whether a bifurcated standard of constitutional review was appropriate. Justice Harlan Fiske Stone tentatively explored the question whether the usual presumption of deference to legislation might be reversed when that legislation facially conflicted with a constitutional provision, when it had the effect of restricting "those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," or where it seemed to be the product of "prejudice against discrete and insular minorities."134 As the Court launched the project of incorporating Bill of Rights provisions into the Fourteenth Amendment's Due Process Clause, Justice Hugo Lafayette Black wondered whether "selective" judicial incorporation of provisions on the basis of judicially-fashioned criteria was another version of illegitimate judicial glossing.135 Several justices experimented with an approach that described some constitutional rights, notably those related to the protection of expressive activity, as "preferred" under the American system of democratic constitutional government.136 Other justices, such as

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129 Pritchett, supra note 120, at 14.
130 Id. at xiv. The term "Roosevelt Court" is Pritchett's; note that the label is itself behavioralist.
131 Id. at 91–93. "Civil liberties" in this period were primarily associated with expressive activity or with the procedural rights of criminal defendants.
132 Id. at 38–45.
133 Thomas Reed Powell, Our High Court Analyzed, N.Y. Times, June 18, 1944, § 6 (Magazine), at 17; Arthur M. Schlesinger, Jr., The Supreme Court: 1947, Fortune, Jan. 1947, at 73, 201–04.
136 See sources cited supra note 113.
Justice Felix Frankfurter, declared that "[t]here is no warrant in the constitutional basis of this Court’s authority for attributing different roles to it depending upon the nature of the challenge to the legislation."\(^{137}\)

It was clear from this set of developments that the Court’s struggles with fashioning a standard for reviewing various categories of legislation were closely related to the fact that its members had internalized a behavioralist view of their function. When justices sought to articulate the appropriate standard of review governing particular classes of cases, they repeatedly invoked language deploiring efforts to substitute judicial views of the wisdom of legislation for those of the legislators,\(^ {138}\) or emphasized that heightened scrutiny of legislation followed from something other than judicial attraction to the constitutional rights allegedly being infringed. Judicial efforts to carve out areas of heightened scrutiny took pains to avoid the inference that such a posture rested on behavioralist affinities.\(^ {139}\)

The internalization of behavioralist definitions of the judicial role in constitutional review cases changed the terms of the discourse of American constitutional jurisprudence. In the universe of republican-inspired constitutionalism in which judges exercised guardian review, the partisan dimensions of judging were treated as largely subsumed by the obligations of judges to declare "right and justice as it exists in written constitutions and natural law."\(^ {140}\) Sometimes partisanship affected this task, and judges rendered "incorrect" decisions. But there was no inherent tension, in guardian review, between a judge’s political inclinations and a judge’s institutional role. Since judges, in the exercise of their constitutional review function, were expected to mark out the boundary between private rights and the public welfare by reasserting the first principles of republican constitutionalism and applying them

\(^{137}\) Barnette, 319 U.S. at 648.

\(^{138}\) E.g., Justice Frankfurter’s opinions in Gobitis, 310 U.S. at 591–600, and Barnette, 319 U.S. at 646–71 (Frankfurter, J., dissenting).

\(^{139}\) Justice Stone’s Carolene Products footnote, advancing general reasons for heightened review, can be seen as one such effort. Carolene Products, 304 U.S. at 152 n.4.

\(^{140}\) Justice Brewer used this phrase in the 1893 address, supra note 99.
to cases, it was irrelevant what particular views they might hold on the short-run political consequences of their decisions.

Modernist, democratic-inspired constitutional jurisprudence treated the assumption that judicial savancy could subsume judicial partisanship as naive. Judges were humans holding power and, as such, political actors. Their views on social issues not only affected their interpretations of the Constitution but also had consequences for the content of American constitutional law. Judges were comparatively unaccountable political actors. Thus democratic constitutionalism *required* judges to distinguish between their normative political views, the views they might hold as legislators, and their obligations in a constitutional order whose foundational values were those of democratic theory. They were expected to articulate this distinction in their opinions by demonstrating that deference to, or invalidation of, a particular piece of legislation furthered democratic values.

C. Democratic Constitutionalism, Judicial Behavioralism, and Countermajoritarian Constitutional Jurisprudence

1. The Principles of Countermajoritarian Constitutional Jurisprudence

In the years between the mid-1940s and the late 1970s, the countermajoritarian difficulty matrix implicitly set the boundaries of and established the framework for discourse in American constitutional jurisprudence. It did so by positing the foundational values of American democratic constitutionalism as a given and by deriv-
ing a fundamental maxim of constitutional discourse, and three corollaries to that maxim, from those foundational values. The posited foundational values followed from the new structural map and new behavioralist insights that served to identify the modern democratic constitutional order in America. The values assumed a presumptive adherence to the constitutional principle of majoritarianism, qualified by departures from that principle when majoritarian policies retarded quintessentially “democratic” rights, such as the right of citizens to express themselves freely and fully on public issues and the right of citizens to full and equal participation in the affairs of government.

The new constitutional foundationalism of the twentieth century resulted in the abandonment of the guardian review function of the judiciary anticipated by republican constitutional theory. In the place of guardian review lay “difficulties” flowing from the federal judiciary’s unaccountable status and policymaking function. A central response to those “difficulties” was the positing of a new set of checks on judges exercising their constitutional review powers. Those checks were embodied in the central maxim of the counter-majoritarian difficulty matrix and its principal corollaries. The maxim was that the federal judiciary, as personified by the Supreme Court, needed to demonstrate its adherence to the foundational values of democratic constitutionalism by writing opinions that showed its awareness of the “difficulties” inherent in its status. It needed, in short, to substitute an intellectual accountability for its lack of political accountability.

The corollaries of that maxim supplied techniques by which the Court could demonstrate its version of accountability in the democratic constitutional order. The first corollary asked the Court to demonstrate in its opinions that it was adhering to foundational democratic values by deferring to majoritarian legislation unless that legislation retarded democratic ideals rather than furthered them. The second corollary insisted that the Court ground its departures from majoritarian policies on general principles of democratic constitutionalism that transcended the particular case to which they were being applied, so that they represented more than a mere judicial preference for the short-run consequences of finding a particular policy constitutionally invalid. The last corol-
lary required the Court to defer to majoritarian policymakers if it could not articulate any generalizable democratic principles. Redirecting the central arena of jurisprudential conflict in American constitutionalism from the public/private boundary to the choice between deferential or heightened standards of review did not assuage that conflict; it only served to frame it in different terms. As guardian review evolved, early twentieth-century justices found the task of “pricking out” the boundary between the public welfare and private rights increasingly difficult, requiring the creation of doctrinal categories, subcategories, and exceptions. Their mid-twentieth-century successors found the task of establishing criteria governing the task of choosing between deferential or heightened review no easier. In particular, they found the choices posed by a model of democratic constitutionalism no less susceptible to substantive judicial glossing than the choices posed by a model of republican constitutionalism.

Although the central corollaries of the countermajoritarian difficulty matrix were designed to confine inappropriate substantive glosses of indeterminate constitutional provisions by politically unaccountable judges, they could not entirely avoid a substantive choice that lay at the center of democratic constitutionalism. That choice was highlighted by the judicial inquiry into whether a particular majoritarian policy retarded or furthered democratic values. Since the policy itself reflected the views of a majority, its adoption was, presumptively, an affirmation of democratic theory. How could the policy thus be sufficiently “undemocratic” to require constitutional invalidation? More fundamentally, how could Supreme Court justices determine whether a policy was undemocratic without making some substantive judgments about the policy?

2. Refinements of Countermajoritarian Principles

Commentators operating within the countermajoritarian difficulty matrix began to realize that the “difficulties” embodied in the tension between majoritarianism and other democratic values were

142 For example, see the majority opinion in Charles Wolff Packing Co. v. Kansas, 262 U.S. 522, 533-44 (1923). For a general discussion of the disintegration of police powers jurisprudence in the early twentieth century, see Barry Cushman, Rethinking the New Deal Court: The Structure of a Constitutional Revolution 66-83 (1998).
endemic to democratic constitutionalism. They undertook successive refinements, in a period extending from the 1940s through the 1970s, of the maxim that judges exercising their constitutional review function could substitute an intellectual accountability for their lack of political accountability.

The refinements centered on the maxim's corollaries, and were illustrated by approved techniques for judges in the democratic constitutional order. One technique, predicated on the democratic, anti-totalitarian character of American constitutionalism, demanded that judicial decisions in a democratic society be grounded on "reason" rather than the "fiat[s]" of powerful officeholders. That technique eventually became sharpened into another, which centered on the judicial reasoning process itself: Commentators insisted that the Court avoid summary per curiam opinions, opinions that featured "the sweeping dogmatic statement" and "the formulation of results accompanied by little or no effort to support them in reason," or opinions that failed to give adequate guidance to the bar and lower courts. Eventually, the techniques posited two generalized intellectual checks on judicial behavioralism.

Constitutional commentators in the 1950s had begun to focus on the relationship between democratic constitutionalism and what they perceived to be the Court's unique institutional characteristics. The Court made its decisions collectively, they noted, and justified its decisions through published legal opinions. They implored the Court to tailor its workload so its justices had time to let the "maturing of collective thought" take effect in reaching their decisions. And they insisted that in constitutional law cases, the

143 See, e.g., Lon L. Fuller, Reason and Fiat in Case Law, 59 Harv. L. Rev. 376, 378-82, 394-95 (1946); Henry M. Hart, Jr., Holmes' Positivism—An Addendum, 64 Harv. L. Rev. 929, 933-35, 937 (1951); Mark DeWolfe Howe, The Positivism of Mr. Justice Holmes, 64 Harv. L. Rev. 529, 541, 545-46 (1951); see also Friedman, Part Five, supra note 13, at 64-93 (discussing some of the sources cited in this subsection).
144 Louis L. Jaffe, The Supreme Court, 1950 Term, Foreword, 65 Harv. L. Rev. 107, 107-08, 112 (1951).
147 Erwin N. Griswold, The Supreme Court, 1959 Term, Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold, 74 Harv. L. Rev. 81, 84-85 (1960);
Court’s decisions be accompanied by opinions justifying results on “neutral principles,” which Herbert Wechsler, in a highly influential 1959 article, defined as “grounds of adequate neutrality and generality” that transcended the immediate result reached in a case.\(^1\)

In this line of mid-twentieth-century commentary one can see echoes of the essential checks on judges that republican constitutionalism took for granted. A particularly resounding echo came in the widely shared assumption among commentators in the 1950s and early 1960s that judges retained a special competence in articulating and applying constitutional principles. Just as the judges who exercised guardian review were thought to be a class of savants, specially trained at determining and applying the fundamental law of a republican government, their modern successors were assigned an institutional competence that apparently stemmed from their longstanding role as the final interpreters of constitutional disputes.

Mid-twentieth-century constitutional commentators regularly associated the distinction between appropriate and inappropriate exercises of the judicial function with the Supreme Court’s ability to ground its opinions on constitutional “principle,” rather than merely using opinions to implement “policy.”\(^1\)\(^4\)\(^9\) Grounding an opinion on “principle” meant demonstrating that a particular interpretation of a constitutional provision embodied the fundamental values of a democratic constitutional order, whereas opposing interpretations did not. The derivation of such constitutional principles was not easy, because many cases represented clashes between competing constitutional arguments, both of which claimed to be derived from democratic political theory. In *Brown v. Board of Education*,\(^1\)\(^5\)\(^9\) for example, both legislative resistance to enforced racial integration and the demands of black citizens to be given full access to public facilities could be associated with the

\(^1\) Henry M. Hart, Jr., The Supreme Court, 1958 Term, Foreword: The Time Chart of the Justices, 73 Harv. L. Rev. 84, 100 (1959).


\(^1\)\(^9\) 347 U.S. 483 (1954).
foundational democratic principle of freedom of association. The Brown decision thus could be seen as a judicial choice that one of those policies would receive constitutional support and the other would not.\footnote{151}

The fact that many constitutional cases posed such conflicts was not perceived, however, as an insurmountable problem by commentators operating within the framework imposed by the countermajoritarian difficulty matrix. The techniques they urged the Court to adopt were designed to respond to those conflicts. The techniques took for granted that where a case posed a clash between two competing “democratic” principles or two policies grounded on the same principle, it was particularly likely to be perceived as being resolved by substantive judicial preferences. Such resolutions amounted to judicial policymaking. They were inappropriate exercises of the judicial function. The proper response in such cases was to defer to the majoritarian branches of government, whose institutional competence lay in the sphere of policy rather than principle. This meant that the Court should not invalidate legislation on constitutional grounds unless it was prepared to base its decision on the unmistakable incompatibility of the legislation with foundational democratic values.\footnote{152}

3. Alexander Bickel’s “Passive Virtues”

There were numerous cases, however, in which a constitutional challenge to legislation did not fully clarify the issue of whether a majoritarian policy furthered or retarded foundational democratic values. Some commentators described Brown as such a case; others characterized the Warren Court’s “reapportionment” cases, in which the Court entertained challenges to legislative practices that apportioned voting districts on grounds other than population, as additional examples.\footnote{153} The characterization of certain constitutional challenges as having ambiguous or indecipherable implications for democratic constitutionalism spawned an additional line of commentary inspired by the countermajoritarian difficulty matrix.

\footnote{151} Wechsler, supra note 148, at 31–34.  
\footnote{152} Id. at 25.  
This line also emphasized judicial techniques. In this instance, the techniques allowed courts to postpone full-blown constitutional view of indeterminate challenges until they could more readily discern whether the legislation being challenged furthered or retarded democratic values. Techniques employing the doctrines of standing, mootness, or ripeness could serve that purpose. These doctrines enabled courts to avoid squarely confronting the constitutionality of legislation, resulting in the legislation being left in place, but they also permitted courts to entertain subsequent challenges to the legislation if its “antidemocratic” character became evident.\textsuperscript{154}

In the best known example of commentary celebrating the “passive virtues” of techniques for avoiding full-blown constitutional challenges to legislation whose relationship to democratic theory had not emerged with sufficient clarity, Professor Alexander Bickel coined the term “counter-majoritarian difficulty.”\textsuperscript{155} Although the perception that the Supreme Court was a politically unaccountable body in a democratic constitutional order had been in place for twenty years before Bickel gave it a name, Bickel vividly reduced the central interpretive maxim of the counter-majoritarian difficulty matrix and its corollaries to a single comprehensive inquiry. “Which values,” he asked in his 1962 book, \textit{The Least Dangerous Branch}, “among adequately neutral and general ones, qualify as sufficiently important or fundamental... to be vindicated by the Court against other values affirmed by legislative acts?”\textsuperscript{156}

This was a question informed by the structural and behavioral premises of democratic constitutional theory, one which proceeded from the endemic “difficulty” that the Court was a politically unaccountable institution which was sometimes required to check undemocratic majoritarian policies. Bickel’s question built upon the line of commentary insisting that such checks be legitimated by opinions appealing to “adequately neutral and general” democratic principles, and the line of judicial opinions and commentary that had sought to identify those values that were sufficiently founda-

\textsuperscript{154} Alexander M. Bickel, \textit{The Least Dangerous Branch: The Supreme Court at the Bar of Politics} 111–98 (1962). For a somewhat different reading of Bickel’s work, see Friedman, Part Five, supra note 13, at 74–78, 104–16.

\textsuperscript{155} Bickel, supra note 154, at 16–17.

\textsuperscript{156} Id. at 55.
tional to democratic theory to override the desires of legislative majorities. Bickel generalized the central inquiry raised by the transformation from republican to democratic constitutionalism. Since fundamental values were no longer the self-evident, easily-discernible constitutional principles of a republican order, they had become too closely associated with subjective judicial preferences, and the Court’s review powers had become too readily identified with countermajoritarianism. The only escape from the “difficulty,” Bickel’s question suggested, lay in the judicial formulation of adequately neutral and general constitutional principles.

By the time Bickel coined the term “counter-majoritarian difficulty” and posed his central question, the Warren Court had taken on some countermajoritarian projects. The Warren Court’s heightened scrutiny of majoritarian policies in several mid-twentieth-century areas of social controversy had not only helped crystallize the goals of scholars seeking to refine the corollaries of the countermajoritarian difficulty matrix, it had also stimulated defenders of the Court to suggest that those lines of commentary avoided, rather than responded to, the central inquiry Bickel had posed. Out of the resulting debate would emerge a perfected version of countermajoritarian constitutional theory in which Professor John Hart Ely would argue that Bickel had asked the wrong question.

**D. Perfecting Countermajoritarian Constitutional Theory: John Hart Ely’s Democracy and Distrust**

Several commentators who supported the Warren Court’s heightened scrutiny of majoritarian polices affecting race relations, the apportionment of voting power, and school prayer argued that some judicial techniques espoused by countermajoritarian-inspired scholars actually served to undermine democratic theory. Advising the Court to defer to majorities or to temporize when principles of democratic constitutionalism appeared to be in conflict, those commentators suggested, could result in undemocratic policies being perpetuated in the guise of democratic theory.157 In cases where

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democratic constitutional principles were facially in conflict, it was entirely appropriate for the Court to probe further and to conclude that a majoritarian policy was only superficially consistent with democratic theory and in practice undermined democratic values.

Warren Court majorities, this line of commentary suggested, had been following the principles of democratic constitutionalism. In concluding that freedom from discrimination on the basis of color was more foundational to a democratic society than freedom to exclude persons on the basis of race; that the principle of "one man, one vote" was more foundational than the principle that a majority could choose to establish the practice of proportional representation; and that the disentanglement of government from religion, so as to promote religious freedom, was more fundamentally important than establishing majoritarian religious practices in the public schools, those majorities had acted appropriately. They had made substantive judicial judgments, to be sure, but their judgments had been based on the fact that the majoritarian policies in each case had limited individual freedom or restricted equality of opportunity. When countermajoritarian lines of scholarship argued for judicial deference, or for temporizing whenever choices between competing democratic principles were facially posed, they were asking the Court to retreat from one of its core functions in a democratic constitutional order.158

This line of criticism exposed some countermajoritarian difficulty scholars to the charge that they were more concerned with fashioning increasingly arcane theories of judicial deference than giving proportional advantages to less densely populated counties within a state by making them voting units equal in weight to more populated counties appeared on its face to be consistent with democratic constitutionalism, since the policy was a product of the collective views of the state's legislative representatives. But the policy made it more difficult for numerical majorities of the state's voters to secure their preferences in the legislature when those preferences were opposed by voters from less densely populated counties. And, by voting to perpetuate a system of proportional representation, representatives from less densely populated counties were voting to preserve their disproportionate power in the legislature. Robert B. McKay, Reapportionment: Success Story of the Warren Court, 67 Mich. L. Rev. 223, 228–29 (1968). Thus if scholars advised the Court not to intervene in reapportionment cases because the issue was a "political question" not appropriate for judicial consideration, that advice had the effect of perpetuating undemocratic practices. See Neal, supra note 153, at 281–88.

with affirming foundational democratic values. But it did not dislodge the matrix from its dominant role in channeling the discourse of American constitutional jurisprudence. As the Warren Court passed out of existence, and the Court during the tenure of Chief Justice Warren Earl Burger continued to take an aggressive stance toward some categories of legislation, revived versions of orthodox countermajoritarian constitutional theory surfaced. The most influential of those was offered by Professor John Hart Ely in his 1980 book, Democracy and Distrust.

The novelty of Ely’s version of countermajoritarian constitutional theory, when compared with the versions offered in the late 1940s, 1950s, and 1960s, was that he took the principal argument of defenders of the Court against countermajoritarian criticism and turned it on its head. Defenders of the Warren Court argued that ultimately the Court’s choices to find some majoritarian policies "undemocratic" represented the affirmation of certain foundational values. In checking majorities, the Court was merely representing the American people’s commitment to democracy. Ely agreed that American democratic constitutionalism was not synonymous with majority rule, and that the Constitution’s framers anticipated that the meaning of some constitutional provisions needed to be derived by the judiciary over time. He claimed, however, that this did not give the judiciary a warrant for discovering and applying unenumerated, “fundamental” constitutional values. Such values, as essentialist, universal entities, did not exist. They were invariably historically, culturally, and ideologically contingent. Judicial declarations of “democratic” principles in constitutional

159 J. Skelly Wright, Professor Bickel, the Scholarly Tradition, and the Supreme Court, 84 Harv. L. Rev. 769, 776–78 (1971).

160 The most provocative of the Burger Court’s “activist” decisions was Roe v. Wade, 410 U.S. 113 (1973), in which the Court majority transformed a line of constitutional “privacy” rights related to personal choices about intimate sexuality into a Fourteenth Amendment “liberty” to choose to terminate a fetus prior to birth. Justice Potter Stewart openly declared that Roe v. Wade represented a revival of heightened judicial scrutiny under the Due Process Clauses (“substantive due process”) where legislatures sought to regulate intimate personal choices. Id. at 167–71 (Stewart, J., concurring). Some countermajoritarian commentators went ballistic. See, e.g., John Hart Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920 (1973).


162 Black, supra note 157, at 428–30.
cases, however well-intentioned, ended up being the association of democratic values with the substantive preferences of judges. The behavioralist “difficulty” of countermajoritarian constitutionalism had returned with a vengeance.163

Ely offered a solution to the difficulty which allegedly took into account the necessity for judicial invalidation of majoritarian solutions that retarded democratic theory without giving the judiciary license to equate foundational democratic values with its own preferences. The solution was to posit a central principle of democratic constitutionalism that informed the meaning of “open-ended” constitutional terms, such as “due process” and “equal protection,” which the Constitution anticipated being interpreted by judges over time. Ely labeled this principle “representation-reinforcement.”164 He derived it from the Constitution’s concern with creating and maintaining a democratic society, and from its expectation that open-ended, potentially ambiguous constitutional provisions would be construed in accordance with this central concern.

Ely’s solution had an alluring logic to commentators who, while sympathetic to many of the decisions of the Warren Court on substantive grounds, remained convinced that there were endemic “difficulties” with judicial invalidation of majoritarian policies. The logic of Ely’s approach ran as follows. One began with two assumptions about constitutional interpretation in a democratic society. First, judicial review would invariably produce some substantive judicial glossing of the constitutional text, because efforts by judges to adhere to the literal meanings of constitutional provisions could not succeed where the provisions were relatively specific (the language of many of those provisions being ambiguous or obscure), and were not expected even to be attempted where the provisions were general.165 Second, Ely inverted the arguments of the Warren Court’s defenders: Yes, democratic constitutionalism required some judicial checks on “undemocratic” majoritarian policies, but all previous efforts to derive “fundamental” democratic values had failed to show how those values could be distinguished from substantive judicial preferences.166

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163 Ely, supra note 161, at 44–70.
164 See, e.g., id. at 181.
165 Id. at 11–41.
166 Id. at 44–72.
This led to Ely's conclusion. The only solution was to fashion a posture toward constitutional review that preserved a procedural set of democratic values, a set that could be seen to be embodied in both the specific and the open-ended provisions of the Constitution. Ely argued that once a set of procedural values associated with representation-reinforcement was acknowledged to be at the core of democratic constitutionalism, an appropriate review posture could be mapped out. It would consist of three elements: judicial policing of the process of representation, judicial clearing of the channels of political change, and judicial facilitation of the representation of minorities in legislatures. Judicial modification of those defective processes reinforced the principle of equal representation of the views of all citizens in government.

Ely believed that many Warren Court decisions reflected that review posture, although the Court had not described its work in those terms. He also identified an earlier Court decision in which his charter for judicial "representation-reinforcement" had been set forth. It was United States v. Carolene Products Co. where the Court, in a footnote, had described when it might be appropriate for judges to exercise heightened review of legislation, thereby departing from the "presumption of constitutionality" that needed to be afforded to majoritarian policies in a democratic constitutional order. Although the Carolene Products footnote had received a fair amount of academic attention as mid-twentieth-century consti-

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167 Id. at 87–88 (summarizing detailed arguments in support of this conclusion).
168 The details of these arguments are set forth in id. at 73–179.
169 Ely used three sets of Warren Court decisions to illustrate these judicial techniques. One set demonstrated the Court's "unprecedented activism in the fields of political expression and association." Id. at 74–75. He saw that development as a recognition by the Court of "the connection between such political activity and the proper functioning of the democratic process." A second set illustrated the Court's involvement in "the voter qualification and malapportionment areas," which he saw as "fueled ... by a desire ... to ensure that the political process ... was open to those of all viewpoints on something approaching an equal basis." The last set consisted of "decisions insisting on equal treatment for society's habitual unequals: notably racial minorities." The decisions, taken together, reflected the Warren Court's concern for the "participational" goals of broadened access to the processes and bounty of representative government, as opposed to the more ... academically popular insistence upon the provision of a series of particular substantive goods or values deemed fundamental." Id. at 74–75.
170 304 U.S. 144 (1938).
171 Carolene Prods., 304 U.S. at 152 n.4.
tutional commentary began to be framed by the countermajoritarian difficulty matrix.\textsuperscript{172} Ely's identification of the Warren Court with the footnote, and his claims about the footnote's essential thrust, helped increase interest in it to the point where one group of casebook editors in 1986 called it "the most doctrinally important footnote in the Court's history," and "the hinge on which much of modern constitutional argument turns."\textsuperscript{173}

Ely's reading of the \textit{Carolene Products} footnote and his association of leading Warren Court opinions with \textit{Carolene Products} jurisprudence formed the heart of his effort to reframe the countermajoritarian difficulty matrix in \textit{Democracy and Distrust}. He first argued, as noted, that the judicial methodology of what he called "interpretivism" (adherence to the literal meanings of constitutional provisions) was incomplete, given the number of open-ended provisions, and the methodology of discovering and applying fundamental values incoherent (such values, in whatever form, ultimately being indistinguishable from substantive judicial preferences).\textsuperscript{174} He then sought to show that the principle of "representation-reinforcement," although itself a cluster of values, was foundational to the Constitution, was supportive of "the American system of representative democracy," and was one that "courts set apart from the political process" were "uniquely situated" to implement.\textsuperscript{175}

Ely's attacks on the coherence of "fundamental values" placed some pressure on him to show why the "participational goals" that his principle of representation-reinforcement furthered were of a different order than substantive values. He made a valiant effort to surmount that pressure. His first tactic was to downplay the first paragraph of the \textit{Carolene Products} footnote, which spoke of reversing the presumption of constitutionality when legislation

\begin{footnotes}
\item[173] Walter F. Murphy et al., American Constitutional Interpretation 483, 493 & n.10 (1986) (providing examples of scholarship). In 1982, Justice Lewis F. Powell, Jr. characterized the footnote as "the most celebrated footnote in constitutional law." Lewis F. Powell, Jr., \textit{Carolene Products} Revisited, 82 Colum. L. Rev. 1087, 1087 (1982).
\item[174] For a pithy summary of that argument, see Ely, supra note 161, at 39–41.
\item[175] Id. at 75.
\end{footnotes}
“appears on its face to be within a specific prohibition of the Constitution.” That paragraph had given as examples “the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.” Ely called paragraph one of the footnote “pure interpretivism” and a poor fit with the other two, which he found “more interesting.” His model of democratic constitutional review would be based entirely on the second and third paragraphs of the Carolene Products footnote.

Ely’s decision to ignore paragraph one of the footnote and concentrate on paragraphs two and three was related to his general strategy of establishing “participational” review as driven by procedural rather than substantive values. That strategy was grounded on three arguments. The first was that the general themes of the Constitution’s design revealed that the document was “overwhelmingly concerned . . . with procedural fairness in the resolution of individual disputes . . . and . . . with ensuring broad participation in the processes and distributions of government.” The second argument was that “a representation-reinforcing approach to judicial review [is] . . . entirely supportive of, the underlying premises of the American system of representative democracy.” The third was that such an approach “involves tasks that courts, as experts on process and . . . as political outsiders, can sensibly claim to be better qualified and situated to perform than political officials.”

I will not belabor Ely’s development of those arguments, which led him to endorse heightened review for the Court in situations where it could serve as a referee ensuring that “the ins [were not] choking off the channels of political change to ensure that they will stay in and the outs will stay out,” or that “representatives beholden to an effective majority [were not] systematically disadvantaging some minority out of simple hostility or prejudice.” Ely’s approach primarily tracked that of paragraphs two and three of the Carolene Products footnote, which anticipated

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176 Carolene Prods., 304 U.S. at 152 n.4.
177 Id.
178 Ely, supra note 161, at 76.
179 Id. at 87.
180 Id. at 88.
181 Id.
182 Id. at 103.
heightened review for instances where "legislation... restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" and where "statutes directed at particular religious or national or racial minorities" raised the possibility of legislative "prejudice" against those minorities. 183

One modification Ely made to the *Carolene Products* approach was particularly revealing of his strategy. He reconceived heightened review for free speech cases, which paragraph one of the *Carolene Products* footnote had suggested was based on a facial conflict between legislation and textually protected constitutional rights, as resting on the principle of clearing the channels of political change. Heightened protection for freedom of expression, in Ely's model, was justified because broad definitions of the scope of that freedom facilitated the process of discussion and debate about majoritarian legislative policies, thereby making it more likely that those policies might be altered. This move allowed Ely to make sense of the Warren Court's increasingly speech-protective jurisprudence, but at the same time to suggest that the principal reason for judicial vigilance on behalf of speech rights was the close connection between speech and political participation in a democracy. Even protection for free speech, then, could be seen as a procedural value.

The significant attention paid to Ely's reformulation of countermajoritarian constitutional review suggests that it touched a deep nerve with commentators. 184 The influential status of Ely's model of democratic constitutional review might first seem surprising, given the apparent vulnerability of his approach. Consider two claims that Ely made in the process of introducing the *Carolene Products* footnote as his inspiration, and signaling that his focus would be on facilitating "participational" goals rather than deriving fundamental values. He first claimed that representation-reinforcement, rather than "old-fashioned value imposition," had

183 *Carolene Prods.*, 304 U.S. at 152 n.4 (citations omitted).
been the focus of the Warren Court. That claim would surely have been provocative to both of the principal lines of commentary that had surfaced between 1953 and 1969, the years of Chief Justice Earl Warren's tenure. One line of commentary had attacked the Court for making substantive value choices that exceeded the scope of their institutional competence; the other line had defended the Court for affirming "democratic" values in the face of majoritarian resistance. Ely was departing from both of those lines in claiming that the Warren Court had merely been facilitating the processes of democratic government, a function it was entirely competent to perform. Yet few of Ely's reviewers suggested that his description of the Warren Court was chimerical.

Ely's second claim followed from his first: that a mode of review directed toward facilitating the goal of representation-reinforcement was different from one designed to further substantive values, because "participation" was a procedural rather than a substantive value. He made a strikingly casual defense of that claim in Democracy and Distrust. It ran as follows:

Participation itself can obviously be regarded as a value, but that doesn't collapse [my approach and the approach of "old fashioned value-imposition"] into one. As I am using the terms, value imposition refers to the designation of certain goods (rights or whatever) as so important that they must be insulated from whatever inhibition the political process might impose, whereas a participational orientation denotes a form of review that concerns itself with how decisions effecting value choices and distributing the resultant costs and benefits are made . . . .

If the objection is not that I have not distinguished two concepts but rather that one might well "value" certain decision

155 Ely, supra note 161, at 74–75.
156 See, supra text accompanying notes 147–153.
157 See, supra text accompanying notes 157–158.
procedures for their own sake, of course it is right: one might...[M]y point would be that the "values" the Court should pursue are "participational values" of the sort I have mentioned, since those are the "values" (1) with which our Constitution has preeminently and most successfully concerned itself, (2) whose "imposition"... supports, the American system of representative democracy, and (3) that courts set apart from the political process are uniquely situated to "impose." 189

In the first part of Ely's defense, he simply asserted that a form of review that focused on legislative processes was different in kind from one that focused on values, without responding to the argument that in his model the Court perfected legislative processes when the legislature had offended certain substantive values, such as the value of making the legislative process as open and "un-prejudiced" as possible. In the second part of his defense, Ely conceded that one could treat his model as ranking "participational" values higher than other values, but declared that the Constitution had always made that ranking, and the ranking was consistent with American democracy. The first part of the defense was unresponsive to the charge that participation was itself a value, and the second part vulnerable to the demonstration that for more than a hundred years, republican-inspired American constitutionalism had encouraged legislative policies restricting participation. 190

In short, one might agree with Ely that representation-reinforcement should be the principal purpose of constitutional review in late twentieth-century American democratic society, but that position seems to rest on a series of substantive value choices and a purposive reading of the Constitution's design. The success of Democracy and Distrust thus appears to be the result of its particular cultural resonance to twentieth-century constitutional theorists who took the countermajoritarian difficulty matrix to con-

189 Ely, supra note 161, at 75.
190 In all the areas Ely's model singled out for heightened review—free speech cases, voting rights cases, and cases involving legislative discrimination against racial, religious, or national minorities—Congress and the states imposed restrictions on "participatory" activity, over a time frame stretching from the late eighteenth century to the early twentieth century, and the Court only occasionally found those restrictions unconstitutional. Alfred H. Kelly & Winfred A. Harbison, The American Constitution: Its Origins and Development 490–93, 664–69, 702–03, 794–95, 818–19, 829 (rev. ed. 1955); Murphy et al., supra note 173, at 615–23.
continue to set the terms of their discourse. To appreciate that reso-
nance, we need to turn to the distinctive attitude toward history exhibited by American democratic constitutionalism as it sup-
planted its republican predecessor.

E. Democratic Constitutionalism and the Marginalization of
Historical Inquiry

Certain sets of attitudes which had helped fuel the early twenti-
eth-century transformation from republican to democratic constitutional theory can also be seen as giving constitutional in-
quiry an ahistorical cast in the years of the countermajoritarian difficulty matrix’s dominance. One set can be captured in the
shared conviction of successive generations of twentieth-century constitutional scholars that modernity in America produced a cul-
tural experience radically unlike that of the past. Prior constitutional decisions and interpretations lay in a remote, qualitatively distinct segment of time. Modern American constitutional law was thought
to center on the distinctive issues and institutional arrangements of an increasingly secularized, industrialized, egalitarian democracy, and modern constitutional interpretation was thought to be a series of exercises in working through the countermajoritarian difficulty. The world of republican constitutional America had little to do with those themes.

But it was not merely this conviction that the altered character of modern America was generating a new constitutional order that inclined mid-twentieth-century constitutional scholars to conclude that history was largely irrelevant to their inquiries. It was also their belief that constitutional law was inevitably going to change with time, as purposive human actors observed and analyzed the conditions in which contemporary constitutional issues were raised and interpreted the Constitution to respond to those conditions. As Chief Justice Charles Evans Hughes put it for the Court in the 1933 case of Home Building & Loan Association v. Blaisdell: 290 U.S. 398 (1934).

The settlement and consequent contraction of the public do-
main, the pressure of a constantly increasing density of population, the interrelation . . . of our people and the complex-

290 U.S. 398 (1934).
ity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity. It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time.\footnote{Id. at 442.}

The behavioralist jurisprudential assumptions of early twentieth-century democratic constitutionalism further reinforced the conviction that history need not play much part in the process of fashioning a democratic constitutional order. If, as the modern behavioral sciences suggested, constitutional interpretation by judges was a version of policymaking by actors with political sensibilities, the meanings of constitutional language derived by Supreme Court justices in the past could be seen as reflections of the attitudes and values those justices held at the time. Those attitudes or values were treated as responses to qualitatively different experiences from those of modern Americans, hence there was no reason to think they were relevant to the disposition of contemporary constitutional issues. At the same time, there was every reason to think that the structural and behavioral themes of American democratic constitutionalism would play out in versions of the question Bickel had asked in *The Least Dangerous Branch*. Which values would qualify as sufficiently foundational to a democratic society to be vindicated by the Supreme Court against other values affirmed by majoritarian institutions? The countermajoritarian difficulty matrix provided the appropriate framework for pursuing Bickel’s question; conversely, prior approaches toward judicial review and prior frameworks for evaluating and commenting on the Court’s performance provided little guidance.\footnote{In an influential article, Alexander Aleinikoff has shown that the methodology of “balancing” in constitutional cases, in which judges weigh the strength of asserted governmental interests supporting legislation against the strength of the asserted constitutional rights the legislation is alleged to have infringed, originated in the twentieth century. T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 Yale L.J. 943 (1987). Although Aleinikoff recognizes the contrast between “balancing” and the methodology it replaced, which consisted of placing challenged legislation on one or another side of the boundary between the public welfare and inviolate private rights, he does not connect up the emergence of balancing to the transformation from republican-inspired to democratic-inspired}
Historical inquiry thus played only a limited role in constitutional discourse in the years in which that discourse was framed by the countermajoritarian difficulty matrix. From the first experiments with bifurcated review that signaled the arrival of democratic constitutionalism in the late 1930s and early 1940s, to the creation of techniques designed to assist countermajoritarian judges in their efforts to fashion an intellectual accountability that would make up for their lack of political accountability, to Ely's effort to reframe the countermajoritarian difficulty matrix to bypass Bickel's question and domesticate the Warren Court's "activism," twentieth-century American constitutional scholarship was relentlessly ahistorical. The remainder of this Section documents that proposition.

1. Early Modernist Commentators

One can observe in the first wave of democratic-inspired commentary that appeared in the 1940s and early 1950s an intuition among academics that the conditions of modern life had produced an altered American constitutional landscape with new implications for the role of judges as constitutional overseers of the actions of other governmental officials. This intuition led commentators to communicate an estrangement from constitutional opinions handed down in the recent past, and ultimately to suggest that they were products of an antiquated, now irrelevant, constitutional order.

Professor Thomas Reed Powell, after noting that the Supreme Court was "not democratically organized" and was the "least subject to democratic pressure" of all the branches of government, maintained that the Court's role as a check on other branches did "not make it a democratic agency except on the false assumption..."
that that government which governs least is the most democratic.\textsuperscript{194} That assumption, Powell thought, "was a frontier conception but...hardly suits the situation today."\textsuperscript{195} Professor Eugene Rostow similarly took democratic constitutionalism as established and emphasized the changes in the Court's posture that had accompanied it. He described the function of the Court as "articulat[ing] the public law of a free society, competent to fulfill its democratic dream in the turbulent second half of the twentieth century."\textsuperscript{196} When one reviewed "the leading constitutional cases of the twenties and the early thirties," Rostow claimed, they seemed "monstrous and fantastic...both in reasoning and result."\textsuperscript{197} The "Constitution of the Old Court," in Rostow's view, was "a remote historical curiosity.\textsuperscript{198}

Professor Louis Lusky had previously associated democratic constitutionalism with "a radical change" in the constitutional status of minority rights, which had ceased to be conceptualized only "in terms of their importance to the individual" and had become seen in terms of "their value to the community as a whole.\textsuperscript{199} The Court's identification of a "public interest in freedom of political activity, over and above the individual interest," Lusky suggested, was not only a recognition that government had a role to play in the promotion of individual "democratic" rights; it also reflected the Court's "full consciousness of its role as the maker rather than the mere interpreter of the organic law.\textsuperscript{200} Lusky's assessment of the Court's appropriate posture in cases raising constitutional claims by minorities was thus grounded on both the structural and behavioralist dimensions of democratic constitutionalism.

By 1947, Professor Hermann Pritchett was prepared to see the openly behavioralist posture Lusky had identified with a few civil
liberties cases as symptomatic of the Court’s posture as a whole. That posture was, at its core, behavioralist and modern. It was obvious to Pritchett that the Court was “a political institution performing a political function.”\(^\text{201}\) It was equally obvious that in the time interval between 1937 and 1947 the Court had “inherited a structure of American constitutionalism sadly in need of repair and remodeling.”\(^\text{202}\) Its predecessors “had failed to carry out the program of continuous adaptation required to fit an eighteenth century document to the facts of twentieth century industrialism and politics.”\(^\text{203}\) This meant that the transition from republican-inspired to democratic-inspired constitutionalism “on occasions seemed shockingly abrupt.”\(^\text{204}\)

The defining dilemmas of constitutional review in the 1940s for Pritchett and his contemporaries bore no resemblance to those that preoccupied earlier Courts. Instead of being centered along the boundary between private rights and the public welfare, they were centered in the tension between the Court’s undemocratic status and its ability to promote democratic values. Pritchett and his colleagues in the 1940s had difficulty reaching any consensus on how that tension should be reconciled, but they had no difficulty recognizing that the nature of constitutional review had fundamentally changed.

Pritchett believed that “[a] policy of judicial activism sponsored by a liberal court is no more consistent with the democratic process than a like conservative policy.”\(^\text{205}\) He thus concluded that modern Courts “must bear constantly in mind the necessity of judicial self-restraint.”\(^\text{206}\) In contrast, Professor Arthur Schlesinger, writing in 1947, argued that since “[t]he Court cannot escape politics, ... let it use its political power for wholesome social purposes.”\(^\text{207}\) “If any decision of the Court can reduce persecution, redress injustice, or promote the general welfare,” Schlesinger maintained, “why should a liberal majority tie its hands by a policy of self-denial?”\(^\text{208}\)

\(^\text{201}\) Pritchett, supra note 120, at xiii (quoting Konefsky).
\(^\text{202}\) Id. at 14.
\(^\text{203}\) Id.
\(^\text{204}\) Id.
\(^\text{205}\) Id. at 286.
\(^\text{206}\) Id.
\(^\text{207}\) Schlesinger, supra note 133, at 202.
\(^\text{208}\) Id.
Meanwhile Professor Henry Steele Commager, after having taken for granted that the Court of the early 1940s was operating in a modern democratic constitutional order quite unlike the republican order of its predecessors, concluded that aggressive judicial review in any form was incompatible with democratic theory. Not only did it place too much lawmaking power in the hands of a countermajoritarian institution, it also deterred legislators and the people they represented from devising their own democratic solutions to public issues.

In a 1952 book entitled Judicial Legislation, political scientist Fred Cahill presented a summary of the transition from republican to democratic constitutionalism and speculated on some of its implications. Cahill described the emergence of democratic-inspired models of judicial performance as the end result of an early twentieth-century confrontation between a largely "passive" theory of the judicial function, in which courts were thought to "merely discover and apply" the law, and "the demands of modern society," which had precipitated a "‘positive’ or ‘service’ state," and "dynamic" and "communal" conceptions of "life" in contemporary America. The new structural map of a modern industrial democracy had "imposed upon our judges delicate and important functions that interject the courts into the very heart of the governmental process." But the traditional definition of the judicial function "refus[ed] to accept the idea that the courts are in any way political bodies." The republican-inspired theory of the judicial function "presented the judge with a closed system made up of universal and permanent principles," but "the important questions for juristic analysis" in the 1940s centered on "the social impact of law and its efficacy as a device for the achievement of prescribed ends" identified by policymakers in a modern society.

Cahill's summary of the transition from republican to democratic constitutionalism pointed toward one inescapable conclusion

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200 Commager, supra note 90, at 72–78.
201 Id.
203 Id. at 6, 8.
204 Id. at 7.
205 Id. at 150–51.
drawn by all of the above commentators. They all believed that the central jurisprudential conceptions, doctrines, and models of republican constitutionalism could not be replicated in the modern democratic constitutional order. Whether one felt that democratic constitutionalism required bifurcated review, self-consciously "liberal" policymaking by an activist Court, or virtually complete deference on the part of the Court to majoritarian policymaking, it was clear that the new constitutional order could not coexist with republican-inspired guardian review. This meant, for Cahill and his contemporaries, that virtually the entire corpus of constitutional doctrine inherited by the Court in the late 1930s was outmoded and thus irrelevant to its central concerns. Constitutional history, as reflected not only in past judicial interpretations of constitutional provisions but in previously dominant models of constitutional review, could be expected to have little influence on modern constitutional law.

2. Bickel and Historical Inquiry

By the time Bickel's *Least Dangerous Branch* appeared, commentators had moved beyond Commager's, Schlesinger's, and Pritchett's intuitions about the proper review posture of a countermajoritarian Court in a democratic society and had begun to develop what they saw as more refined interpretive and institutional restraints on the Court's policymaking capacity. Some of those restraints, we have seen, emphasized the judicial articulation and application of transcendent, democratic constitutional "principles," which raised the question, as Bickel recognized, of where such principles originated. In addressing that question Bickel espoused an "organic" approach to constitutional interpretation, one in which general propositions of governance could be extracted from provisions in the Constitution's text and used to resolve modern constitutional issues, even ones the framers had not anticipated.215 Thus at first glance Bickel appeared to anticipate some attention to history in constitutional adjudication. But on closer examination, Bickel's approach did not anticipate that historical inquiry should be given great weight in constitutional analysis.

215 Bickel, supra note 154, at 105.
Bickel acknowledged that scholarship by historians had consistently demonstrated that particular provisions of the Constitution had been understood quite differently by their framers and moderns.\footnote{Id. at 100 (citing Leonard Williams Levy, The Legacy of Suppression: Freedom of Speech and Press in Early American History (1960)).} He concluded, however, that such dissonances in constitutional "meaning" should not prevent modern judges from grounding their constitutional interpretations on foundational democratic principles. This was because, although the Constitution was an historical document, its framers had only wanted to mark out the broad outlines of American constitutional government and intended to leave the details to their successors.\footnote{Id. at 102–03.}

In an extraordinary characterization of the framers and their relationship to moderns, Bickel elaborated upon this claim:

It is . . . quite apparent that to seek in historical materials relevant to the framing of the Constitution, or in the language of the Constitution itself, specific answers to specific present problems is to ask the wrong questions . . . . No answer is what the wrong question begets, for the excellent reason that the Constitution was not framed to be a catalogue of answers to such questions. And indeed, how could it have been, consistently with the intention to write a charter for the governance of generations to come—for a period, it was hoped, stretching far into the future? . . . These were strong, hopeful men, it must be remembered, living at a time of burgeoning intellectual inquiry, when the best of men remembered change and looked for it. They did not believe in a stable world. They were themselves the instruments of change . . . . they could not have believed that they were the last of their breed . . . . Structural matters aside, . . . what the Framers said "comes down to us more like chapter headings than anything else. They put it up to us, their successors, to write the text. And why not? We are better equipped and better able than they to deal with their future, which is our present. At that, we are older and more experienced than they. They died in a younger world."\footnote{Id. at 102–04 (quoting Charles P. Curtis).}

This passage combines an inaccurate description of the framers' sensibility—they did not think of themselves as "instruments of
change," but rather as actors in the grip of their own passions and
the cycles of nature and time—with an equally inaccurate recon-
struction of the framers' imagined relationship to their successors.
Far from simply establishing "chapter headings" in the Constitu-
tion, and leaving "the text" to future generations, the framers
sought to lay down some specific and some general propositions of
constitutional governance that they expected to endure as long as
the American republic endured. And far from thinking that their
successors were "better equipped and better able" than they to fill
in the details of American constitutional government, the framers
were apprehensive about the capacity of the experimental republic
they had created to survive and associated its survival with fre-
quent recurrence to the first principles of republican government
that were embodied in the constitutional provisions they had
drafted.219

But the most arresting feature of the passage, for present pur-
poses, is the implicit relationship it posits between actors in the
past and actors in the mid-twentieth-century present. Actors in the
present are "better equipped" and "better able" to deal with the
contemporary problems they face. They are "older" in the sense of
having experienced a modern world and being able to contrast it
with the "younger" worlds of the past. They are necessarily more
competent to resolve modern constitutional controversies, to
"write the text" in the chapters their predecessors left blank except
for headings. They have come to understand history as a continu-
ous progression of qualitative change. Consequently they have
come to realize that the past, in constitutional interpretation as in
other fields, offers no specific answers to specific contemporary
problems.

Bickel sounded these historicist themes throughout The Least
Dangerous Branch. "[H]istory cannot displace judgment," he main-
tained, for "the only abiding thing is change."220 The role of
history in constitutional analysis was reduced to demonstrating
"what one age finds worthy of note in another," either as an in-
structive contrast, dramatizing the segmentation of time into "past"

219 For evidence of the framers' premodern and prehistoricist attitudes toward
cultural change, see 3 & 4 White, supra note 15, at 973–75.
220 Bickel, supra note 154, at 108 (quoting Justice Louis Brandeis).
and "present," or as a source of "principles that we can adopt or adapt, or ideals and aspirations that speak with contemporary relevance."21 "Our task is to create a 'usable past,' for our own living purposes. We are guided in our search" for that "usable" past "by our own aspirations and evolving principles."22 Although "[w]e require to know, as accurately as may be, whence we come," it is only "to be aware that it is our own reasoned and revocable will, not some idealized ancestral compulsion, that moves us forward."23

As Bickel and the line of counternajoritarian difficulty-inspired scholarship his work drew upon24 clashed throughout the 1960s with the commentators who defended the Warren Court on the grounds that the substantive values it promoted were innately worthy and in keeping with the aspirations of a democratic polity,25 the place of history in constitutional interpretation continued to be treated by both sides in the dialogue as extremely attenuated. When Ely set out to reframe the counternajoritarian difficulty matrix in Democracy and Distrust, he retained the assumption of Bickel and his critics that history had little to contribute to modern constitutional analysis.

3. Ely and Historical Inquiry

Ely had begun Democracy and Distrust by claiming that constitutional theory in the 1970s centered on a dichotomy that he asserted to be "false," and sought to surmount.26 If one took for granted "the underlying democratic assumptions" of American constitutionalism, Ely maintained, both of the leading approaches to constitutional review that created the dichotomy were inconsistent with those assumptions.27 One of the approaches was for courts to exercise their review power "by second-guessing the legis-

21 Id. at 109-10 (quoting Burckhardt).
22 Id. at 109 (quoting Mr. Muller).
23 Id. at 110.
24 In The Least Dangerous Branch, Bickel cited Wechsler, supra note 148, Hart, supra note 147, Jaffe, supra note 144, and Bickel & Wellington, supra note 145. Bickel, supra note 154, at 275 n.13, 276 n.11, 279 n.27, 283 n.93.
25 The Black, Pollak, and Mueller & Schwartz articles, supra notes 157 & 158, were explicitly directed at the line of commentary that culminated in Wechsler, supra note 148.
26 Ely, supra note 161, at vii.
27 Id.
lature’s value choices.” That approach failed because of the countermajoritarian status of the judiciary. The other approach was for courts to “stick close to the thoughts of those who wrote our Constitution’s critical phrases and outlaw only those practices they thought they were outlawing.” That approach also failed. Not only were the “thoughts” of the framers elusive, sometimes to the point of unintelligibility, but some constitutional provisions, such as the Due Process Clause, the Privileges and Immunities Clause, and the Ninth Amendment, were so open-ended as to amount to general invitations for subsequent generations to fill in their details in particular cases. Thus the “intent” of the framers, and the determinate “meaning” of critical phrases in the Constitution, were largely unrecoverable to moderns.

But that was not the only difficulty with employing what Ely called “clause-bound interpretivism” as a methodology for judges exercising constitutional review. Judicial recourse to the “thoughts of those who wrote our Constitution’s critical phrases” as a check on the substantive value choices of legislatures was also undemocratic. It employed “the beliefs of people who have been dead for over a century” as the touchstone for whether contemporary majoritarian policies passed constitutional muster. This amounted to designating the beliefs of a particular generation of historical actors as constitutionally fundamental, even if those beliefs were no longer shared by most contemporary Americans and even though the Constitution had been designed to endure over time. It was one thing to insist that specific constitutional provisions restraining majorities, such as the provision preventing the American people from electing a president under the age of thirty-five, be enforced by the judiciary. The continued presence of such provisions in the Constitution could be read as demonstrating that the people, who held the power to amend that document, still believed in them. It was quite another to claim that all the provisions of the Constitution should be given the meaning ascribed to them by specially

228 Id.
229 Id.
230 Id.
231 Id.
232 U.S. Const. art. II., § 1, cl. 5.
favored generations of framers, especially when that meaning proved impossible to recover.

Ely concluded, at one point, that Bickel’s “hardest question” of modern constitutional theory—“which values . . . qualify as sufficiently important or fundamental . . . to be vindicated by the Court against other values affirmed by legislative acts”—was “the wrong question” because of the impossibility of distinguishing such values from the substantive preferences of Court majorities. But that did not mean that he believed, any more than Bickel, that judges could be restrained by history, or even that historical inquiry should play a significant role in late twentieth-century constitutional analysis. In fact, when Ely discussed historical inquiry in connection with his demonstration of “the impossibility of a clause-bound interpretivism” as a meaningful constraint on judges, he summed up his position by quoting Bickel: “[T]o seek in historical materials relevant to the framing of the Constitution . . . specific answers to specific present problems is to ask the wrong questions. With adequate scholarship, the answer that must emerge in the vast majority of cases in no answer.” Ely believed that the periodic tension in a democratic constitutional order between majoritarian policies and democratic values could be addressed without resorting to “clause bound interpretivism” or the judicial discovery of fundamental values. But his solution, the judicial purification of legislative processes to further goals associated with the principle of “representation-reinforcement,” pointed away from history and toward a future in which a greater concordance between the doctrinal content of American constitutional law and “the underlying democratic assumptions of our system” would be achieved. Historical inquiry was as marginal to Ely’s enterprise as it had been to all the preceding twentieth-century commentators who operated within the countermajoritarian difficulty matrix.

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234 Id. at 27.
235 Id. at 11, 43.
IV. THE COLLAPSE OF THE COUNTERMAJORITARIAN DIFFICULTY MATRIX AND THE REENTRY OF HISTORY IN LATE TWENTIETH-CENTURY CONSTITUTIONAL SCHOLARSHIP

This Part seeks to connect up each of the intellectual trends described in Parts I, II, and III to the arrival of historical inquiry as a central concern of contemporary American constitutional scholarship. Because a large number of scholarly contributions are discussed in this Part, and the time frame of the discussion progressively approaches the present, a brief summary of the relationship of this Part to the Article's general arguments seems in order.

In the preceding portions of the Article, I argue that historical scholarship and legal scholarship in the late nineteenth- and twentieth-century American academy paralleled one another in their tacit assumptions about the nature of scholarly inquiry, especially as that inquiry has involved the importance of history as a source of contemporary scholarly insights. I further argue that the late nineteenth- and early twentieth-century epistemological transformations associated with the onset of modernity in America profoundly altered the role of historical data in the social science disciplines—including history—and in legal scholarship. Those epistemological transformations had the effect of marginalizing historical inquiry in legal scholarship, and in all the social sciences except history. They also altered the approved professional stance of historians, who came to see themselves as the equivalent of objective, “scientific” recorders of the past rather than discerners and appliers of the universal principles embedded in historical data.

Finally, I argue that the marginalization of historical inquiry took a distinctive form in, and had a particularly powerful effect upon, early and mid-twentieth-century American constitutional scholarship. The distinctive form in which historical inquiry was marginalized by constitutionalists in that period was the counter-majoritarian difficulty matrix, and the power and enduring quality of that matrix came from the way in which it complemented, and articulated, the early twentieth-century transformation from a premodern, republican constitutional order to a modern, democratic one.

The above arguments are designed to produce a different reading of the contributions of twentieth-century American constitutional scholars from the “early modernists” of the 1930s.
through Bickel, the 1950s scholars to whom he was indebted, and Ely. That reading seeks to historicize those groups of scholars, and to explain why, despite the Constitution's eighteenth-century origins, historical inquiry played so marginal a role in their work.

Now the narrative turns to a time frame in which historical inquiry began to play a more central role in constitutional scholarship, and, simultaneously, the canon of scholarly objectivity that had been entrenched in the American historical profession began to lose its power. As the details of those developments are set forth, readers may have difficulty seeing the forest through the trees. Bearing in mind the overarching perspective in which details are being situated may provide some help. The perspective invites readers to associate the re-emergence of history in contemporary constitutional scholarship with the weakening of modernist epistemological assumptions—particularly the assumption about the historicist progression of time—that helped fuel the earlier marginalization of history in American constitutional jurisprudence.

A. Estrangement from the Countermajoritarian Paradigm: Four Groups of Scholars

With the publication of *Democracy and Distrust*, a new version of countermajoritarian-inspired constitutional theory was offered to the legal academy. Ely's ingenious effort to reconcile the undemocratic institutional status of the Court with its ultrademocratic mission attracted a great deal of attention. But, in retrospect, *Democracy and Distrust* can be seen as the last influential version of twentieth-century constitutional scholarship constructed within the framework of the countermajoritarian difficulty matrix. Almost simultaneously with the appearance of *Democracy and Distrust* appeared work that started from the premise that the matrix had exhausted itself as a paradigm for asking fruitful questions about American constitutionalism in the late twentieth century.

1. Warren Court Liberals

Evidence of the decline of the matrix's influence can be found in the work of four quite different groups of commentators in the 1970s and 1980s. The first group was composed of scholars whose political consciousness marked them as "Warren Court liberals."
They were sympathetic to the outcomes reached by the Warren Court in its leading cases, which Ely claimed could be justified by his theory of "representation-reinforcement." Ely's and their mutual affinity for the Warren Court, however, did not convince some members of this group of scholars that Ely's concepts of process and participation sufficiently constrained value choices in constitutional adjudication. Ely's approach, they felt, ignored the reality that constitutional law was at bottom about substantive value choices. His "representation-reinforcement" model either attempted to conceal those choices or undermined the moral force of the Supreme Court, whose central task was to remind Americans of the foundational values upon which their society rested.


237 Tribe, supra note 184, at 1072-77. Tushnet, supra note 188, at 1051, made a similar criticism, but I would not describe Professor Tushnet, at any point in his career, as a "Warren Court liberal."


Most recent accounts of late twentieth-century American jurisprudence treat Dworkin's work in the 1970s and 1980s as "highlight[ing] the intellectual overlap between the liberal philosophical tradition," embodied by such works as John Rawls's A Theory of Justice (1971), and "the process tradition," embodied by Hart and Sacks, The Legal Process, supra note 149. Neil Duxbury, Patterns of American Jurisprudence 297 (1995); see also Cass R. Sunstein, Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy), 92 Colum. L. Rev. 1, 48-52 (1992). None see Dworkin as participating in the historical turn. Kalman quotes Dworkin as saying of himself and others interested in grounding constitutional doctrine in moral philosophy, "We're not concerned with the historical question . . . We're not concerned about how principles are in fact chosen. We're concerned about which principles are just." Kalman, supra note 1, at 139 (citing Gary C. Leedes, The Supreme Court Mess, 57 Tex. L. Rev. 1361, 1385 (1979), quoting Three Concepts of Liberalism: A Conversation with Ronald Dworkin, The New Republic, Apr. 14, 1979, at 44).

I agree with this general characterization of Dworkin's work. Although Dworkin's perspective on constitutional issues in the 1970s clearly identified him as a "Warren Court liberal," his interdisciplinary orientation was toward philosophy rather than history. Thus despite Dworkin's influential participation in debates on constitutional law topics in the period in which the dominance of the countermajoritarian difficulty
Meanwhile, as Ely was developing the approach that he would flesh out in *Democracy and Distrust*, other Warren Court liberals, also critical of his approach, began to revive the role of history in constitutional analysis. The most visible examples were Professors Thomas Grey and Paul Brest.

A 1976 article by Grey sought to identify two competing approaches to constitutional interpretation. Although Grey’s article started within the parameters of the countermajoritarian matrix, his description of the two approaches made it clear that he found the matrix an inadequate framework for addressing “perhaps the most fundamental question we can ask about our fundamental law.” That question was whether, in undertaking constitutional review of legislation, judges needed to confine themselves “to determining whether . . . laws conflict with norms derived from the written Constitution,” or whether “they [may] also enforce principles of liberty and justice [whose normative content is] not to be found within the four corners of our founding document.” Grey described his question as raising the validity of an “interpretive” or a “noninterpretive” approach toward constitutional interpretation. “Interpretivism,” as Grey defined it, was “deeply rooted in our history,” and had as its “chief virtue” the ability to support “judicial review while answering the charge that the practice is undemocratic.” Under a “pure interpretive model” of constitutional interpretation, Grey claimed, “[t]he people have chosen the principle . . . and have written it down in the text of the Constitution”; judges merely applied the people’s commands. In sum, Grey felt that interpretivism drew much of its power from its responsiveness to the premises of counterinajoritarian theory.

matrix began to recede, I have not focused upon his scholarly contributions in this Article.


240 Thomas C. Grey, Do We Have an Unwritten Constitution?, 27 Stan. L. Rev. 703 (1975). Friedman, Part Five, supra note 13, at 114–24, has a quite different analysis of late twentieth-century “liberal” constitutional commentaries and considers a wide range of scholarship.

241 Grey, supra note 240, at 703.

242 Id.

243 Id. at 703, 706.

244 Id. at 705.

245 Id.
By devoting the bulk of his article to describing and justifying what he called "noninterpretive judicial review," Grey signaled his sense that the countermajoritarian difficulty matrix was an inadequate framework for addressing constitutional issues. Although he intended his case for noninterpretive review to have distinct contemporary implications (he described 1970s constitutional "liberals" as persons who would "be dismayed by the prospect of any major diminution in the courts' authority to protect basic human rights"), the ground on which he made the defense of noninterpretive review was historical. He ranged over Supreme Court cases from the eighteenth century through Brown v. Board of Education and beyond to reach the following conclusion:

[T]here was an original understanding, both implicit and textually expressed, that unwritten higher law principles had constitutional status. From the very beginning, and continuously until the Civil War, the courts acted on that understanding and defined and enforced such principles as part of their function of judicial review. Aware of that history, the framers of the 14th amendment reconfirmed the original understanding through the "majestic generalities" of section 1. And ever since, again without significant break, the courts have openly proclaimed and enforced unwritten constitutional principles.

Grey conceded that the history he produced in Do We Have an Unwritten Constitution? was "a brief sketch," but he promised to supply "lengthy and detailed historical documentation" of noninterpretivism as "a lawful and legitimate feature of our system of judicial review." His strategy was designed to direct the attention

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246 Id. at 706.
247 Id. at 713–14.
248 Id. at 717.
249 Id. at 715. He subsequently made an effort to supply that documentation for the framing period. See Thomas C. Grey, Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought, 30 Stan. L. Rev. 843 (1978). His claims about the ubiquity of noninterpretivism in American constitutional jurisprudence in Do We Have an Unwritten Constitution? had been much broader, as the excerpt quoted above indicates. But at a minimum, Grey had demonstrated the existence of unwritten "general" or "higher" law as an important source drawn upon by judges in their interpretations of constitutional provisions in the founding period. For a similar analysis of the Marshall Court period, see 3 & 4 White, supra note 15, at 112–37.
of constitutionalists, in considering "fundamental questions" about the American constitutional order, away from the "[a]rguments about institutional competence and the general propensities of judges," central inquiries for the countermajoritarian difficulty matrix, toward history as a source of legitimacy.\(^{250}\) He made that strategy apparent in the conclusion of his essay:

[T]here remains the question whether in our Constitution we have actually granted [the] large power [of noninterpretive review] to our judges.... In resolving this issue of legal authority, there seems to me only one plausible method of inquiry. We must apply the conventional and accepted categories of legal argument—original understanding, judicial precedent, subsequent history, and internal consistency—and see if they support judicial review that goes beyond interpretation.\(^{251}\)

None of the "categories of legal argument" in Grey's "one plausible method of inquiry" for evaluating the legitimacy of noninterpretive review were the institutional and behavioralist categories of the countermajoritarian difficulty matrix. All of his categories, except the last, were historical.

Grey was thus the first of the post-Warren Court liberal constitutional scholars to make a decisive methodological turn away from countermajoritarianism to history. His Stanford colleague Paul Brest was to join him, less fully, in that turn. Brest's significance for this Article, however, is not only as an example of a scholar inspired by the Warren Court who considered turning toward historical inquiry in the early 1980s.\(^{252}\) He also represents a link between Grey and another group of scholars who became estranged from the countermajoritarian difficulty matrix at approximately the same time.

In 1980, Brest wrote *The Misconceived Quest For the Original Understanding.*\(^{253}\) He began the article by defining "originalism" as

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\(^{250}\) Grey, supra note 240, at 714.

\(^{251}\) Id. at 715.

\(^{252}\) Brest's work in the 1980s remained largely centered on current constitutional issues, and it had not been primarily historical in its orientation. See, e.g., Paul Brest, The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship, 90 Yale L.J. 1063 (1981).

\(^{253}\) Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. Rev. 204 (1980).
“the familiar approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters.” In a footnote to that definition he elaborated:

John Ely uses the term "interpretivism" to describe essentially the same concept [here Brest cited the opening pages of Democracy and Distrust]. At the cost of proliferating neologisms I have decided to stick with "originalism" . . . . I use the term "originalism" to describe the interpretation of text and original history as distinguished, for example, from the interpretation of precedents and social values.

In those sentences Brest, perhaps unwittingly, reinforced the proposition that any variety of historically-oriented constitutional scholarship, whether of the sort that Grey had undertaken or the "originalist" work he was characterizing, represented a departure from the governing assumptions of countermajoritarian constitutional jurisprudence. Understanding this dimension of Brest's article requires some further particularization.

Brest wrote The Misconceived Quest for the Original Understanding in the wake of Grey's two articles on "unwritten" constitutional law and Democracy and Distrust. In the latter work, Ely specifically rejected "interpretivism," a term he borrowed from Grey, and which Brest now virtually equated with "originalism." Thus each of the three scholars could be said, by 1980, to have agreed with one another that constitutional interpretation could not be confined to "the interpretation of text and original history." Each was an "anti-originalist" in Brest's sense of that term. But they were quite different varieties of anti-originalists.

Ely's alternative interpretive strategy to "interpretivism," we have seen, was "representation-reinforcement," an attempted perfection of countermajoritarian-inspired constitutional jurisprudence. It was also largely ahistorical in its methodological emphasis. Grey's strategy for constitutional interpretation was, in contrast,
historically-oriented. Brest encapsulated Grey’s approach in distinguishing constitutional originalism from “the interpretations of precedents and social values,” the precise sources, in a historical context, upon which Grey’s two 1970s articles centered. In Brest’s terms, Grey’s work was historically-centered but anti-originalist; Ely’s was anti-originalist but not historically-centered.

Brest’s own emphasis, in his critique of originalism, was historically-centered in terms of its sources, but its normative thrust was to describe history as an “interpretive social science,” whose practitioners needed to understand “the indeterminate and contingent nature of the historical understanding.”260 The partial ability of contemporary interpreters to recover historical data, Brest believed, should lead to the conclusion that “[i]t seems peculiar, to say the least, that the legitimacy of a current doctrine should turn on the historian’s judgment that it seems ‘more likely than not’... that the adopters intended it some one or two centuries ago.”261 Brest could thus hardly be called a proponent of the view that historical research was likely to provide definitive answers to current constitutional questions.262

Nonetheless, Brest’s article, by equating “interpretivism” with “originalism” and critiquing originalism on the naiveté of its assumptions about history and historical interpretation, was an effort to shift debates in constitutional scholarship from countermajoritarian issues to issues centered in historical inquiry. Although Brest was not suggesting that history should be controlling in constitutional interpretation, he was suggesting that the principal locus of controversy in 1980s constitutional jurisprudence would be on the intelligibility and legitimacy of historical constitutional sources. Grey had suggested the same thing. Neither had indicated that current institutional arrangements and behavioral theories about judges were central to that debate.

260 Id. at 222.
261 Id.
262 Grey could be said to have endorsed that view, since his historical analysis had direct application to justifications in contemporary constitutional opinions that invoked extratextual principles such as “vested rights” or “privacy.” Grey could have been read as saying that historical evidence demonstrating the founders’ assumption that sources beyond the written text were constitutionally legitimate provided a pedigree for such justifications.
Shortly after writing *The Misconceived Quest for the Original Understanding*, Brest took a more overt step away from the countermajoritarian difficulty matrix. In a 1981 article, Brest declared that the matrix had lost its utility because "the controversy over the legitimacy of judicial review in a democratic polity," the contested question at the very center of the matrix, was "essentially incoherent and unresolvable." This was because, in Brest's view, the controversy was a product of the inability of what he called "modern liberal ideology" to resolve "[t]he Madisonian tension—between majority and minority, legislature and court." That tension could not be resolved because it was endemic of a deeper tension between the individual and the social order, the public and private spheres of existence, and, ultimately, "between self and other, between self and self." The countermajoritarian difficulty matrix had been erected to address and to try to answer unanswerable questions. "To continue the controversy over judicial review and democracy in the terms in which it has been framed," Brest maintained, was to deny the existence of this deeper tension within a liberal theory of democracy, and "thus to limit both our vision and the possibilities for social change."

For those who agreed with him that the countermajoritarian difficulty matrix was no longer useful or even coherent, Brest briefly mentioned "alternative strategies." One was to "turn to history and

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263 Brest, supra note 252, at 1063. A segue from Brest's *The Misconceived Quest for the Original Understanding*, supra note 253, to his 1981 Yale article was his review essay on *Democracy and Distrust*, which appeared earlier that year in a symposium in the Ohio State Law Journal. Brest, supra note 184. In that essay, which focused on what Brest took to be the effort of Ely to "establish a value-free mode of constitutional adjudication," Brest concluded that "it can't be done" because of the inescapable connections between whatever "process" in which constitutional actors participated and the substantive values undergirding that process. Id. at 131, 142. Although Brest did not explicitly describe *Democracy and Distrust* as taking for granted the integrity of the countermajoritarian difficulty framework for addressing constitutional issues, he did identify Ely with "a tradition of scholarly attempts to establish modes of judicial review" that derived an understanding of the role of the Supreme Court from "the incompetence of courts to discover fundamental values and measure legislative policies against them," and from "a theory of representative democracy." Id. at 131.

264 Brest, supra note 184, at 1065.

265 Id. at 1108.

266 Id.

267 Id. at 1108-09.
a broader sort of legal theory to understand where we are and how we got here. Brest cited two works that sought to historicize twentieth-century American legal and social science scholarship as illustrations of what he meant by a historical turn. The subject matter of the works extended from the 1920s to the 1970s, but both works revealed a common perception on the part of their authors that their experience in coming to maturity during the 1960s had resulted in their having a distinctive generational consciousness that separated them even from their immediate scholarly predecessors. Thus Brest's conception of a turn toward historical scholarship by constitutionalists was inextricably connected to "a broader sort

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265 Id. at 1109.
266 Id. at 1109 n.245. The citations were to Edward A. Purcell Jr., The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value (1973) and Mark Tushnet, Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies, 57 Tex. L. Rev. 1307 (1979). Both of those works produced intellectual histories of early and mid-century scholarship organized around "fundamental contradictions" in the ideology of modern American liberal democratic theory. Compare Purcell's version, supra, at 267–72, with Tushnet's, supra, at 1309–16.
267 See Purcell, supra note 269, at ix, xi ("[T]his book ... grew out of a commitment to what in the early sixties was called the Civil Rights Movement.... [T]he mid-sixties appear from the present vantage point to have ushered in a new set of conditions and a new cluster of ideas that distinguish the present period from the era that extends back [from the mid-sixties] to the mid-thirties.").
Tushnet conveyed his sense of detachment from his immediate constitutionalist predecessors in more theoretical terms:

The typical constitutional law article [of the 1970s] has a standard form. The author identifies a doctrine developed in recent Supreme Court cases, notes some difficulties in the internal logic of the doctrine, indicates that the doctrine seems incompatible with the results of other cases, suggests minor modifications in the doctrine to make it consistent with those cases, and concludes that the doctrine as modified... provides a sensible way of achieving results without going too far.... But the standard form and its variants all end in the same place: Supreme Court decisions ordinarily are, and in any event can easily become, embodiments of the principles of justice, defined as the standard political principles of the moderate-left of the Democratic Party....

When the Supreme Court's decisions were generally in accord with liberal principles, the standard form posed no difficulties.... Since 1970, however, the Court's decisions have been in tension with liberal principles.... Under these circumstances, the standard form article seems increasingly removed from reality. We no longer have reason to think that there is a necessary connection between Supreme Court decisions and principles of justice, and yet legal academics continue to churn out articles that assume such a connection.

Tushnet, supra note 269, at 1322–23.
of legal theory” than that animating countermajoritarian work, a conception that lead him to abandon the countermajoritarian difficulty matrix.

Brest’s version of a historical turn was also connected to ideology. As he put it, “the truly courageous” among those alienated from the countermajoritarian difficulty matrix “might go the next step and, grasping what we understand of our own situation, work toward a genuine reconstitution of society.” Brest meant this “next step” to be understood by his contemporary constitutional scholars as the defining normative goal of his future work. He meant to distance himself not only from countermajoritarian scholarship but from the “liberal” world view that he believed animated it. In taking this step he severed his connection with Warren Court liberals and aligned himself with another group of critics of the countermajoritarians.

2. Critical Scholars

Brest’s disassociation of his normative views from those he identified with twentieth-century “liberal” ideology signaled the emergence, in the early 1980s, of a major split between critics of Democracy and Distrust. The source of the split was different starting assumptions about the role of institutions holding power in a democratic society. Ely and some of his Warren Court liberal critics retained a relatively sanguine view of the democratic character of legislatures, despite their imperfections. Brest and other critics were more skeptical about the compatibility of any form of power-holding with democratic ideals. They were more inclined to think of democratic rhetoric as in the service of the self-interested agendas of legislators or lobbyists. In short, their estrangement from countermajoritarian constitutional jurisprudence was sharper, and deeper, than Ely’s Warren Court liberal critics.

Scholars who shared the views Brest expressed in 1981 had begun to identify themselves, as early as the late 1970s, as members of a “critical legal studies” movement. But the connection of Critical scholars to the historical turn in constitutional scholarship would take some time to evolve.

271 Brest, supra note 252, at 1109.
272 Id.
The critical legal studies movement came into being, as an identifiable body, in 1977.273 Initially, critical legal studies scholars did not focus on countermajoritarian scholarship: indeed few of them directed their attention toward constitutional law.274 But the emergence of the critical legal studies movement in the late twentieth-century legal academy can nonetheless be seen as additional evidence of the connection between estrangement from the countermajoritarian difficulty matrix and the application of historical inquiry to legal scholarship.

Although the political agendas of Critical scholars sometimes overlapped with Warren Court liberals on specific issues, Brest's 1981 disassociation of himself from "liberal" constitutional ideology signaled that most of the critical legal studies movement's fire was directed at those identified with legal "liberalism," a term Critical scholars used as a catchall for a variety of dominant traditional scholarly postures in the legal academy in the 1960s and 1970s. The most specific criticism of traditional "liberal" scholarship advanced by Critical scholars was its unreflective attitude toward the tendency of established doctrinal frameworks, in all

273 The critical legal studies movement's "official" founding is typically traced to a conference held in Madison, Wisconsin in the spring of 1977. See John Henry Schlegel, Notes Towards an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies, 36 Stan. L. Rev. 391,394-96 (1984). The official designation of the movement was the Conference on Critical Legal Studies, which was initially by invitation only. For an excellent summary of the origins and emergence of the critical legal studies movement, see Duxbury, supra note 238, at 435-74 (1995).

274 Tushnet, one of the organizers of the 1977 critical legal studies conference, was an exception. In addition to his 1979 Texas Law Review article, Tushnet wrote a critique of Ely in 1980. See Tushnet, supra note 188. In the late 1970s and 1980s, Tushnet wrote a number of articles reflecting what might be called a Critical perspective on constitutional interpretation, many of which appeared in part in Mark Tushnet, Red, White, and Blue: A Critical Analysis of Constitutional Law (1988). Although those articles repeatedly examined historical sources, Tushnet's historical inquiries took place within the "fundamental contradictions" critique of twentieth-century liberal ideology anticipated by Purcell, supra note 269, and advanced by Duncan Kennedy. Duncan Kennedy, Toward a Historical Understanding of Legal Consciousness, 3 Res. L. & Soc. 3-24 (1980); Duncan Kennedy, The Structure of Blackstone's Commentaries, 28 Buff. L. Rev. 205 (1979); Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685 (1976).

In the same time period, Tushnet produced some historical work animated by the same critique but more directly engaged in the analysis of historical topics. See, e.g., Mark V. Tushnet, The NAACP's Legal Strategy against Segregated Education, 1925-1950 (1987); Mark V. Tushnet, The American Law of Slavery, 1810-1860 (1981).
fields of law, to recognize the fundamental contradictions in modern liberal ideology, and by doing so to support the status quo while obfuscating the reasons for doing so. By responding to traditional doctrinal formulations in this unreflective way, Critical scholars claimed, their liberal counterparts were preventing a full-scale exposure of the indeterminacy of doctrine and the necessarily contingent and provisional status of established doctrinal propositions.275

One of the strategies employed by Critical scholars to attack the integrity of doctrine involved the use of methodologies identified with intellectual history. Some of the most influential early work produced by members of the critical legal studies movement applied the techniques of “structuralist” intellectual historians—scholars concerned with unpacking language to reveal the “deep structures” of thought that it signified—to legal works written by historical actors. In the hands of Critical scholars, structuralist intellectual history took on a polemical edge. By recovering the “deep structures” of once-dominant works of legal scholarship, Critical scholars attempted to demonstrate that the “influence” of such works pivoted on the resonance of their starting cultural and intellectual assumptions.276 Although structuralist techniques could readily be applied to history because the starting assumptions of actors in the past had lost their resonance and were more immediately apparent, the methodology also served to expose the contingency of the assumptions driving respected works in the present. Historical inquiry, as practiced by late twentieth-century


276 The paradigmatic example was Duncan Kennedy, The Structure of Blackstone’s Commentaries, supra note 274. In that article, Kennedy was only secondarily interested in recovering the unarticulated social attitudes and values that informed Blackstone’s treatise. His primary purpose was to show that Blackstone’s entire work, despite its great influence, was composed of a series of provisional and contingent resolutions of deeply contradictory social conflicts, which were just as capable of being resolved in a different fashion. The point was to show that the “integrity” of legal principles rested on tacit intellectual premises, shared by particular generations, which lent a false permanency or universality to those principles.
Critical scholars, was thus a self-conscious weapon of political critique.\footnote{One can see this use of historical inquiry in Kennedy’s unpublished 1975 manuscript, *The Rise and Fall of Classical Legal Thought* (1975) (unpublished manuscript, on file with the Virginia Law Review Association), which traced American jurisprudence from the late nineteenth century through the early 1960s. Although that manuscript appeared to be an exercise in descriptive and conceptual intellectual history on the surface, one of its central aims was to draw connections between twentieth-century process theory, the dominant perspective on public law at the time Kennedy entered the legal academy, and older versions of “classical” thought, such as the “formalist” jurisprudence that prevailed in the late nineteenth and early twentieth centuries. By suggesting that process theory was a kind of “formalism,” Kennedy was not only seeking to historicize it, but to discredit it. “Formalism,” for most legal academics in the 1970s, had the overtones of a mechanical “jurisprudence of concepts,” at once divorced from reality and reactionary in its implications. By identifying process theory as a species of formalism, Kennedy was claiming that its disciples were advocates of the status quo. But the technique he employed to reach these polemical conclusions was historical analysis.}

Although a comparatively small percentage of the work generated by critical legal studies scholars was directly concerned with historical topics,\footnote{One could argue, however, that the historically directed work produced by Critical scholars was among its most influential. To cite just two examples, Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (1977), was awarded the Bancroft Prize in American history, and Kennedy’s *The Rise and Fall of Classical Legal Thought*, supra note 277, was arguably the most widely circulated and cited unpublished manuscript in twentieth-century American legal scholarship since Hart & Sacks, supra note 149.} the *impulse to historicize* emerged as a regular feature of Critical scholarship. Often Critical scholars historicized work as part of a general critique of that work. By demonstrating the time-bound character of the work’s starting assumptions, they were not only seeking to distance themselves from it, but to undermine its legitimacy. By the 1990s, this technique had become absorbed into other sectors of legal scholarship, and process theory had been associated with a particular moment in the twentieth-century history of American legal education.\footnote{See Duxbury, supra note 238, at 205–99. For two efforts in the early 1970s to historicize “process theory,” reflecting, at the time of their writing, “Warren Court Liberal” perspectives, see G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 Va. L. Rev. 279 (1973), and Bruce A. Ackerman, *Law and the Modern Mind* by Jerome Frank, 103 Daedalus 119 (1974) (book review) (coining the term “Legal Process School” in an effort to place Jerome Frank’s *Law and the Modern Mind* in historical perspective).} The first step in the declining influence of the countermajoritarian matrix was its historicization by scholars who felt a generational distance from its
central assumptions, and the methodologies of the critical legal studies movement helped legal scholars refine their efforts at historicizing.

The impulse to historicize that surfaced among late twentieth-century Critical scholars suggested that they assumed that historical inquiry could play a significant, if indirect, role in clarifying contemporary legal issues. Critical scholars' identification of the importance of archaic attitudes and values in shaping the influence of past legal works did not mean that they were suggesting that those attitudes and values needed to be taken seriously by present actors. But they were suggesting, as Brest had, that historical work could dramatize the contingency of attitudes and values once taken for granted, and thereby prepare the way for transformative departures from the current legal status quo.

In the same year that Brest distanced himself from "modern liberal ideology," Professor Richard Parker wrote a critical review of Democracy and Distrust.²⁸⁰ Parker began by suggesting that Ely's fixation on issues of process and participation would lead American constitutional theory "into a fog," because it "[brought] to the surface deeply rooted assumptions of conventional 'process-oriented' theory that seem, or ought to seem, starkly implausible in light of the experience of our generation."²⁸¹ Parker's criticism also had normative bite. He claimed that Ely's approach ignored the central questions for late twentieth-century American constitutionalism, including whether minorities should be "integrat[ed]... into a polity that is biased against citizens who lack the resources needed to be politically effective."²⁸² Parker concluded that the counterma-

²⁸¹ Parker, supra note 280, at 223.
²⁸² Id. at 257.
joritarian difficulty matrix had outlived its usefulness. A "new constitutional theory" was required.

In deriving the perspective which led him to call for that "new constitutional theory," Parker relied partly on historical inquiry, although he made only brief references to historical sources in his article. Those references, however, became particularly interesting to yet another group of late twentieth-century critics of the countermajoritarian difficulty matrix.

Parker prefaced his historical references with the claim that in *Democracy and Distrust*, Ely had "manipulate[d] the republican political theory of the eighteenth and nineteenth centuries to provide his conception of representative government . . . an imprimatur of history." Parker was referring to Ely's brief historical account of the devolution of the republican political theory of the framers, which posited government as existing "in the interest of the whole people," into a twentieth-century version of that theory, premised on the increased heterogeneity of the American population, in which government needed to respond not only to the majority but to minorities who did not share the majority's ideological values.

Ely's historical account of American republican theory, Parker charged, was superficial and misleading. In particular, Ely's treatment of republican theory "[swept] under the carpet the republican belief that the polity should rest on a relatively equal distribution of wealth," and "flatly ignore[d] an equally vital republican principle: that . . . maintenance of government in the interest of the people is said to depend on active involvement of the people in political life." Ely's treatment of republicanism, Parker concluded, "not only suppress[ed] the republican concern for social equality, [it] suppress[ed] as well [the other central] republican tenet of an active citizenry."

Parker's description of Ely's history of American republicanism as attenuated and highly purposive was accurate. Ely's account

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283 Id. at 258. A similar normative bite had marked Tushnet's 1980 review of Ely. See Tushnet, supra note 188, at 1038.
284 Parker, supra note 280, at 255–56.
285 Id. at 256.
286 See Ely, supra note 161, at 78–81.
287 Parker, supra note 280, at 256.
288 Id.
showed some awareness of the “discovery” by historians, first pre-figured in the 1950s and embodied in two particularly influential books in the late 1960s, of the centrality of American versions of republican ideology to the generation that framed the Constitution. But Ely invoked the republicanism of the framers primarily to contrast it with the dominant versions of American political theory that followed it. Parker’s interpretation of republicanism in his critique of Ely, however, was equally purposive. He gave no more historical evidence for the proposition that the framers’ republicanism depended on “active involvement of the people” (as distinguished from their elite representatives) than Ely had given for his claim (which Parker found dubious) that republican theorists at the time of the framing assumed that “the people” were an essentially homogeneous group whose interests did not vary significantly.


Ely, supra note 161, at 80-81 ("[I]t didn’t take long to learn that from the standpoint of protecting minorities [the original republican design] was not enough. Whatever genuine faith had existed at the beginning that everyone’s interests either were identical or were about to be rendered so, had run its course as the republic approached its fiftieth birthday.").

Neither work can fairly be said to advance the view that the republican theory of the framers was centrally about the “active involvement of the people in political life.” Id. The analysis of republicanism by both Wood and Pocock is sufficiently subtle to resist being reduced to central propositions, but both works emphasize the complicated relationship, in republican theory, between the value of civic-mindedness in elites and rhetorical appeals to the sovereignty of “the people.” Ely’s account of the framers’ republicanism makes it appear to be animated by the principle of equal concern and respect, and Parker’s critique of Ely treats republicanism as the equivalent of deliberative democracy. In contrast, both Wood and Pocock emphasize the paradoxical relationship between the elitist, hierarchical strands of republicanism and its rhetorical invocations of “the people.” For more detail, see G. Edward White,
Parker's invocation of historical literature emphasizing the significance of republican theory to the founding generation was to become particularly resonant with another group of post-countermajoritarian constitutional scholars in the 1980s. But the interest of Grey, Brest, Tushnet, and Parker in historical inquiry in the late 1970s and early 1980s needs to be placed in context. That interest remained extremely rare among American constitutionalists in the legal academy in this time frame. Henry Monaghan, in a 1981 article, captured the attitude of the vast majority of his fellow constitutionalists. "My impression," he wrote, "is that few of the present generation of constitutional theorists are concerned with what the relevant history ‘really’ shows with respect to [current issues] .... They simply do not care .... Their eyes are on the present, not the past."\(^2\) According to Monaghan, "few if any of [present constitutional theorists] have ... an interest in ... historical scholarship."\(^2\) But shortly after Monaghan made that comment, a perspective on constitutional interpretation featuring explicit conversations between historical actors and their contemporary constitutional counterparts began to take root in the legal academy.

3. Originalists

As noted, the group of commentators who began a search for the "original intent" of the framers of constitutional provisions has typically been identified as primarily responsible for the historical turn in constitutional scholarship. Although this section seeks to minimize their causal significance, originalists were unquestionably the most unambiguous late twentieth-century adherents to the proposition that history mattered decisively in contemporary constitutional adjudication. Indeed they were the only group of scholars participating in the revival of history who self-consciously sought to replace the interpretive constraints on judges fashioned by countermajoritarian scholars with a set of historical constraints. The originalists' revival of history was conceived of as an unmedi-

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Reflections on the "Republican Revival": Interdisciplinary Scholarship in the Legal Academy, 6 Yale J.L. & Human. 1 (1994).


\(^2\) Id.
ated transfer of historical truth, embodied in the “original intention” of the framers of constitutional provisions, from the past to the present. The purpose of that transfer was made clear by the first late twentieth-century scholar to endorse originalism as a theory of constitutional interpretation, Raoul Berger. A search for “original intention” was important, Berger wrote in 1977, in order to confine “judicial power to revise the Constitution.” Twenty years later Berger was to define the primary goal of originalist constitutional jurisprudence more pointedly. The concept of “original intention,” he noted, “acts as a brake on unlimited judicial discretion.”

The evolution of late twentieth-century originalist jurisprudence from Berger’s initial formulation to its 1990s version is itself a fascinating and complicated story, but I will not examine that development in detail. For the purposes of this Article, I am interested in a potentially paradoxical feature of the emergence of originalism—its growing resonance among American constitutionalists, notwithstanding its premise that an “original intention” of the framers of constitutional provisions could be determined, as well as unproblematically applied to modern cases, in a time frame in which the American historical profession was recoiling from the belief that historical information could be found and rendered “objectively.”

Berger’s Government by Judiciary, when it appeared in 1977, precipitated a great deal of commentary by legal scholars and historians, most of it hostile to his originalist methodology and to his conclusions about the “original intention” of the framers of the

297 Brest identified this apparent tension between originalism and skepticism about the capacity of historical inquiry to be conducted objectively in The Misconceived Quest for the Original Understanding, supra note 253, at 221–22. As Brest put it, Hans-Georg Gadamer and others propounding a “hermeneutic” theory of interpretation hold “that we can never understand the past in its own terms, free from our prejudices or preconceptions.... One need not embrace this essentially solipsistic view of historical knowledge to appreciate the indeterminate and contingent nature of the historical understanding that an originalist historian seeks to achieve.” Id.
Fourteenth Amendment.298 The fact that so many constitutionalists sought to engage or to refute Berger, rather than simply dismissing his approach as that of a pseudo-scholar, was itself suggestive.299 Moreover, Berger’s early critics, who included such visible scholars as Ely,300 Brest,301 and Professor Gerald Gunther,302 took the integrity of originalist jurisprudence to be dependent on the ability of the originalist to recover “original intention” faithfully, using credible techniques of historical inquiry. They thus evaluated Berger as a historian and found his historical accounts deficient. In so doing they implicitly took a step toward reconnecting history to late twentieth-century constitutional scholarship.303


299 Berger’s approach to historical inquiry, which emphasized the selective use of quotations from historical actors and contemporary scholars with little attention to the context of the quotations and little effort to confront evidence complicating his arguments, was noted and ridiculed by some commentators. See, e.g., Soifer, supra note 298, at 653–59. Berger had no professional training as a historian. Most commentators, however, took Berger’s descriptive claims—that originalism had been the interpretive theory of the founding generation—seriously enough to engage them, despite his idiosyncratic treatment of historical evidence. For his own part, Berger tirelessly engaged with his critics, thereby enhancing the visibility of his approach. See the articles cited in Berger, supra note 296, at 504–05. Law journals could have declined to give Berger space for such efforts; instead they readily provided it.


303 Ely’s criticism of Berger was particularly interesting in this respect. As previously noted, to the extent Ely engaged in historical analysis in Democracy and Distrust, his history was in the service of his critique of “interpretivist” constitutional theory and his development of an alternative theory pivoted around the goal of “representation-reinforcement.” At one point, in pursuing his critique of interpretivism, Ely considered whether the Privileges and Immunities Clause could be understood to have any determinate meaning, and concluded, largely on the basis of “the language [of the clause] (or what we know of its surrounding intentions)” that it could not. Ely, supra note 161, at 27. In the course of his analysis he confronted and rejected Berger’s “extremely narrow interpretation” of the Privileges and Immunities Clause in
Originalism appeared to take on more explicit political overtones when two prominent members of the Department of Justice in the Reagan administration endorsed it as a constitutional methodology in 1984 and 1985. Their articles, taken together, made more explicit the connections between historical inquiry in constitutional jurisprudence and the substitution of historical constraints on judges for the institutional constraints emphasized by counter-majoritarian theorists. Both Assistant Attorney General William Bradford Reynolds and Attorney General Edwin Meese, in endorsing originalism, emphasized the dissatisfaction they felt with current jurisprudential constraints on the courts as constitutional interpreters. In a 1984 address, Reynolds declared that his “attempt to return the nation to its constitutional moorings” was a response to the “anti-democratic, result-oriented jurisprudence of our time.”\(^{304}\) He contrasted the contemporary idea that “courts...should direct public policy” with “the role of the judiciary as the Framers of our Constitution saw it.”\(^{305}\) Later that year, Meese developed Reynolds’s themes further. Meese equated “constitutional moorings” with a “jurisprudence of original intention,” which consisted of three interpretive propositions.\(^{306}\) First was that “[w]here the language of the Constitution is specific, it must be obeyed.”\(^{307}\) Second was “[w]here there is a demonstrable consensus among the Framers and ratifiers as to a principle stated or implied by the Constitution, it should be followed.”\(^{308}\) Third was “[w]here


\(^{305}\) Id. at 225, 229.


\(^{307}\) Id.

\(^{308}\) Id.
there is ambiguity as to the precise meaning or reach of a constitutional provision, it should be interpreted and applied in a manner so as to at least not contradict the text of the Constitution itself.\textsuperscript{309}

Strictly speaking, only the second of those propositions was "originalist" in character. The first proposition merely called for judges to follow unambiguously clear constitutional language in interpreting the Constitution. No respectable late twentieth-century theory of constitutional interpretation disputed that position. The difficulties lay in the fact that so few constitutional provisions had unambiguous clarity and specificity. The third proposition was also largely uncontroversial. It only required judges interpreting constitutional provisions not to advance interpretations that bore no relationship to the text of the provision being interpreted. The difficulties here also stemmed from the fact that few ambiguous provisions gave much guidance for their interpretation. Since the proposition was directed at ambiguous provisions, it seemed to amount to a rule that judges, in construing those provisions, should at least make some reference to them. No late twentieth-century constitutional scholar was likely to oppose that rule.

The provocative dimension of Meese's version of originalism thus centered on his claim that when "a demonstrable consensus [existed] as to a principle stated or implied by the Constitution" on the part of its "Framers and ratifiers, ... it should be followed."\textsuperscript{310} Adherence to that proposition required historical research. The "consensus" needed to be "demonstrable," and "Framers and ratifiers" of the Constitution needed to be consulted. (In addition, the "principle" stated or implied by the Constitution needed to be discerned, although that might be possible simply by reading the text.\textsuperscript{311})

\textsuperscript{309} Id.
\textsuperscript{310} Id.
\textsuperscript{311} For example, suppose one were interested in what "principle" was "stated or implied" by the First Amendment's provision that "Congress shall make no law ... abridging the freedom of speech." Did this provision mean, as some Supreme Court justices eventually concluded, that Congress was prevented from making nearly all laws of any kind restricting speech, or did it only mean that Congress could not pass laws "abridging" speech, that is, censoring speech in advance? That was the sort of question that Meese's second proposition was designed to clarify. One looked to see if there was a "consensus" among the "Framers and ratifiers" as to what "abridging speech" meant. Id. If one concluded that there was, and that it meant that
The posited connections between an originalist approach to constitutional interpretation and a professed loss of faith in the efficacy of institutionalist constraints on judges raised the stakes for historical inquiry in American constitutional scholarship in the 1980s and 1990s. As a methodology for constraining judges, originalism raised a number of questions, many of which constitutional scholars in the 1980s and 1990s addressed. A detailed study of the framers’ own views on the weight that their “intent” should be accorded by future generations, undertaken by Professor Jefferson Powell in 1985, concluded that they did not afford much weight to the proceedings of the Philadelphia convention, to which ratifiers did not have access; they anticipated the Constitution would be interpreted in the manner of a statute, with emphasis on the common understanding of its words rather than on legislative history; and in general, their approach was consistent with seeing the Constitution more as a charter of general principles, to be interpreted over time, than as a collection of particularized, time-bound propositions.\(^{31}\)

While these critiques of originalism were appearing, other commentators began to demonstrate an interest in more refined versions of an originalist approach.\(^{32}\) By the close of the 1980s, two


\(^{32}\) Space prevents me from pursuing an extended intellectual history of late twentieth-century originalism in this article. In my view such a project would need to take into account three distinct stages in the conceptual inquiries animating originalist historical inquiry. It would also profit from charting a relationship between those stages and three formidable interpretive difficulties accompanying an originalist constitutional perspective. Between the appearance of Berger’s Government by Judiciary and the present, originalist scholars have refined the object of their central historical search, successively redefining that object from Berger’s “original intention” of the framers of constitutional provisions, to the “original meaning” of those provisions, and, finally, to the “original understandings” various framers had about that “meaning.” I believe that these refinements of originalist historical inquiry have been responses to the major interpretive difficulties originalists confront.

One difficulty is defining and recovering the appropriate sources of the “original intention” of constitutional framers; a second is the difficulty of developing a common and plausible theory to make sense of the relationship between the words of a
prominent judges, Robert Bork and then-Judge Antonin Scalia, had endorsed versions of originalism.\textsuperscript{314} The defeat of Bork's nomination to the Supreme Court, in part because of some of the contemporary implications of his originalist approach, did not cause him to abandon the perspective.\textsuperscript{315}

The political dimensions of originalist jurisprudence in the 1980s served to obscure the fact that more refined versions of originalism had implicitly posited an altered view of the relationship between late twentieth-century constitutional jurisprudence and its historical antecedents. As American constitutionalism evolved from the early years of the twentieth century through the 1970s, embracing the "living Constitution" theory of constitutional adaptivity, a reformulation of constitutional jurisprudence around the countermajoritarian difficulty matrix, and the implicit confining of history to a largely ir-

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relevant place in constitutional adjudication, its development was fueled by interpretations of the Constitution that were predicated on historicist theories of historical change. Those theories assumed that since the present was qualitatively different from the past, the “meaning” of constitutional provisions needed to be continually resupplied by actors occupying a different segment of time from the provisions’ framers. In 1986, Justice William Brennan articulated this modernist-inspired approach to constitutional interpretation:

Current Justices read the Constitution in the only way that we can: as twentieth-century Americans . . . [T]he ultimate question must be: What do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be the measure to the vision of our time.316

The contrast that defined Brennan’s vision was between “a world that is dead and gone” and “current problems and current needs.” Only the shell of the Constitution survived the passage of time. Constitutional meaning came from the present.

To propose a theory of constitutional adjudication whose constraints on judges were rooted in history rather than in the modernist constraints of countermajoritarian jurisprudence, then, was to signal an estrangement from Brennan’s assumptions. History reentered late twentieth-century constitutional scholarship at the very time when the central idea animating Brennan’s approach—that “the vision of our time” must control modern constitutional interpretation—came to be perceived as unsettling. Originalism, and the other late twentieth-century jurisprudential approaches that reintroduced a consciousness of history into constitutional jurisprudence, shared, despite their quite different political ramifications, an estrangement from the idea that modern judicial actors, interpreting the Constitution in light of “current problems and current needs,” could adequately be constrained

only by the interpretive and institutional canons laid down by modern countermajoritarian scholars.

Warren Court liberals and Critical scholars shared with originalists an estrangement from countermajoritarian constitutional jurisprudence. The groups also shared an enthusiasm for interpretive approaches that employed techniques of historical inquiry as promising alternatives to countermajoritarian theory. The two former groups, however, implicitly anticipated a more attenuated role for history in constitutional analysis than the originalists. Neither Warren Court liberals nor Critical scholars were interested in reviving historical inquiry as an interpretive check on the decisions of contemporary judges. Although both groups believed that countermajoritarian-inspired checks on judges were illusory or incoherent, they were less troubled by the absence of meaningful checks on judges than by the gap between judicial interpretations of the Constitution and their visions of social justice in late twentieth-century America. In contrast, for originalists, a revival of historical inquiry in American constitutionalism was necessary precisely because checks on judges were fundamentally important and countermajoritarian checks had failed. Their goal was to make future debates on constitutional interpretation take place in an historical setting.

As originalism was developing and refining its perspectives in the 1980s and 1990s, another group of constitutional scholars began their own investigation of the potential promise of history as a source of checks on contemporary judges. Traces of this group’s interest in history can be found in Parker’s 1981 critique of Ely, in which he alluded to Ely’s “manipula[tion of] the republican political theory of the eighteenth and nineteenth centuries,” and cited some examples of “the now voluminous writing on republicanism” by historians.317 The ideology of American republicanism, which this group associated with the framers of the Constitution, became the source of the group’s identity. Like the originalists, these scholars began to look to the attitudes and values of the founding period as the potential source of an alternative vision of a post-countermajoritarian constitutional order. And, as in the case of the originalists, their vision was both influenced by idealized conceptions of an American future and significantly connected to the

317 Parker, supra note 280, at 255, 256 n.140.
American past. Those conceptions of an idealized constitutional future were typically quite different from, and on occasion incompatible with, conceptions shared by originalists, tempting commentators to distinguish the groups by emphasizing their divergent short-term political goals.

4. Neorepublicans

It is helpful to see the neorepublican scholars of the 1980s as representing a melioristic version of post-countermajoritarian constitutional theory, in contrast to the more deconstructive version of

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316 Kalman, in The Strange Career of Legal Liberalism, quotes Frank Michelman, one of the scholars most visibly identified with the revival of republican political theory as a late twentieth-century constitutional perspective. According to Kalman's reproduction of Michelman's comments, Michelman asked rhetorically, "Without the past . . . who am I? . . . Without mining the past, where do we go for inspiration?" Kalman, supra note 1, at 175 (quoting Michelman's remarks in a session on "Republicanism and Legal Culture" at a 1987 meeting of the Association of American Law Schools).

317 Kalman explicitly links the emergence of historical inquiry among "liberal law professors" to the emergence of originalist essays by members of the Reagan administration. Id. at 132-38. If one notes that Parker's review of Ely appeared in 1981, that causal claim seems to have difficulties.

Another example of Kalman's claim appears in the following passage: [Sunstein's "Interest Groups in American Public Law"] inaugurated the rush to republicanism . . . Sunstein's argument in "Interest Groups" resonated for the reform-minded academic lawyers everywhere who had kept their faith in the Warren Court. He offered a way of coopting originalism by likening it to republicanism. Academic lawyers who read him need no longer bash Berger or cede the historical battleground to the right; Sunstein held out the promise that they too could be historically correct. The republican revival among academic lawyers reflected both their communitarian longings and a strategic move to steal the thunder of conservative originalists. Id. at 155-56. Even if Kalman's suppositions about the motivations of "[a]cademic lawyers who read [Sunstein]" are plausible, the question remains whether those persons would have been enticed by the promise that they could "be historically correct" as constitutional interpreters. There were no originalists then seated on the Supreme Court—Justice Scalia had not been identified with originalism at the time of his nomination—so why was the "historical battleground" important to contemporary constitutionalists?

In short, Kalman's interpretation of the causal connection between late twentieth-century originalist and neorepublican constitutional jurisprudence presupposes that historically-centered constitutional inquiry resonated with many constitutional scholars at the time, so that a politically-inspired confrontation between originalists and their critics was inevitable. The evidence presented in this Article suggests that the turn to history in late twentieth-century constitutional scholarship emerged in a far more complex fashion.
Critical constitutionalist scholars. Both versions started from the same place: Scholarship inspired by process theory had not formulated any meaningful constraints on judicial power, or, for that matter, on any of the forms through which elites exercised power in American society. Critical scholars reasoned that since the distinctions between process or participatory values and substantive values, or between law and politics generally, were illusory, the remedy was to abandon those distinctions, and consider new ways in which law might be employed as a transformative political force. For them, history could be helpful in facilitating transformative change, not because the past provided useful models for contemporary policymaking, but because historical inquiry could be used to demonstrate the innate contingency of all political arrangements, including the existing legal and political status quo.

Neorepublicans agreed with Critical scholars that countermajoritarian-inspired constitutional scholarship had overestimated the weight of process constraints on judges and other powerholders. They also shared the Critical scholars' assumption that legislative policymaking, in the 1980s, was more accurately described as reflecting the agendas of self-interested elites than as an embodiment of the collective wishes of the people. But they were disturbed by features of the Critical approach. They felt it to be deliberately polarizing in its emphasis. Critical scholars not only engaged in savage attacks on their “liberal” colleagues, they appeared to assume that since law and politics were inextricably connected, legal scholarship was just another version of political activity, mirroring the techniques, employed by politicians, of distorting the views of one’s opponents and closing ranks with one’s ideological allies. This disturbed scholars who had a vision of the academic community as a collegial body dedicated to the relatively disinterested pursuit of knowledge.320

Another potentially disconcerting feature of critical legal studies to scholars who became attracted to republican ideology, was the

absence among many of its adherents of a programmatic, affirmative vision of a reconstituted legal order. Although many Critical writers referred to "transformative politics," their actual proposals tended to be cryptic or, when spelled out, to be so "transformative" at a micro-level that some initially considered them efforts at humor.\(^2\) The antic, or polemical, qualities of critical legal studies as a programmatic vision were particularly unsettling to some members of law faculties who had come to feel estranged from what they perceived to be general tendencies within American culture in the 1980s. They identified this culture with a consumption-driven, individualist ethos erected on the mutually reinforcing propositions that individuals should maximize their economic preferences and that government should abandon its role as a beneficent, humanitarian force. In the view of this group of academics, the deconstructivist projects of Critical scholars were distracting the legal academy from external policy issues in need of serious attention.

Thus the group of scholars who became attracted to republicanism as a constitutional ideology were in search of a post-countermajoritarian perspective that combined an estrangement from the excessively individualistic and materialistic tendencies of mainstream American politics in the 1980s with a more civil, less polarizing technique for articulating programmatic reforms. They found a historical model for such a perspective in the republican-inspired political and social theories of the founders' generation, which a cadre of historians, writing in the late 1960s and 1970s, had unearthed for them.

At first glance, late eighteenth-century republican ideology appeared to be a most unpromising body of thought to serve as an inspiration for late twentieth-century post-countermajoritarian constitutional theorists.\(^3\) But two features of republicanism, as it had

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\(^2\) One opponent of critical legal studies described how he had first been amused by Duncan Kennedy's "Utopian Proposal," which called for a rotation of all the positions associated with a law school, from dean to janitor, among all the school's employees. Then, on realizing that Kennedy meant the proposal seriously, he became infuriated. Louis B. Schwartz, With Gun and Camera Through Darkest CLS-Land, 36 Stan. L. Rev. 413, 413-14 (1984).

\(^3\) Republican theorists of the founding period assumed that the model of government they were creating for America would include severe restrictions on suffrage that privileged propertied white males. Such policies had the effect of confirming the
been recovered by historians, proved especially attractive to legal scholars who found themselves disturbed by their Critical peers and no longer energized by the countermajoritarian difficulty matrix. One feature was the apparently "communal" overtone of republican thought, which emphasized the obligations of high-status persons to the community at large and associated "virtue" with civic participation. Late twentieth-century enthusiasts for republicanism took this "communal" strain as evidence that the founders of the Constitution would not have countenanced the atomistic tendencies of late twentieth-century constitutionalism, with its emphasis on "rights" rather than civic obligations.\footnote{See, e.g., Parker, supra note 280, at 256 ("In republican theory, citizenship is taken seriously."). By 1991, an extended version of this reading of the republicanism of the founding generation had appeared in Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse 76–144 (1991).}

The other feature of the founders' republicanism that late twentieth-century neorepublicans found attractive required an even more extensive gloss. Neorepublicans took the connection the framers had made between "virtue" and civic participation as requiring dialogue, on issues affecting the polity, among all classes and sectors of the community. They then generalized the republican principle of dialogue on civic affairs to a much broader principle, with a panoramic sweep across time, of "deliberation" in a society in which "the people" held ultimate constitutional sovereignty. By this interpretive technique the obligation eighteenth-century republican theory imposed on elites to participate in civic affairs was translated into an obligation on the part of their twentieth-century counterparts to investigate the attitudes and listen to the views of all citizens, whether or not they possessed elite status. The founders' concept of "virtue" in a republican polity had become "democratic deliberation," in which all American citizens exchanged ideas on the common good.\footnote{For a vivid example of this generalization of an idea of the framers across time, which included the translation of that idea from elite "virtue" (civic responsibility) to "democratic deliberation," see the work of Cass Sunstein. Cass R. Sunstein, The Partial Constitution 142–53 (1993); Cass R. Sunstein, Beyond the Republican Revival, 97 Yale L.J. 1539 (1988); Cass R. Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29 (1985).}
Republicanism as "democratic deliberation" was a gloss the founders would not have recognized. Despite their rhetorical embrace of "the people" as sovereigns, they were not prepared to permit all sectors of the population to participate in governance. Nor did they believe that the "virtue" they associated with the participation of elites in public life signaled a willingness on the part of those holding high status to exchange ideas on governance with lower status members. Elites who participated in public life were virtuous because they had the resources, leisure, and standing to withdraw into their own private concerns. They chose to give some of their energy and talent to the public arena out of noblesse oblige. No member of the founding generation equated that comparatively narrow sense of public obligation with the far broader one of hearing the concerns of nonelites in public discussion. Indeed nonelites were not expected even to participate broadly in public deliberations. "Democratic deliberation" was a twentieth-century concept, derived from a far more robust conception of participation in public affairs than the founding generation contemplated.

Distancing themselves from Critical scholars and developing a critical perspective on the allegedly rampant aggrandizement of self-preference and distrust of government that characterized late twentieth-century America were thus arguably more important goals of neorepublican constitutional scholars in the 1980s and early 1990s than the goal of coopting originalists. The very fact that neorepublicanism as "deliberative democracy" was an almost unrecognizable version of the founders' republican ideology suggested that the neorepublican enterprise was hardly an effort to

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325 "Democratic deliberation" is arguably a broader concept than Ely's "representation-reinforcement" in that it is oriented toward the goal of creating dialogue among all members of a community, not merely the goal of helping persons whose interests are not adequately represented in a legislature. In any event, both concepts are far more participatory in their emphasis than the framers' conception of representation.

The gap between late eighteenth- and late twentieth-century conceptions of political participation is vividly illustrated in a recent symposium in the Fordham Law Review. Symposium, The Constitution and the Good Society, 69 Fordham L. Rev. 1569 (2001). Many of the participants in the symposium seemed enamored of the "civic participation" strain of neorepublicanism, but almost all of the commentators began their analyses by assuming that a principal purpose of American constitutionalism, as it entered the twenty-first century, was to further, rather than to limit, citizen participation in government.
restore history as recovered truth to a position of primacy in late twentieth-century constitutional interpretation. But the neorepublicans had turned to history, rather than simply asserting the foundational value of "deliberative democracy" in their constitutional inquiries. To understand more fully why their first instinct had been to look to history, one needs to take a closer look at the sort of historical inquiry that animated neorepublican constitutional scholarship as it evolved from the mid-1980s.

In 1986, Frank Michelman signaled that the discovery of republicanism as a long-obscured ideological framework for the founding generation might have implications for contemporary constitutional law. Following Parker in drawing on the contributions of historian J.G.A. Pocock, who argued that the identification of American thought by mid-century scholars as liberal, individualist, and pluralist obscured the importance of republicanism in the founding period, Michelman concluded that uncovering republican traditions made possible a different view of the Constitution: that of a "charter of self-government." He then suggested that the apprehensiveness the framers felt toward legislatures, as a potential source of demagoguery or tyranny, could be seen as grounded in a concern that legislative action might actually impede the capacity of the people to govern themselves. It followed that the judiciary, in its capacity as a constitutional check on legislatures, was serving as an agent for the people.

For example, Michelman noted, when legislatures thwarted the full "modeling of active self-government," the Supreme Court could take on that task "as one of [its] ascribed functions." Since legislative determinations "are not our self-government," he maintained, "[j]udges overriding those determinations do not, therefore, necessarily subtract anything from our freedom. Their actions may augment our freedom." He anticipated the possibility that the Court might affirm "an autonomous public interest independent of the sum of individual interests," an interest in dialogue on pub-

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326 Pocock, supra note 292, at 526–27, 545.
328 Id. at 74.
329 Id.
330 Id. at 75.
lic issues, citizen participation, and, ultimately, self-government. In this role, the Court was actually furthering democratic values that the legislature, because of its "individualistic" character, might restrict.

Michelman's idealized neorepublican polity was thus a blend of the "[t]races of [s]elf-[g]overnment" he found in the republicanism of the framers and the late twentieth-century values of unfettered public dialogue and unrestricted citizen participation. The strategy he had employed to fashion that definition of an ideal late twentieth-century commonwealth had been to reach beyond the countermajoritarian difficulty matrix to history. Once he recovered a historical tradition that suited his purposes, he refashioned it, so that neorepublicanism looked very little like its original version. But this approach to history was not intended to convey the message that purposive historical inquiry was irrelevant to contemporary constitutional analysis, except as fodder for normative advocacy. Instead it was intended to suggest that historical inquiry could aid in the recovery of "traces" of an American constitutional "tradition" that might provide a basis for getting beyond the countermajoritarian difficulty. Michelman's invocation of republican traditions could have been read as implicitly claiming that the countermajoritarian difficulty matrix was irrelevant to late twentieth-century constitutional theory because its assumptions about constitutional design departed from the understandings of those who drafted the Constitution. Countermajoritarian scholars drew their intellectual energy from the assumption that the tension between judicial review and legislative majoritarianism was built into American constitutionalism. But the sort of historical inquiry engaged in by Michelman—an inquiry directed at uncovering the republican ideology of the framers—revealed that although they believed that the Constitution was a charter for self-government, they also believed that legislatures did not promote self-government and that courts might. Thus history could serve to delegitimate countermajoritarian constitutional jurisprudence.


332 Michelman, supra note 327, at 4.
Some friendly critics of Michelman took that conclusion to follow from his historical exegesis.\textsuperscript{335}

There was another feature of Michelman's historical approach that takes on added significance when contrasted with the approach of originalist historical inquiry as it was evolving in the late 1980s. Michelman's method of historical inquiry did not duplicate the techniques of originalist scholars, who concretized historical data related to foundational constitutional provisions, extracted "intention," "meaning," or "understanding" from that data, and then applied the extracted understandings to specific contemporary constitutional problems. Michelman's method relied on much broader historical sources in the recovery of constitutional traditions such as republicanism, and linked those traditions to present issues at a much higher level of abstraction.\textsuperscript{334}

Michelman was not unique among his neorepublican counterparts in adopting this method of historical inquiry.\textsuperscript{336} It was clear, from the initial stirrings of neorepublican constitutional scholarship in the 1980s, that its practitioners intended to treat history as a constraint on contemporary judges in a quite different fashion from their originalist contemporaries. They were seeking to recover past constitutional attitudes and values as "traditions" that derived their legitimacy from their panoramic sweep and their foundational character. By recovering these constitutional traditions, neorepub-


\textsuperscript{334} Michelman, supra note 327, at 74 ("[T]he civic-republican tradition, currently resurgent in American constitutional-legal thought, offers historical validation for the ideal of freedom as self-government realized through politics, along with visionary resources for critical comprehension of the ideal and of specific institutional manifestations of it.").

\textsuperscript{336} The comments made in this paragraph about Michelman's Traces of Self Government, supra note 327, could also be made of Sunstein's Interest Groups in American Public Law, supra note 324. If anything, Sunstein's historical analysis was even more category-driven and attenuated than Michelman's. For a comparable methodological approach to historical inquiry employed by a scholar with a neorepublican constitutional perspective, see James Gray Pope, Republican Moments: The Rule of Direct Popular Power in the American Constitutional Order, 139 U. Pa. L. Rev. 287 (1990). See also Stephen M. Feldman, Republican Revival/Interpretive Turn, 1992 Wis. L. Rev. 679, 691–97 (emphasizing the panoramic sweep of the republican "tones" and "themes" which formed part of the "roots of American constitutional thought").
lican scholars were not only trying to signal the suppression of those traditions by later generations, they were insisting that contemporary judges start paying them serious attention.

Despite their different methods of historical inquiry, both the neorepublican and the originalist commentary of the late 1980s and early 1990s can be seen as embodying an important shift in the orientation of late twentieth-century American constitutionalists toward segments of time. Countermajoritarian scholarship had taken place decisively within the present. Its matrix for framing issues of constitutional jurisprudence presupposed that the "difficulty" that lay at the heart of those issues was a distinctive one based on conditions and attitudes peculiar to modern America. Countermajoritarians assumed that American society was qualitatively more democratic, both in the sense of experiencing broader political participation and in the sense of making a more robust commitment to democratic theory. At the same time, they believed that the collapse of essentialist conceptions of law and the insights of the social science disciplines had combined to produce the recognition that judges were a species of policymakers. Thus, as an empirical proposition, there was a "countermajoritarian difficulty," and the phenomenon was comparatively novel. Under the circumstances, constitutional commentators were well-advised to make a sharp separation between their present and the past, and to treat much of constitutional history as irrelevant.

The originalists and the neorepublicans began to modify that segmentation of time, so that the relevance of the past began to creep back into constitutional inquiries. Rather than immersing themselves in the modern present, they began with a certain estrangement from what they took to be the defining cultural and jurisprudential tendencies of late twentieth-century America. This estrangement led them, as it had the Critical scholars, to the investigation of history as a source for arguments that "things could be otherwise." Moreover, originalists and neorepublicans

336 This is not to say that originalists and neorepublicans held similar perceptions about the cultural identity of late twentieth-century America. To the contrary, the political orientations of scholars in the two groups were, on the whole, noticeably contrasting, as were their respective analyses of why a late twentieth-century constitutional theorist might feel estranged from trends in late twentieth-century politics, culture, or constitutional jurisprudence.

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unearthed some data from the past they found congenial. Originalists found some texts and "understandings" that they believed could serve as constraints on late twentieth-century judicial activism, and neorepublicans found "traces of self-government" that they believed spoke directly to contemporary constitutional adjudication. Thus "original intent," "meaning," and "understanding," together with republican-inspired constitutional "traditions," entered the dialogue of constitutional jurisprudence. By the early 1990s, the idea that contemporary scholarship in the legal academy could include "conversations" with historical actors had become a common invocation.337

5. Common Threads

A common ground among the four groups of scholars who became estranged from countermajoritarian constitutional jurisprudence and whose work reintroduced history into late twentieth-century constitutional inquiry is that they were motivated to turn to history because they hoped it would provide them with a way of fashioning a novel, more coherent or more stabilizing framework for making sense of the universe of constitutional discourse. They had come to perceive that universe as increasingly foundationless, and as seemingly no longer capable of being clarified by the central normative and analytical inquiries of the countermajoritarian difficulty matrix.

By denying the integrity of countermajoritarian interpretive and institutional constraints as stabilizing mechanisms, and claiming that beneath all issues of "principle" and "process" lay substantive value choices, Warren Court liberals had suggested that the only limits on constitutional adjudication were derived from foundational principles of "rightness," "fairness," or "justice." Those principles were abstract, but their foundational meaning could perhaps be derived through historical inquiries designed to identify the constitutional rights, or principles that Americans regarded as

“fundamental.” Once identified, they might also serve as constrain-
ing elements on judges in constitutional cases.\footnote{The scholarship of Grey and Brest in the 1970s and 1980s had anticipated this use of history. For an alternative use of foundational “principles” as a constraint on free-

Critical scholars likewise found countermajoritarian constraints meaningless, but they went further in embracing antifoundational-
isin than any of their late twentieth-century counterparts. In the end, however, they not only turned toward history, they also ant-
icipated that the use of historical inquiry as a subversive technique, demonstrating the contingency of established assumptions about law or governance, was but the first step in building a new constitu-
tional order.\footnote{Thus in Red, White, and Blue, after critiquing all the approaches to constitutional interpretation that were regarded as statured by late twentieth-century scholars, Tushnet indicated that his ultimate goal was to develop a constitutional order that would embody the political principles of socialism. See Tushnet, supra note 274, at 145–46.} Notwithstanding their sharp disagreements with Warren Court liberals, Critical scholars shared that group’s con-
cern that countermajoritarian constitutional theory simply papered over the social instability of late twentieth-century America, and this stood in the way of a reconstituted version of American consti-
tutionalism.

Of all the scholarly groups turning to history in the late twenti-
eth century, originalists made the deepest investment in historical inquiry, and the appeal of originalism to some contemporary judges and commentators, notwithstanding the formidable interpretive difficulties it presents, suggests a strong need among such persons for a constitutional jurisprudence that can provide intelli-
gible, durable guidelines for judges and other constitutional actors. Originalism takes the past not merely to be relevant, but to be a source of guidance for present actors; a concretized version of his-
torical inquiry is the privileged method for ascertaining that guidance. Originalist constitutional jurisprudence thus seems the clearest example of a post-countermajoritarian interpretive theory whose paramount goal is the furthering of constitutional and cul-
tural stability.
Neorepublicans also can be seen as interested in history as a source of stability. When the neorepublican movement was launched, its adherents saw the primary purpose of their historical investigations as providing some perspective on the allegedly rampant late twentieth-century ethos of self-maximization by acquainting contemporary Americans with the radically different conceptions of civic obligation, and of the relationship of government to the individual, which they attributed to the founding generation and identified with American constitutional traditions. To neorepublicans, civic-mindedness and other values subsumed under the rubric of "civility" were promising antidotes to the rampant individualism and polarized human relations of modern American democracy at the turn of the twenty-first century. This was not history as suppressed alternative, but history as shining example. When more detailed historical examinations of the republican-inspired world of the founding generation revealed that the example might be tarnished, neorepublicans retreated from direct associations with the hierarchical, gendered, slaveholding features of the eighteenth-century American republic and settled on the theoretical correspondences between civic-mindedness, civility, and "democratic deliberation."\(^{340}\)

To summarize, all the groups of scholars participating in the "historical turn" shared the view that mainstream countermajoritarian jurisprudence had somehow reached a dead end. All the groups, with the exception of Critical scholars, were interested in investigating the promise of historically-derived constraints on judges, which would serve as substitutes for the (now illusory) interpretive and institutional constraints of countermajoritarian jurisprudence. Finally, all of the groups, including the Critical scholars, turned to history as a potential source of foundational values, inspirational conceptions of governance, or authoritative constitutional principles, which might provide sources of social stability or inspire the creation of a new American constitutional order. In the view of each group, historical inquiry was newly relevant because modernist-inspired, countermajoritarian constraints

\(^{340}\) Compare Symposium, The Republican Civic Tradition, 97 Yale L.J. 1493 (1988), with Symposium, Constitution and the Good Society, supra note 325, for a vivid demonstration of the metamorphosis of neorepublicanism into "deliberative democracy."
on the judiciary had failed, and the failure of those constraints was symptomatic of deep schisms and tensions within late twentieth-century American culture.

B. Historicist Theories of History, Objectivity, and the Historical Turn

At this point, a paradox noted earlier returns with a vengeance. Why should constitutional scholars have turned to history as a potential source of jurisprudential and cultural stability in the very decades in which the American historical profession was retreating from strong versions of the canon of objectivity in historical inquiry? How could history provide determinate answers to contemporary constitutional issues, or inspire traditions for late twentieth-century constitutional actors, if, as Brest had put it in 1981, the scholar’s capacity to retrieve historical data as truth was at best partial, and invariably contingent? Why should legal academics place any faith in history as a stabilizing force if historians were having trouble identifying any perspectival stance that constrained the subjective preferences of the scholar?

Here a recapitulation of the early themes of this Article may clarify matters. The ahistorical character of much of twentieth-century constitutional scholarship, I argue, can be seen as a product of the same forces that spawned the development of the social sciences as autonomous disciplines in American higher education, and that contributed to the emergence of the canon of objectivity in the early twentieth-century American historical profession. The social science disciplines were a testament to the confidence of late nineteenth-century educators that secularized, scientific methodologies for acquiring and disseminating knowledge were compatible with the increasingly modern character of American civilization. Using those methodologies, humans could make sense of their external world, define and organize its phenomena, and take steps to control their environment and anticipate their future. The methodologies made modernity, with its advanced industrialization, its rapid population growth, its democratizing political culture, and its

341 Brest, supra note 253, at 222.
increasingly fluid class lines and status distinctions, a less frightening experience.

The power of scientific disciplines to release and channel human creativity permitted early twentieth-century Americans to imagine an existence in which human-generated change could be described as progress. History ceased to be thought of as an inexorable cycle of birth, decay, and rebirth, produced by omnipotent external forces, and came to be thought of as a process of qualitative change. The conception of time as a continuum was replaced by a conception of time as a collection of discrete segments—the past, present, and future—each necessarily different from the others. Thus the initial emphasis of the social science disciplines on the use of historical inquiry to derive the essential, defining principles of a field of knowledge was replaced, in all areas except history, by an emphasis on the application of empirical methodologies, taken to have predictive as well as synthetic value, to data culled from the present. Historians continued to study the past, but from a radically different posture. They no longer treated the past as a source of universal essences or principles, but as a contrasting segment of time. History remained an instructive source of knowledge for moderns, but the instructions—history's "lessons"—lay in an understanding of the real and potential differences between the past and the present. By faithfully observing and recording the tendencies of past generations, historians could help present actors avoid destructive policies. The crucial element in historical research was a posture of detachment, akin to that of the scientist, from which the historian approached data in the past. That posture was designed to communicate the different segments of time occupied by the historian and the subjects of historical inquiry.

The canon of objectivity thus was logically entailed by the historicist conceptions of time as segmented and progressive. Since historians were situated in a different time segment from that of their subjects, for them to impose the experiences and attitudes that defined them as moderns on those subjects was to ignore the fact that history was a progression of qualitative change. Modern experiences and attitudes could not be those of actors in the past, given the nature of history. Thus an accurate recreation of the past required a suspension, in the historian, of the particularistic beliefs that defined one as a modern. It required objectivity.
Thinking about the canon of objectivity as intimately related to conceptions of segmented time, and of history as a progression of qualitative change, helps explain the varying strength of the objectivity canon among American historians over the course of the twentieth century. As noted, Peter Novick has charted a relationship, extending from the 1900s through the 1960s, between the status of the objectivity canon and the “cultural social and political climate” in which successive versions of the canon were formulated by American historians. He finds that in periods of political and cultural “synthesis,” such as the first two decades of the twentieth century and the period encompassing World War II and the Cold war, strong versions of objectivity were advanced, and in periods of “polarization . . . confusion, apathy, and uncertainty,” such as the years between World Wars I and II or the years between the mid-1960s and the end of the century, the objectivity canon was less dominant or severely undermined.

Novick’s findings identify a close connection between a segmented view of time, which is an essential component of a theory of history as a progression of qualitative change, and a strong sense among a set of actors of the distinctive cultural identity of their present. If actors generally agree on the defining characteristics of their present, they have a more discernible baseline for contrasting it with the past. They have a sharper vision of segments of time, a clearer sense of the nature of progressive change over time, and thus an enhanced ability to discern differences between the experiences of present actors and those in the past. They see themselves as better able to distinguish their current world from the world they are investigating. A robust conception of objectivity rests on that capacity to distinguish.

In contrast, if present actors see their present cultural situation as one of “polarization[,] . . . confusion, apathy, and uncertainty,” they may be less inclined to develop a clear baseline for contrasting present and past. The absence of such a baseline prevents actors from drawing the sharply differentiated segments of time that a fully developed progressive conception of historical change requires. Without a clear conception of segmented time, efforts to

33 Id. at 415.
contrast the past and present become more difficult, and the relegation of past data and past attitudes to the category of "irrelevant" becomes a more problematic exercise. At some point, the absence of a clear understanding of the distinctiveness of present time may threaten the conception of segmented time itself.

Novick believes that something like this may have occurred within the American historical profession in the last years of the twentieth century. By the 1980s, he claims:

Sensibilities were too diverse to be gathered together under any ecumenical tent. As a broad community of discourse, as a community of scholars united by common aims, common standards, and common purposes, the discipline of history had ceased to exist. Convergence on anything, let alone a subject as highly charged as "the objectivity question," was out of the question.34

Novick's conclusions suggest that the collapse of the objectivity canon among late twentieth-century historians was related to their sense that their contemporary social and political culture was confused, polarized, and unstable, so that they lacked a clear vision of the time segment they inhabited.

Novick's analysis helps us understand the relationship between the collapse of the objectivity canon among historians in the late twentieth century and the increased use of historical inquiry in American constitutional scholarship in that same time period. In stark contrast to the years between 1945 and the mid-1960s, when historians were reformulating a strong version of the objectivity canon and historical inquiry was implicitly discarded from the lexicon of constitutional scholarship, late twentieth-century scholars lacked a sense of a vivid, stable present. Post-World War II scholars had an enhanced sense of the cultural homogeneity of American civilization: America was modern, democratic, antitotalitarian, capitalist, and largely free from ideological polarization. It was a vivid "present," to be juxtaposed against or to obliterate a quite different "past."

But by the early 1980s this clear sense of a set of consensual "present" values, defining modern American culture and providing a backdrop to the democratic constitutional order in the cold war

34 Id. at 628.
years, had been lost. Late twentieth-century scholars saw their present as confused, polarized, and unstable.

As a clear sense of the late twentieth-century “present” vanished, the objectivity canon virtually collapsed as a central professional ideology for late twentieth-century historians. At the same time, constitutional scholars came to detach themselves from the countermajoritarian difficulty matrix for similar reasons. That matrix’s assumptions about the American democratic constitutional order appeared increasingly suspect, and its guidelines for enlightened constitutional adjudication appeared increasingly thin and question-begging. At an epistemological level, the estrangement of historians from the canon of objectivity and the estrangement of constitutional scholars from the countermajoritarian difficulty matrix were parallel phenomena.

The parallels come into sharper relief if one views both the canon of objectivity and countermajoritarian constitutional jurisprudence as products of a fully historicist conception of history. By redefining history as a continuous progression of qualitative change, early twentieth-century American intellectuals had transformed historical inquiry from a search for universals to a method for emphasizing the demarcations between past and present time. They also had transformed constitutional interpretation from a method that emphasized frequent recurrence to the first principles of American constitutionalism and their application to novel cases, to a method that emphasized the appropriate allocations of power among governing institutions in a modern democracy. Both transformations were fueled by a description of history as being composed of discrete segments of time, and that description was the product of a historicist consciousness.

So it may be that in recoiling from the canon of objectivity and countermajoritarian constitutional jurisprudence, late twentieth-century scholars were beginning to ask themselves whether the dominant historicist conception of historical change that had marked that century needed to be rethought. On reflection, the experience of the twentieth century offered some powerful counterexamples to the idea that human-generated qualitative change over time was the equivalent of progress. Humans holding power and making use of scientific expertise had produced some frightenedly militant and repressive nation-states. Cumulative scientific
knowledge had developed weapons of nuclear destruction. The twentieth century had experienced more global wars, with more casualties, than any of its predecessors. If humans were the central causal agents in the universe, that might not bode well for the species' long term existence.

But it was not merely these counter examples to the proposition that human-generated historical change resulted in progress that raised problems for a historicist theory of history. By positing that the future would always be qualitatively different from the past, the theory seemed to ignore recurrent themes in world history; themes that seemed to conjure up a kind of historical determinism. A vivid example, combining several such themes, could be found in the dramatic resurgence, in some "post-colonial" nations, of patterns of ethnic, religious, or tribal conflict that had characterized the nation at an earlier point in its history, but had seemingly subsided when that nation became part of a larger geopolitical unit dominated by a "colonial" power. Whether the setting was the Indian continent after the departure of its British occupiers, the African continent after being vacated by the British, French, Germans, and Dutch, the Balkan nations after the dissolution of artificially created Communist nation-states, or regions of Russia after the collapse of the Soviet Union, pre-colonial rivalries, based on ancient affiliations and older geographic proximities, resurfaced. These developments not only served to undermine the theory that newly-created governmental units, the products of purposeful human activity, could fundamentally change the destinies of the inhabitants of those regions, they presented a scenario where the twenty-first-century conditions of life in some areas of the world more resembled an ancestral than an immediately preceding experience. Here was proof of a kind, it appeared, that history did not resemble a progression of qualitative change. It more closely resembled the inexorable recurrence of themes deep within a culture.

The difficulty with a fully historicist theory of history, then, is not that human actors are powerless to alter the conditions of their existence. Theories of historical change that describe humans as passive actors swept by the currents of external forces underestimate the capacity of human powerholders to act as agents of change. The difficulties with historicism lie in its indiscriminate as-
sociation of human-generated qualitative change with progress, and with its demarcation of historical time as segmented rather than continuous. Human actors in "the present" do not occupy a time interval that can be sharply demarcated from the interval occupied by their immediate predecessors: instead they occupy a jumble of "present" and "past" time, and their experiences reflect not only their consciousness of contemporary conditions but the weight of the ideas and institutions they have inherited from the past. They may find "lessons" in the legacies they receive from the past and seek to make changes in their condition with those lessons in mind. Those changes may or may not represent "progress," depending on how one defines that term. But present actors are never able to write on an entirely blank slate. They can never treat history as entirely "irrelevant" to their existence. This is even true when a set of actors, such as those who lived in early twentieth-century America, are overwhelmed by a sense that the conditions of their existence are dramatically different from those of their predecessors. When they seek to respond to those conditions they do so with the weight of their immediate past pressing upon them.

V. CONCLUSION: THE CRUMBLING OF HISTORICISM, THE RECOGNITION OF HISTORY AS CONSTITUTIONAL CONSTRAINT, AND NEOHISTORICAL CONSTITUTIONAL SCHOLARSHIP

A. The Legacy of Modernity

The legacy of the twentieth century is, to an important extent, the legacy of modernist responses to modernity. The forces of modernity—secularization, science, social differentiation, advanced industrialism, and the rise of democratic models of politics—transformed the condition of most nations on the globe, including America, in the early years of that century. As modernity emerged, a distinctive epistemological response to modern life emerged with it. That response posed new theories of causal attribution in the universe. These theories abandoned an existing set of external causal agents, which included, in addition to an omniscient deity, nature, and universalist models of social relations and economic affairs, "law," as a collection of essentialist, determinate, universal
principles, and "history," as a continuum of time on which the fundamental cycles of birth, maturity, and decay played out.

Modernity fueled the new theories. It provided human actors with evidence of external change, and it provided a laboratory for disciplines that sought to apply the techniques of science to make sense of that change. Scientific models of acquiring and disseminating knowledge rested on the capacity of trained humans to make empirical observations of the external world and to derive explanatory theories from their observations. Phenomena that could not be subjected to empirical observation, such as the "will" of an omniscient deity, were implicitly ruled out as a source of explanatory theories. Knowledge of an explanatory character came to be centered in the human application of scientific techniques, and scientific knowledge came to be seen as a basis for expertise. Expertise provided the grounding for enlightened human policymaking, and humans emerged as the central causal agents in the universe.

Older theories of history as a continuum of time over which universalist themes flowed could not survive this epistemological shift. The discernible differences moderns observed between their contemporary existence and their recollected past were taken as evidence of qualitative change. And not only was the present different from the past, it was different because humans had helped make it so. Humans were harnessing the forces of modernity to shape the course of history. With the aid of scientific knowledge, they could make change synonymous with progress. And, as the course of history was defined as not only changing but progressive, the time segments of the present and the future became more significant than those of the past. History, propelled by purposive human intervention, was proceeding ever more rapidly away from the past and toward the vision of an idealized future. Segmenting time was a way of emphasizing the increasing irrelevance of the past to the modern world.

One can see this modernist-inspired, fully historicist conception of history informing mid-twentieth-century countermajoritarian constitutional jurisprudence. The insights of modern social science

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resulted in a more sophisticated understanding of American governing institutions, including the judiciary. Law was now better understood as an "on-going, functioning, purposive process" than as a collection of determinate, essential principles. Judges were better understood as a species of policymaking officials. The incompatibility of unconstrained constitutional interpretation by judges in a modern democratic society was also better understood. Modern, majoritarian constraints on judges needed to be fashioned, such as the obligation to ground constitutional decisions on principles that transcended individual results and embodied fundamental democratic values, or the obligation to defer to majoritarian branches of government when those principles could not be supplied. Those constraints could not come from the corpus of premodern constitutional jurisprudence with its alien conceptions of law and judging. They needed to come from the observations and theories of modern political science.

B. Recoiling from Modernity

But as the twentieth century waned, the optimistic fusion of scientific knowledge, human creativity, and the forces of modernity, which helped equate the course of history with progress, began to split apart. The objective nature of scientific inquiry, taken as a gospel by early twentieth-century physical and social scientists, began to be questioned. The associations between scientific training, expertise, and enlightened policymaking made by early twentieth-century "social engineers" confronted the counterexamples of totalitarian states of the right and the left, harnessing modernity in the service of terror, brutality, and repression. Scientific training, it appeared, did not inevitably breed objectivity, nor did it constrain its practitioners in any meaningful sense. With the sciences unmasked as purposive, value-laden disciplines, where did constraints on human policymakers come from? "Law," as a determinate, essentialist, extrahuman body, was an illusion. "History," as the embodiment of universal values and principles, had been subordinated to human-fashioned policies. The externalist causal agents of premodern epistemology had been discredited.

346 Hart & Sacks, supra note 149, at iii.
All that was left, it seemed, was modernity and naked human powerholding. Given the conflagrations of the twentieth century, that was not a pretty picture.

Thus the simultaneous disengagement of historians from the canon of objectivity and of constitutional scholars from the countermajoritarian difficulty matrix can be seen as illustrations of a late twentieth-century estrangement from the disturbing implications of a modern world in which unconstrained human actors seek to shape the forces of modernity for their own purposes. At the same time that historians were losing confidence in the idea of objectivity as a truly constraining force in scholarship, constitutionalists were losing confidence in the idea that social science definitions of the institutional strengths and weaknesses of branches of government could constrain judges. In each discipline, a claim had been made that a model of scientific inquiry, which posited human observation as the ultimate basis for making sense of the universe, carried with it constraints on the discretionary range and willfulness of humans. And in each discipline that claim had been rejected.

At this point, in the midst of this epistemological ferment and the perceptions of cultural instability that accompanied it, historical inquiry reentered the discourse of American constitutional scholarship. We should now be in a position to advance a more informed explanation for history's "arrival." That explanation rests on reassembling the central themes of this article, and applying them to chart the relationship of current neohistorical work to the first stirrings of post-countermajoritarian historical inquiry in the 1970s, 1980s, and 1990s.

C. The Dilemma of Unconstrained Human Causal Agency

Since the culmination of the epistemological revolution that resulted in the emergence of the social science disciplines in American higher education, the collapse of externalist, premodern sources of causal agency, including "law," and the redefinition of history as a continuous process of qualitative change, the fundamental policy issue for modern actors has been that of fashioning intelligible constraints on the power of humans as causal agents. With the disappearance of law, history, nature, and divine will as meaningful causal forces, and with the recognition of the capacity
of humans to use secularized and scientific techniques of intellectual inquiry as mechanisms of social control, denizens of the twentieth century have repeatedly confronted the question of where limits on purposive human conduct can be said to originate.

Countermajoritarian constitutional jurisprudence had been erected on the assumption that the spectre of unchecked human power would not undermine American constitutional democracy because judges, the central source of that power, could be constrained or would constrain themselves. But the precise institutional roles metered out by countermajoritarian scholars for legislatures and the judiciary did not survive close scrutiny and were perceived by some critics as enhancing the risk of majoritarian tyranny and the consequent erosion of fundamental American liberties. The collapse of countermajoritarian constitutional theory was ultimately related to its inability to supply adequate constraints on judges or legislatures. And its collapse was hastened by the collective loss, in the late twentieth century, of a sense of shared cultural attitudes and values that had once been thought of as making possible the judicial formulation of principles and the legislative formulation of policies that Americans understood to be foundational to constitutional democracy.

With the collapse of countermajoritarian constitutional jurisprudence, history reentered the discourse of late twentieth-century constitutional commentary. As we have seen, the arrival of history came at the same point in time when professional historians had lost faith in the canon of objectivity as a strong constraint on the production of historical scholarship; the same late twentieth-century epistemological and social forces had contributed to those developments. This meant that constitutional scholars turned to history at the very point when professional historians had acknowledged that recovery of the past as a discrete entity, apart from and untouched by the present, was no longer possible. What sort of "history," then, was attractive to constitutional scholars?

Given the strong emphasis of the twentieth-century legal academy on issues of contemporary policy, one might be inclined to hypothesize that the conception of history that late twentieth-century American constitutionalists had in mind was a distinctively normative version. In fact, such a hypothesis, in which "history" becomes a synonym for "a revival of traditional values" and in
which the "historian" functions as a scholar with an ultratradition-
alist normative contemporary agenda, would appeal to those who
believe that the historical turn in late twentieth-century constitu-
tional scholarship can be laid at the doorstep of the Reagan
administration. But this Article has identified several other groups
of late twentieth-century scholars who participated in the historical
turn and has proceeded from the premise that no scholarly “turn,”
whatever its direction, occurs unless it has some deep resonance
within the academy and the larger culture. Of all the places, in fact,
where one might expect a turn to “history” as right-wing normative
propaganda to surface, the American legal academy in the early
1980s would have been one of the last places to look.

The links between the arrival of history in constitutional scholar-
ship, the collapse of countermajoritarian constitutional jurisprudence,
and the disintegration of the objectivity canon among professional
historians need to be explored from another angle. Instead of ask-
ing what normative purposes the introduction of historical inquiry
serves for contemporary constitutionalists—a question that builds
on modernist assumptions—one might ask how history fits into a
constitutional discourse whose central concern is with the nature
and locus of constraints on contemporary human powerholders.
The assumption driving that question would be that one set of con-
straints imposed on human actors, the set erected by
countermajoritarian constitutional jurisprudence, has been re-
vealed as illusory, and another set of constraints, that erected by
secularized science and its methods of inquiry—a set which in-
cludes the posture of objectivity in trained professionals—has also
been treated as lacking conceptual integrity. With the disappear-
ance of both sets of constraints, the problem of unchecked, willful
human agency becomes more acute.

D. History as Constraint

But why should history be regarded as a possible solution to that
problem, as a possible constraint on human powerholders? One
might argue that with the loss of objectivity there is nothing to pre-
vent present actors from creating their own versions of history,
designed to conform to or reinforce their contemporary agendas.
But that argument is itself modernist-inspired. It proceeds from a
conception of time as segmented, in which actors in the “present”
have a discretely different experience and set of attitudes from actors in the past, and, more fundamentally, in which actors in the present are capable of overwhelming or wholly erasing their past. Pressed to its conclusion, this view of time assumes that present actors operate under no burden from their past; if their past is inconvenient, it can be wholly forgotten.\footnote{This claim is also made by Rubenfeld, supra note 8, at 26–27.}

But that view of time is not an accurate description of the temporal condition in which contemporary actors are invariably situated. That condition consists of a more complex relationship with the present and the past than the description assumes.

Consider, first, the relationship of contemporary actors with the immediate culture that constitutes “the present” for them. The difficulty with the canon of objectivity is not only that it appears to be erected on a naive belief that contemporary historians will suspend the normative reactions they have, as citizens of the present, to data from the past. There is a further difficulty: contemporaries cannot escape the set of attitudes and experiences that defines their existence as occupants of a particular moment in time, and thus cannot be “objective,” in the sense of bringing none of those attitudes or experiences, when they view the past. Just as those attitudes and experiences may incline present actors to “forget” some of their history, they may require them to remember some of it. Present actors are thus “trapped” in their current existence to a greater degree than the objectivity canon assumes, but their temporal condition need not privilege a view of history as progressively irrelevant.\footnote{To put this point in context, when Brest, supra note 253, at 221–22, suggested (following Hans-Georg Gadamer) that historical interpretation is necessarily “indeterminate and contingent,” his conclusion said nothing about whether a contemporary interpreter, for reasons related to his or her own temporal situation, would be inclined to privilege and respect “the past” or dismiss “the past” as irrelevant.}

Indeed, the view of history as progressively irrelevant to the present and the past confronts a conundrum. A commonsensical proposition about human existence is that actors living in a temporal “present” are significantly burdened by their immediate past. A theory of radically segmented time assumes that actors in “the present” have the ability to separate themselves from the past and the
future, because history is a process of qualitative change and, ultimately, because changes obliterate the past. Since change is induced by the purposive acts of humans, the segmentation of time can be willed. But a moment's reflection will remind us that such radical separation of the "past" and "present" is not possible. Every time contemporary humans make a decision they do so against the backdrop of their immediate past. They themselves are creations of actors and events in that past. Their contemporary institutions were forged in that past. When they seek to make changes in their external world or in their attitudes to it, their frame of reference is composed of the external landmarks and attitudes they inherit, regardless of their perspective on that inheritance. And when they succeed in making such changes, or when changes otherwise occur, what is changing is not just their present but their future as well. The changes are providing new points of reference for actors in the future.

History can thus be described as the ultimate constraint on the purposive acts of human causal agents, because those acts, at any moment in time, take place within a temporal condition that includes inherited attitudes and events. The immediate and distant pasts provide part of the contours of the attitudes and experiences that define a contemporary actor's present and "trap" that actor in it. To separate those contours from the set of attitudes and experiences is to take away a good deal of its shape. To say that a present actor can ignore or fully "separate" from history, or to claim, more extravagantly, that "past," "present," and "future" can be radically segmented in time, is to posit a hubristic, human-centered view of temporal change.

Assume, then, that one cannot easily read history out of the experience of contemporary actors, and that even the most future-oriented contemporary policymaker is constrained by the weight of his or her immediate past. At this point one can see why historical inquiry, as a methodology, and history, as a medium, might be resurfacing in American constitutional scholarship. Historical inquiry can be seen as an investigation of another set of constraints that confine contemporary policymakers. By looking at history, one develops a more realistic portrait of the framework in which contemporary constitutional issues are raised and decided.
Nonetheless, previous generations of twentieth-century American constitutional scholars implicitly chose not to engage in historical inquiry. This article argues that it is not simply the omnipresence of the immediate and distant past in the temporal condition of present actors that has propelled contemporary constitutionalists toward history. It is also the intuitive disaffection of those scholars with the logic of modernist-inspired theories of causal agency and historical change. Two reasons history as a source of constraints on present constitutional actors has become resonant are the immediate cumulative memory of the twentieth century, with its recurrent examples of naked human powerwielding, and the struggle being undertaken by contemporary Americans to cohere around a set of values and norms that transcend human self-aggrandizement. In this cultural setting, one can see how constitutional scholars of a variety of persuasions, confronting the problem of deriving constraints on powerholders in a democracy, mindful of the collapse of the countermajoritarian paradigm that once dominated their field, and aware of the foundational status of constitutionalism in American culture, might be especially motivated to explore history. All the more, perhaps, because their inchoate experience of their contemporary world suggests that few other potentially stabilizing forces can readily be identified.

E. Characteristics of Current Neohistorical Constitutional Scholarship

The groups of late twentieth-century constitutional scholars who became estranged from the countermajoritarian difficulty matrix and revived historical inquiry in their work can be seen, from the perspective of the first decade of the twenty-first century, as transition figures between modernist-inspired, ahistorical, countermajoritarian scholars and those engaged in neohistorical work in the contemporary legal academy. Whereas the late twentieth-century groups whose work has been previously addressed initiated a turn to history and provided preliminary models for historical inquiry, contemporary neohistorians have immersed themselves in history and refined those models. In the process, they have internalized, far more significantly than their immediate predecessors, what might be called the "ordinary science" of historical inquiry as practiced by "professional" historians.
It is hazardous to advance characterizations of scholarship when it is in the process of evolving, and when it originates from the same temporal and cultural conditions that the prospective characterizer is experiencing. I am therefore not going to attempt to do more, in this Section, than advance a preliminary typology of clusters of contemporary neohistorical work that I have observed, and provide some illustrative examples.  

Contemporary neohistorical constitutional scholarship may be said to contain three identifiable clusters of scholars, who, at one level, share an attitude towards historical inquiry, but at another level, can be seen as approaching their work from distinct methodological perspectives which make them appear, on the surface, as quite different groups. The shared attitude of the clusters of scholars is comparatively easy to describe: it amounts to "taking historical inquiry seriously," as evidenced by efforts to enlist a full range of investigative and interpretive techniques that have been developed by twentieth-century historians to produce grounded and balanced recoveries of data from the past. The attitude represents a qualitative shift from the selective, cursory, secondary source-dominated historical inquiry of many of the constitutionalists who first made a "historical turn" in the 1970s and 1980s. It also represents a greater recognition of the negative implications for legal scholars of, as Morton Horwitz put it in 1991, "roaming through history looking for one's friends."  

This attitude of "taking historical inquiry seriously" has resulted in a narrowing of the methodological gaps between members of law faculties who have received graduate training in history and are currently interested in twentieth- and twenty-first-century constitutional issues, and contemporary constitutionalist scholars who,

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350 My usual reaction to characterizations of my own recent work as representing some theoretical, methodological, or ideological perspective is to treat such characterizations as missing complexities. Given this attitude, I think it is far less important that readers endorse the characterizations I am making in this section than that they appreciate the remarkable outpouring of neohistorical constitutional scholarship that is currently taking place in the legal academy, and that they recognize that the approach to historical inquiry among contemporary neohistorian constitutionalists has altered from that of their post-countermajoritarian predecessors. 

following the "historical turn," are bringing data from history to bear in their analyses of contemporary issues. Because of the capacity of this attitude to evolve into an implicit baseline for current historical research by constitutionalists, it may be the most significant dimension of the arrival of history in constitutional scholarship, and its implications for the course of American higher education in the twenty-first century may be quite profound.

But a shared attitude that historical inquiry needs to be "taken seriously" is not the only characteristic I am ascribing to current neohistorical scholarship. Holding that attitude does not mean that one necessarily agrees with those who share it about which investigative or interpretive techniques should be given primacy, or, more fundamentally, about the normative implications of a particular historical inquiry. It is with regard to those issues, in fact, that the clusters of current neohistorian constitutionalists appear to diverge. Since the divergences, at first blush, appear to be on ideological grounds, characterizing current neohistorical work raises the question with which this Article began: Is the "turn to history" by late twentieth-century constitutionalists, at bottom, a response to short-term political developments?

I suggest that three clusters of scholars compose the community of persons engaged in current neohistorical work: persons whose scholarship can be placed within the late twentieth-century originalist tradition; persons whose work appears to be employing, in significantly modified form, some of the techniques of late twentieth-century Critical and neorepublicanist scholars; and historians whose scholarly antecedents cannot be explicitly identified with estrangement from the countermajoritarian difficulty matrix. The late twentieth-century antecedents of this third group of scholars lie in the implicit decision of several persons to simultaneously pursue law degrees and advanced degrees in history in the 1960s and 1970s, and eventually to offer themselves as candidates for entry-level positions on law school faculties. The decision of those per-

Horwitz's identification of "roaming through history" with "a certain kind of lawyer's history" captures an attitude toward cursory, agenda-driven historical inquiry by constitutional scholars that has been widely prevalent among late twentieth-century professionally trained historians, both on law school faculties and in history departments. Id. For a detailed discussion of sources exhibiting that attitude, citing works from the late 1970s to the early 1990s, see Kalman, supra note 1, at 169–90.
sons to combine historical and legal training, and to enter the law school teaching market as prospective legal historians, taken together with the tacit decision of some law schools to hire legal historians, may bear some causal connection to the diminished primacy of the countermajoritarian difficulty matrix. But if such a connection existed, few of us who entered the legal academy at that time were aware of it. Our collective reaction might better be described as a keen awareness that law faculties seemed to regard work in legal history as distinctly marginal, despite their (grudging?) interest in us.

In the early and mid-1970s, Americanist historians on law faculties, perhaps mindful of the ahistorical orientation of constitutionalist scholarship, tended to focus on private law rather than on constitutional subjects, or decisively separated their historical work from their work on contemporary constitutional issues. Gradually, as

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353 I am describing this cluster of scholars as “professionally trained” historians, but I only mean to suggest by the term that they have some advanced training in history (not necessarily doctoral degrees). I do not mean to imply that the work of this cluster of scholars is somehow more competent than their “untrained” neohistorian counterparts.

354 Between 1970 and 1977, several law schools hired persons with law degrees and advanced training in history who began to work in the fields of American legal and constitutional history. A partial list of such persons would include Henry Bourguignon, Randall Bridwell, James Ely, William Fletcher, Tony Freyer, Robert Gordon, Hendrik Hartog, Wythe Holt, Morton Horwitz, Alfred Konefsky, Bruce Mann, William Nelson, Stephen Siegel, Aviam Soifer, Mark Tushnet, and me. During the same time period, Stanley Katz and Charles W. McCurdy, originally members of history departments, joined law faculties. In the 1980s, Maxwell Bloomfield, Edward Purcell, Harry Scheiber, and William Wieck, also members of history departments in the 1970s, became tenured members of law faculties.

In the last ten years some legal and constitutional historians, formerly exclusively affiliated with law faculties, have received appointments to history departments and have offered some history courses for undergraduate and graduate students. The number of these people seems to be growing, and the phenomenon seems also to be taking place with respect to economics, English, philosophy, and political science departments. The development seems worth explaining, but this Article is not the place for pursuing the topic.

355 Bourguignon's, Ely's, Freyer's, Gordon's, Horwitz's, and Nelson's work in the early and mid-1970s focused on private law issues. See, e.g., Henry J. Bourguignon, The First Federal Court (1977) (examining American late eighteenth-century prize and admiralty law, based on research conducted between the late 1960s and the mid-1970s); James W. Ely, Jr., Law in a Republican Society: Continuity and Change in the Legal System of Post-Revolutionary America (1976) (discussing property law); 1 Tony Allan Freyer, Forums of Order: The Federal Courts and Business in American History (1979) (representing the culmination of work Freyer had begun in 1972); Morton J. Horwitz, The Transformation of American Law, 1780-1860 (1977)
the historical turn among constitutionalists gained momentum in the 1980s and early 1990s, the numbers of professionally trained historians on law faculties increased, the work of those historians came more into the provenance of constitutionalists, and the scholarly focus of Americanist historians on law faculties increasingly turned toward constitutional topics.356 These developments have resulted in an integration of the substantive and methodological concerns of the professionally trained historians on law faculties with the concerns of the other two clusters. That integration has, in my view, been a particularly important factor precipitating the “arrival” of history in contemporary constitutional scholarship.

The integration of the work of professionally trained historians on law faculties with that of scholars whose approaches have evolved out of the originalist, Critical, and neorepublican work of (combining articles Horwitz published between 1973 and 1976 with further research); William E. Nelson, Americanization of the Common Law (1975) (combining new research with articles published between 1967 and 1974); Robert W. Gordon, J. Willard Hurst and the Common Law Tradition in American Legal Historiography, 10 Law & Soc'y Rev. 9 (1975).


the 1970s and 1980s can be seen as having two quite different effects. On the one hand, the current neohistorical constitutional scholarship of the latter two groups has been far more sophisticated in its historically grounded inquiries, and far less overtly polemical, than originalist, Critical, or neorepublican work of the 1970s and 1980s. On the other hand, the work of professionally trained historians, in the period from the 1980s to the present, has been far more directed towards constitutional subjects, and far more implicitly engaged with current constitutional issues, than the work of professional historians on law faculties in the years when the historical turn first began. Thus all three clusters of scholars can be described as "neohistorians." The latter two clusters can be so described because of their members' increased efforts to take historical inquiry seriously as constitutionalists. The professionally trained historians can be so described because of their implicit willingness to engage in work that is less constrained by strong versions of the canon of objectivity, and can thus be said to have more discernible contemporary implications.

It remains to distinguish the approach of the latter two clusters of neohistorian constitutionalists, to provide some examples of their work, and to make some concluding observations about the arrival of history in current American constitutional scholarship.

I argue that the methodological affinities between the groups of current scholars, whose work can be associated either with the originalist or with the Critical/neorepublican historical work of their late twentieth-century predecessors, are far more significant than perspectival differences between those two clusters of thinkers. Nonetheless, I have perceived a different approach toward historical inquiry, as undertaken in the context of contemporary constitutional concerns, animating the two groups. This difference can be seen as related to alternative theories governing the interpretation of historical data by contemporary constitutionalists.357

357 Given the outpouring of neohistorical constitutionalist work, it is astonishing that so little attention has been directed to probing the issue, as Larry Kramer has put it, of whether "[t]he role of history in constitutional theory [can] itself be resolved by historical inquiry." Larry Kramer, Fidelity To History—And Through It, 65 Fordham L. Rev. 1627, 1629 (1997). Kramer asserts that it cannot: "The role of history in constitutional interpretation is necessarily a theoretical question." Id. Needless to say, this Article is erected on the premise that Kramer's conclusion is correct.
Scholars working in the originalist tradition continue to be concerned about the dangers they associate with unconstrained interpretations of foundational constitutional principles by contemporary constitutional actors, especially judges. They also continue to assume that some primacy needs to be given to the constitutional text, and to "understandings" associated with that text, as a check on these interpretations. Their versions of "history as constraint" have thus tended to be of two sorts: concrete extractions of the understandings of textual provisions of the Constitution by their framers, and direct application of those understandings to contemporary issues; or "discoveries," through the use of a variety of investigative techniques, of original constitutional understandings that have been obscured, sometimes because of deficient historical research, by modern courts and commentators. The historical inquiries of these lines of neo-historian constitutional commentators, when compared with their originalist predecessors, are far more informed by the methodological techniques I have identified with "taking historical inquiry seriously."


My proposed categories for current originalist-inspired historical work are not meant to be mutually exclusive. For an example of originalist-inspired scholarship drawing upon both "concretizing" and "discovering" methodologies, see Caleb Nelson, Sovereign Immunity as a Doctrine of Personal Jurisdiction, 115 Harv. L. Rev. 1559 (2002).

360 For a particularly vivid example of the increasing methodological sophistication of originalist-inspired work, compare Berger's 1977 edition of Government by Judiciary, supra note 295, with Nelson, supra note 359, or Bradley & Goldsmith, supra note 359.
Scholars whose work seems to partake of Critical and neorepublican traditions of historical inquiry can be said to resemble those traditions in the less concrete, more panoramic, form in which their historical inquiries are undertaken. I believe this tendency follows from a different theory of the interpretation of historical data by contemporary actors. Those in the originalist tradition may recognize the prospective partiality or contingency of efforts by persons situated in the present to recover their history, but, where constitutional interpretation is concerned, they resist embracing partiality or contingency as inevitable and seek to erect analytical barriers against it. Originalism is fundamentally about erecting and maintaining such barriers.\textsuperscript{361}

In contrast, Critical and neorepublican scholars who turned to history, as we have seen, embraced the partiality and contingency of historical interpretation by contemporary actors. They thus concluded that historical “truth,” in the sense of direct correspondences between past texts and understandings and present issues, was either completely illusory or at least never fully realizable. They thus felt freer to engage in more panoramic surveys of historical data, seeking to recover constitutional “traditions” or foundational constitutional principles that seemed to endure, albeit in constantly modified form, over time. Although many such scholars were concerned about the potentially nihilistic or destructive implications of interpretive partiality or contingency, their searches for constitutional traditions or foundations were conducted against a baseline of constant constitutional change.\textsuperscript{362}

More recent neohistorians influenced by this theory of constitutional interpretation have significantly refined it. Perhaps implicitly recognizing that in periods of cultural instability stark versions of constitutional antifoundationalism can be deeply unsettling, they

\textsuperscript{361} Kramer, supra note 357, takes a different view toward the differences between originalists and other neohistorian constitutionalists. He suggests that there are many reasons why one might want to be an originalist, including cabining judicial discretion. The essential difference between originalist and other neohistorians rests in a theory about whether historical inquiry should be “Founding obsessed” or whether it should include a far broader sweep in time. Id. at 1628.

\textsuperscript{362} For an example of this attitude by a scholar whose work had also been interested in the recovery of constitutional “traditions,” see Morton J. Horwitz, Foreword, The Constitution of Change: Legal Fundamentality Without Fundamentalism, 107 Harv. L. Rev. 30 (1993).
have sought to develop an approach that combines panoramic recoveries of historical data with sophisticated techniques of historical investigation and a view of the Constitution as a foundational document that requires "translation" from one generation to another. The different elements in this approach have resulted in this cluster of neohistorian scholars pursuing more diverse sorts of historical inquiries, making their identity more difficult to encapsulate in a label.

363 The most obvious, and arguably the least historically grounded, example of this "panoramic" strain of neohistorical work is 2 Bruce Ackerman's *We The People: Transformations* (1998). For a more grounded version, see David M. Golove, Against Free-Form Formalism, 73 N.Y.U. L. Rev. 1791 (1998).

364 In addition to Golove, supra note 363, see Martin S. Flaherty, History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land," 99 Colum. L. Rev. 2095 (1999).


Lessig himself is far more interested in constitutional theory than historical inquiry. But something like the idea of "fidelity as translation" informs the line of work I am currently describing. The best statement of the work's general approach I have seen is in Kramer, supra note 357, although Kramer's own work has tended to focus on founding periods and to engage in a broad analysis of the sources of constitutional understandings in those periods, rather than attempting panoramic histories of American constitutionalism over time. See, e.g., Larry D. Kramer, *Madison's Audience*, 112 Harv. L. Rev. 611 (1999). Kramer's more recent Harvard foreword, *We The Court*, does contain some "panoramic" historical investigation. Larry D. Kramer, Forward, *We The Court*, 115 Harv. L. Rev. 4 (2001).

366 Stephen Griffin's approach, as set forth in Stephen M. Griffin, *Constitutional Theory Transformed*, 108 Yale L.J. 2115 (1999), draws upon another scholarly movement, what he calls "historical institutionalism in political science." Id. at 2116, 2161 (citing representative work by "historical institutionalism"). Griffin proposes "an historicist constitutional theory" in which "the theory of constitutional change is prior to the task of constitutional interpretation," and it is clear that he is more concerned with historicism's potential as a normative political theory than with its role as an attitude toward historical change over time. Id. at 2116. At one point, Griffin accepts Robert Gordon's definition of historicism as "the recognition of the historical and cultural contingency of law," id. at 2120 n.18, and proceeds from that definition to urge that "constitutional scholarship" proceed from a "commitment to questioning... the necessary fictions of constitutional law." Id. at 2156.

I would distinguish this line of neohistorical scholarship, in its various manifestations, from yet another line of contemporary constitutional scholarship that engages in historical inquiry. In that line of work, historical inquiries seem quite firmly in the service of contemporary normative constitutional agendas. In addition to Ackerman,
The different governing assumptions of the two clusters of scholars thus suggest that, despite their mutually deep investments in professional techniques of historical research, they will regularly be inclined to recover different, and sometimes conflicting, versions of the constitutional past. Doubtless some members of the contemporary academy will assign ideological labels to particular contested versions, but I am not interested in doing so here. It is difficult enough, in the first decade of the twentieth century, to know what the baselines for describing someone as a "libertarian," "conservative," "liberal," or "progressive" are, let alone to map out shifting positions. But I think it is fair to say that the two clusters of neohistorians I have associated with originalist or Critical/neorepublican traditions will retain discernibly different group identities for the immediate future.\footnote{365}

\section*{F. Concluding Observations}

Meanwhile the attention of professionally trained historians on law school faculties to scholarly projects with contemporary constitutional implications continues to grow.\footnote{369} As the common interests supra note 363, examples of this line of work would include Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction (1998); Michael Dorf & Barry Friedman, Shared Constitutional Interpretation, 2000 Sup. Ct. Rev. 61; and Reva Siegel, Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action, 49 Stan. L. Rev. 1111 (1997). An earlier model for this line of work may have been Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 Colum. L. Rev. 1 (1994). I would not describe this work as "neohistorical," in the sense in which I am applying that term to current constitutionalist scholarship.

\footnote{366} Kramer calls his approach "[p]ositivism [w]ithout [o]riginalism." Kramer, supra note 357, at 1630. But that encapsulation does not fully capture the differences between neohistorian scholars working within the originalist tradition and the cluster of scholars with which Kramer is affiliated. Kramer and his counterparts appear to share an approach to historical inquiry in constitutional jurisprudence that combines a positivist conception of the Constitution, an interest in grounded, professionally-inspired techniques of historical investigation, and an evolutionary theory of constitutional change. They differ from contemporary originalist neohistorians only by embracing that term to current constitutionalist scholarship.

\footnote{367} If for no other reason, the clusters will retain separate identities because the legal academy relishes scholarly debate, and relishes, almost as much, attaching political labels to the disputants.

and concerns of these scholars more closely overlap with those of the other clusters of neohistorian constitutionalists and the interdisciplinary character of American higher education becomes even more entrenched, it may, at one point, not be possible to regard the "professional historian" cluster as having any separate identity. This might cause some disquiet among those who assume that to be a historian is to disengage oneself from the shifting landscape of contemporary constitutionalism. But it seems rather too late, in light of the pressure on the objectivity canon, to revive a role for the historian as detached observer. Twenty-first century Americans are in the process of beginning to take a detailed, not altogether sanguine, look at their twentieth-century heritage, and part of that investigation requires a sense of the twenty-first century world one inhabits.

In sum, one need not be invested in the past to engage in historical inquiry. One might have a reformist agenda and be interested in investigating some of the particular burdens of history that contemporary actors bear in order to bring those burdens into sharper relief, in the hope that their weight might lessen. Or, as a reformer, one might want to press historical inquiry farther back in time, to reveal a set of policies, and a set of assumed burdens of the past that have disappeared with time, in the aim of revisiting the policies or simply gaining distance on the conventional wisdom of the present.

Other enthusiasts for historical inquiry in constitutional scholarship might have different, more restorative agendas. But if historical inquiry is thought of as an investigation of an important set of constraints that affect all contemporary actors charged with entertaining and resolving constitutional issues, it need not be


It causes no apparent difficulty for Kalman. See, e.g., Kalman, supra note 1, at 9 ("I suggest that historians inside and outside the law schools have something to say to academic lawyers, and that both lawyers and historians would benefit from the interchange."). Nor does Barry Friedman seem troubled. See Barry Friedman, The Turn to History, 72 N.Y.U. L. Rev. 928 (1997) (reviewing Kalman's The Strange Career of Legal Liberalism).
driven by any particular set of ideological goals. This Article argues that the clusters of scholars currently pursuing historical inquiries in constitutional scholarship have a quite diverse and complex intellectual heritage. They are united, I believe, by their own experience (or that of their immediate predecessors) with the countermajoritarian difficulty matrix, and also by an intuitive sense that, especially in unstable times, a fully historicist description of the relationship of past and present time is fundamentally inaccurate. They are also united by the belief that history matters, decisively, in American constitutionalism.

History matters not merely because the Constitution is a historical document. History matters because every actor affected by the Constitution—from those charged with giving its authoritative interpretations for a particular moment in time, to those who comment on those interpretations, to the much larger number of persons whose relationship to their constitutional past is much less specific but no less significant—is, even more deeply, affected by that actor's immediate past. History may have arrived in American constitutional scholarship, but history has always been with us. The significance of history for current constitutionalists can itself be seen as confirming our increased awareness that the past remains an inescapable dimension of our present.