REVIEW ESSAY

LEGAL LIBERALISM AT YALE

Stephen M. Griffin[1]

THE STRANGE CAREER OF LEGAL LIBERALISM. By Laura Kalman.[2] New Haven, CT: Yale University Press. 1996. Pp. viii, 375. Cloth, $40.00.

Laura Kalman's book appears at first to be history on a very small scale. She offers an account of the reaction of ten legal scholars[3] to the Supreme Court's conservative turn in the 1970s and 1980s, as well to developments in constitutional theory, such as the need to justify *Roe v. Wade*[4] and the rise of originalism. Closer examination reveals that Kalman has written the first history of contemporary constitutional theory, a history that will be of interest to anyone doing work in the field. More important, Kalman has provided the most detailed and sophisticated discussion to date of what can be called the problem of history in constitutional interpretation.[5]

Kalman defines legal liberalism "as confidence in the ability of courts to change society for what judges believe is the bet-

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1. Professor of Law, Tulane University.

2. Professor of History, University of California, Santa Barbara.

3. The ten scholars are Bruce Ackerman, Akhil Amar, Owen Fiss, Sanford Levinson, Frank Michelman, Suzanna Sherry, Cass Sunstein, Gregory Alexander, Morton Horwitz, and Mark Tushnet.

Kalman's discussion is certainly not limited to these ten. Other scholars whose work is discussed to some degree include Raoul Berger, Alexander Bickel, Paul Brest, Robert Cover, Ronald Dworkin, John Hart Ely, Richard Epstein, Stanley Fish, Michael Klarman, William E. Nelson, Richard Posner, H. Jefferson Powell, David Rabban, and Laurence Tribe. The first names of Amar and Tribe are consistently misspelled throughout the book.

4. 410 U.S. 113 (1973).

5. My own discussion of this problem occurs in Stephen M. Griffin, *American Constitutionalism: From Theory to Politics* 164-69 (Princeton U. Press, 1996).

ter."[6] (p. 4) More specifically, legal liberalism means support for the Warren Court and a belief that its legacy deserves protection from (presumably) legal conservatives. Kalman contends that protecting the legacy of the Warren Court became increasingly problematic in the 1970s, leading to a crisis that law professors hoped to solve by turning to other academic disciplines—first to moral philosophy, then to hermeneutics, and finally to history. Kalman's ten scholars are all examples of this final turn to history, specifically the turn toward republicanism, that has received so much attention in the law reviews over the past decade.

Kalman identifies herself as a legal liberal, and she has written not simply a legal history, but a self-conscious defense of the use of history as a way to come to grips with the changes that have occurred in the Supreme Court's jurisprudence since the Warren Court. Kalman also identifies strongly with Yale, where she received her doctorate in history. She seems to have the deepest insight with respect to the constitutional scholars that have watched the Court from New Haven over the years, first discussing Alexander Bickel, then Owen Fiss and Robert Cover, and finally Bruce Ackerman and Akhil Amar. At times, the book threatens to become a history of constitutional theory at Yale.[7]

Kalman's history of legal liberalism invites reflection not simply on the proper relation of history to constitutional law, but on the possible future of legal liberalism and the nature of constitutional theory. After summarizing Kalman's history, I will address each of these topics below.

I

In Part One, "The Spell of the Warren Court," Kalman provides an intellectual history of contemporary constitutional theory. She begins by tracing its origins in legal realism and the reaction of legal-process scholars such as Henry Hart to *Brown v. Board of Education*.[8] According to Kalman, the legacy of legal realism for constitutional theory was a concern with finding

6. This is actually Kalman's definition of the belief of law professors in "'the cult of the Court,'" but it is equivalent to her definition of legal liberalism provided on page 2 of the book.

7. See Kalman's earlier book, *Legal Realism at Yale 1927-1960* (U. of North Carolina Press, 1986).

8. 347 U.S. 483 (1954).

objective foundations for constitutional reasoning. In general, however, she regards legal-process scholars such as Hart and Bickel as having far more influence than the legal realists over the subsequent course of constitutional theory. Like many scholars (including myself), she identifies Bickel's "countermajoritarian difficulty" as having set the agenda for constitutional theory in the law schools.[9] She tends to see subsequent developments in constitutional theory, including the turn to republicanism, as efforts to answer Bickel's democratic critique of judicial review.

The greatest impetus behind the development of contemporary constitutional theory, however, was not *Brown*, but *Roe*. *Roe* was the return of substantive due process, thought discredited in the *Lochner* era, and it set constitutional theorists to work in a way that *Brown* had not. The responses to *Roe* were interdisciplinary in a way that was new. Kalman describes the growing interest of law professors in other disciplines in the 1970s, inspired partly by more conservative readings of the Constitution by the Burger Court. The first turn was to moral philosophy, specifically Rawls's theory of justice, but, as Kalman tells the story, legal scholars soon decided that Rawls's work did not have much direct relevance to constitutional law.

More fruitful was Thomas Grey's introduction of the distinction between interpretivism and noninterpretivism.[10] Although Grey explicitly endorsed a noninterpretivist justification of controversial Court decisions, the subsequent debate seemed to involve scholars trying to justify the same decisions while remaining resolutely interpretivist. The publication of Raoul Berger's critique of the Court's fourteenth amendment jurisprudence made this move much harder by in effect defining interpretivism in terms of what came to be known as originalism.[11]

Despite the fact that the Burger Court did not overrule Warren Court rulings wholesale, Kalman sees legal liberalism as being under siege during the late 1970s, especially in the wake of the rise of law and economics and critical legal studies. Legal liberalism was also troubled during this period by splits within it

9. My own analysis is set out in Stephen M. Griffin, *What Is Constitutional Theory? The Newer Theory and the Decline of the Learned Tradition*, 62 S. Cal. L. Rev. 493 (1989).

10. See Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 Stan. L. Rev. 703 (1975).

11. See Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Harvard U. Press, 1977).

over important public policy issues such as affirmative action. As legal liberals became demoralized, they turned at the beginning of the 1980s to other disciplines for reassurance with a sense of renewed effort. This time, the turn was to hermeneutics.

I suspect that most of us who diligently waded through the endless articles and symposia generated in the 1980s on the nature of interpretation eventually reached the conclusion that Gadamer and company either did not lead anywhere or simply tracked long-established lines of reasoning in legal interpretation.[12] At times it seemed that the main reason legal scholars were interested in hermeneutics was to have a handy way to refute originalism. For example, Kalman describes Paul Brest's attempt to criticize originalism by using hermeneutic theory.[13] But the use of complex European theories of interpretation probably only confirmed originalists in their belief that legal liberals were noninterpretivists through and through.

For Kalman, Owen Fiss exemplified legal liberalism in the 1980s, first declaring that traditional approaches were dead, then gradually assuming a more hopeful outlook. Fiss's initial pessimistic judgment was more the result of developments in legal theory generally, specifically the already mentioned challenges posed by law and economics and critical legal studies, than the outcome of debates in constitutional theory. Nonetheless, Kalman reaches the somewhat extreme conclusion that by the mid-1980s, legal liberalism "appeared dead, a historical relic. Almost precisely at this point, history came to the rescue." (p. 131)

The turn to history worked in a way that the earlier turns to moral philosophy and hermeneutics did not. A school of thought, neorepublicanism, was created from the ideas of the founding generation. It was created in part to answer the conservative critics of mainstream constitutional theory, from Attorney General Edwin Meese onward, who used originalism as a club to pillory legal liberalism. While legal liberals could respond by criticizing originalism, they did not want to abandon the Framers to the tender mercies of the Reagan administration.

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12. See, e.g., *Symposium, Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. Rev. 259 (1981); *Interpretation Symposium*, 58 S. Cal. L. Rev. 1 (1985).

13. See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204 (1980).

Properly understood, didn't history support the New Deal and the Warren Court? And so the turn to history began.

At this point, Kalman provides some background on the republican revival, which is the main focus of the book. Legal scholars took inspiration from the histories of republicanism provided by Bernard Bailyn, Bailyn's student Gordon Wood, and J.G.A. Pocock. Kalman identifies Pocock as being of special importance to legal liberals in search of a new approach because "Pocock was saying America possessed a home-grown and nonsocialistic alternative to the liberal tradition." (p. 153) Cass Sunstein and Frank Michelman were the legal liberals leading the way toward republicanism. Kalman says that "liberal law professors marketed republicanism as a theory that could solve the counter-majoritarian difficulty, revive Warren Court liberalism, provide progressives with even more than they had received from the Warren Court, and had the Founders' imprimatur." (p. 160) But Kalman sounds a note of warning. "Once law professors made the historic turn, historians entered the fray to police their territory." (p. 163)

While Kalman's account of the progress of contemporary constitutional theory is excellent in many respects, it is always difficult to write this kind of "present history."[14] Since the events Kalman discusses are still within living memory, I suppose that some scholars would quibble over this or that aspect of her story. My particular quibble is that Kalman seems to think that Bickel's countermajoritarian difficulty dates back to the founding and that Bickel represented it as such. To the contrary, the countermajoritarian difficulty is largely a twentieth-century creation. The difficulty had credibility for Bickel's readers because of the conflict between the New Deal and the Old Court, not because the founding generation also believed in majoritarian democratic principles and set those principles against judicial review. Bickel clearly relied on this twentieth-century background in *The Least Dangerous Branch*, not the thought of the founding generation.[15]

In Part Two, "Lawyers and Historians," Kalman drops the chronological narrative of legal liberalism to provide an extended argument on the relationship between law and history. She wishes to argue that "historians inside and outside the law

14. See Theodore Draper, *Present History* (Random House, 1983).

15. See Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill, 1962).

schools have something to say to academic lawyers, and that both lawyers and historians would benefit from the interchange." (p. 9) She also has a point to make against the many historians who criticize the use of history in legal scholarship: "historians should recognize that the historic turn represents a sensible strategy for legal liberals and . . . law professors, who yearn for validation from the rest of the academy, should not curry favor with historians by abandoning the attempt to discern original meanings of the Constitution." (p. 9)

Kalman begins her discussion by endorsing William E. Nelson's distinction between lawyers' legal history and historians' legal history. The idea is that lawyers' legal history is motivated by current legal controversies, whereas historians' legal history is not. Historians are thus interested in the past in a general sense, not simply as a way of solving the legal problems of the present. This distinction is not one between professions. Law professors are perfectly capable of writing historians' legal history and history professors are perfectly capable of writing history that serves a contemporary legal purpose. In addition, Kalman endorses Nelson's point that neither version of history is superior to the other. The past can be used in many ways for many different purposes.

This approach to history in the law means that historians should not have been concerned with the use of history by the neorepublicans. As Kalman is at pains to explain, however, historians most certainly were concerned, even offended, by the trespass of legal liberals into their territory. Historians such as Joyce Appleby criticized the appropriation of republicanism by law professors. These criticisms exposed fundamental differences between the approach of most history professors and the legal liberals. Kalman notes that historians "favor context, change, and explanation," while law professors "value text, continuity, and prescription." (p. 180) From the perspective of Appleby and other historians, legal history that is motivated by contemporary views such as legal liberalism will inevitably be presentist history, history that introduces too much orderliness and schematization into the study of the past.

In her final chapter, Kalman notes that despite many criticisms, originalism remains part of the constitutional scene and wonders whether historians and lawyers can reach some accommodation. She urges historians to engage the work of law professors, even as they may view lawyers' legal history as more myth than history. Kalman argues boldly that this should not

matter. The history produced by legal liberals, whether originalist or not, is itself part of American history and should be regarded as an attempt to come to grips with the meaning of historical change within our constitutional tradition.

To show how historians can legitimately connect with contemporary issues, Kalman describes the field of public history and the effort by some historians to affect public policy. Historians have served as expert witnesses and have participated actively in the writing of amicus briefs in Supreme Court cases. She argues that this participation makes sense when competent historical investigation supports the public policy positions historians want to advance.

Even such well-meaning efforts pose problems. Lawyers want the past to provide continuity, whether they are interested in having the Court uphold past precedents (as in the case of abortion litigation during the 1980s) or overturn them. From a historical perspective, however, the focus should be on change in the past and how that change might support continuity or change in the present. Kalman remarks tellingly, "[f]or historians, the most satisfying constitutional theory might represent a combination of noninterpretivism with changed circumstances." (p. 201) Lawyers before the Court cannot rely on such a theory. In order to be persuasive, lawyers must look for continuities between past and present. Before the Court, original intent must be combated with original intent, not with an argument that original intent has been rendered anachronistic by historical change.

Kalman nevertheless argues that historians can participate in court cases without losing their integrity as scholars. She draws a distinction between scholarly history and public history for nonacademics. Historians can legitimately offer public history if it is responsible. She illustrates her idea of responsibility by endorsing H. Jefferson Powell's "rules for originalists."[16] Historians can legitimately make originalist arguments in court to the extent they are responsible in this sense and also to the extent that they would argue for the same positions before a scholarly audience. The way the arguments are presented may differ, but as long as the historian is consistent in the conclusions she or he draws, scholarly integrity is preserved.

16. See H. Jefferson Powell, *Rules for Originalists*, 73 Va. L. Rev. 659 (1987).

Kalman then moves back to neorepublicanism and asks whether it is good public history by the criteria she has developed. She notes that the neorepublicans are contesting with conservative originalists for control of the constitutional terrain, and that the political beliefs of most historians match the former much more than the latter. Kalman argues that historians should recognize that this conflict with originalists must be fought, not avoided with arguments about the historical unreality of originalism. After all, neorepublicans are advancing a version of originalism as well. Kalman thinks it is possible for history professors to be critical of neorepublicanism in their role as historians, yet be favorably disposed to it as citizens who recognize that by embracing a framework for politics endorsed by the Framers, they at least ensure a hearing for their point of view in American political debate.

Ultimately, Kalman sees Bruce Ackerman's "neofederalist" theory of dualist democracy as having a better chance than neorepublicanism of reconciling the differing approaches toward history taken by lawyers and historians. Kalman notes that Ackerman's work has been received far more favorably by historians than by legal scholars. Kalman thinks that Ackerman has more historical support for his theory than law professors have acknowledged. She argues that Ackerman's theory "is more historically plausible than neorepublicanism and that it possesses the potential to move constitutional theory beyond the counter-majoritarian difficulty." (p. 221) Kalman answers scholars like Laurence Tribe who are critical of the projects of both Ackerman and Amar that this "'Yale school'" of constitutional interpretation shows a "greater sensitivity to history and a more *disciplined* approach to interdisciplinary work." (p. 224) (emphasis in original) From Kalman's point of view, the Yale school promises to use history to replace Bickel's myth of the countermajoritarian difficulty with a new historical-legal myth of the founding—one that emphasizes the sovereignty of the people "and, by explaining how constitutional change has occurred, to illuminate how it may take place." (pp. 224-25)

Kalman says that she does not advocate Ackerman's brand of neofederalism and cites various problems with it. But she admires the work of Ackerman and Amar as a creative use of history to get constitutional theory out of its countermajoritarian rut. Even if constitutional theory escapes its obsession with judicial power and countermajoritarianism, however, it will not be out of the woods. The faith of legal liberals in the promise of

court cases such as *Brown* and in the Court as an engine of social change has been undermined. *Brown* is now attacked both by critical race theorists and conservatives such as Justice Clarence Thomas. Kalman refers to Michael Klarman's backlash thesis, which argues that *Brown* caused social change only indirectly, by inspiring a virulent white backlash that led eventually to violent confrontations that crystallized a national majority in favor of civil rights.[17] So constitutional theorists have moved from seeing *Brown* as prophetic to seeing it merely as the indirect cause of a great change that was not the Court's to generate in the first place. With regard to Klarman and his generation of theorists (of which I am a member), Kalman asks: "[i]f 1937, 1954, and 1973 were the pivotal moments for the last three generations of constitutional law professors—the Wechslers, the Covers and Michelmans, the Sunsteins—what will be the decisive moment for members of this new generation?" (pp. 234-35)

Kalman fears the loss of the understanding of *Brown* as a pivotal case and the loss of faith in judicial power. Klarman's process theory that avoids legal liberalism and drains *Brown* of its significance, says Kalman, "frightens me, as it must legal liberals at law schools who see *Brown* as foundational and derive a sense of purpose from it." (p. 235) She sees neorepublicanism and neofederalism as better alternatives in that they seek to use history to come to grips with the present and revitalize the project of "legitimating judicial review by a liberal judiciary." (p. 235) Kalman does worry that if constitutional theory loses its focus on the countermajoritarian difficulty, it may justify activism by a conservative Court. But she takes comfort in the thought that "if the wheel turns and an activist liberal Court committed to making law a tool of social reform emerges, it would probably be able to work more effectively if it is not dogged by the counter-majoritarian bogeyman." (pp. 236-37)

II

Kalman's reflections on the relation between history and constitutional theory, the nature of scholarship, and the future of legal liberalism raise many interesting and important questions. While the use of history in constitutional scholarship has been very problematic, historians have not often been willing to lend their assistance in exploring better ways to make use of the

17. See Michael J. Klarman, Brown v. Board of Education: *Facts and Political Correctness*, 80 Va. L. Rev. 185 (1994).

past. Kalman's discussion of the uses of history is by far the most extensive to date.[18] It is helpful both in understanding the problems legal scholars face in trying to find a usable past and the much different perspective historians bring to constitutional debates. Although I provide a number of criticisms below, any future discussion of these questions must take Kalman's book into consideration.

Kalman's project is one of reconciliation. Lawyers are to be reconciled with historians and originalists are to be reconciled with nonoriginalists. Unfortunately, there are good reasons for thinking that the opposing parties are not interested in mediation. One way to see this is to ask whether originalists would accept the historical methodology that Kalman recommends. It is likely that they would not.

Consider Kalman's use of Powell's "rules for originalists."[19] For Kalman, Powell's rules on how to use history are a matter of common sense. They should be adopted by anyone seeking to "use history for originalist purposes." (p. 202) The flavor of Powell's rules can be conveyed by three examples: "History itself will not prove anything nonhistorical"; "History answers—and declines to answer—its own issues, rather than the concerns of the interpreter"; and "History never obviates the necessity of choice."[20] While these rules may make sense to historians, any self-respecting originalist would have to reject them. Indeed, part of the point of Powell's article is that originalists *do not*, in fact, accept these rules.[21] While Powell criticizes originalists for ignoring the rules of good history, Kalman expects them to smoothly adopt the rules without complaint. Both Powell and Kalman fail to appreciate that the price of adopting the rules would be the end of originalism, at least as contemporary originalists understand it.

Originalism as practiced by Robert Bork, Henry Monaghan and others is not simply an appeal to history, but a complex constitutional theory that is variously based on appeals to the need to curb judicial discretion, to the constrained role of a judiciary

18. For other recent discussions, see Griffin, *American Constitutionalism* (cited in note 5); Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 Colum. L. Rev. 523 (1995); Cass R. Sinstein, *The Idea of a Useable Past*, 95 Colum. L. Rev. 601 (1995); Mark Tushnet, *Interdisciplinary Legal Scholarhsip: The Case of History-in-Law*, 71 Chi-Kent L. Rev. 909 (1996).

19. See Powell, 73 Va. L. Rev. (cited in note 16).

20. Id. at 662, 669, 691.

21. See generally id.

in a democracy, and a critique of past Court decisions.[22] With respect to Powell's rules just quoted, it could be said that the purposes of originalism are to let history determine case outcomes, show that history usually answers the concerns of contemporary constitutional interpreters, and let history reduce or even eliminate the problems of choice that justices face. Of course, none of these purposes is compatible with Powell's rules or Kalman's desire to reconcile originalism with nonoriginalism.

In saying this, I do not mean to question Kalman's suggestion that history written according to Powell's rules will occasionally be helpful to lawyers and judges seeking guidance in constitutional cases. But Kalman is underestimating the gap between lawyers' and historians' legal history and also between those legal histories and the kind of appeals to history that have been common in originalist theory and in contemporary constitutional theory in general. Kalman seems to think that originalism is an instance of lawyers' legal history. As just explained, it is something quite different—a particular constitutional theory or philosophy in which the appeal to history is just one important element.

The implausibility of Kalman's proposed reconciliation between historians' legal history and originalism points toward a larger difficulty—whether originalist or not, constitutional scholars are not interested in history in the way historians are. There is a deep incompatibility between the projects of the American constitutionalist and the American historian. One reason is that American constitutional law implicitly embodies a presentist bias, what historians call a Whig theory of history. As Joyce Appleby remarks, "[l]ike the history of science, the history of the United States Constitution has been largely written as the history of its progress."[23] The story of constitutional law is typically presented as a narrative of moral progress, of a continuous closer approximation of the ideals of the founding generation, culminating in the desirable democratic order of the present, with its valuable and historically rooted set of fundamental rights. This story stresses the continuities between past

22. See generally Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (Free Press, 1990); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. Rev. 353 (1981).

23. Joyce Appleby, *The American Heritage: The Heirs and the Disinherited*, in David Thelen, ed., *The Constitution and American Life* 146 (Cornell U. Press, 1988).

and present, rather than the discontinuities that have also contributed to the present constitutional order.[24]

Whether constitutional scholars are originalist or not or in favor of judicial activism or not, they are united in showing the American constitutional tradition in its best light and demonstrating that the continuous development of this tradition argues in favor of whatever position they happen to hold.[25] Since they argue from a text that has not changed much in a formal sense in over two hundred years, interpretations that stress a continuous commitment to the rule of law are far more useful to constitutional lawyering than historicist narratives that stress conflict and change.

Kalman knows all this in a sense. She reminds us many times that there are important differences in the worldviews of law professors and historians. Yet she has not gauged the full extent of the difference and she too easily accepts the responses of constitutional scholars to criticism of their work by historians. When historians criticized the work of the neorepublicans at a meeting of the Association of American Law Schools, Kalman quotes Frank Michelman's response that constitutional scholars must seek a usable past. Michelman asked, "'[w]ithout the past . . . who am I?'. . . 'Who are we? . . . Without a sense of our identity, how do we begin to make a case for anything? Without *mining* the past, where do we go for inspiration?'" (p. 175) (emphasis in original) Kalman comments correctly that "[b]y mooring their vision in the Founding, law professors believed they could make a more powerful case for it." (p. 175)

The ideas about the role of history expressed by Michelman are unexceptionable in legal scholarship. The past is understood as a source of identity, authority, and inspiration. Since not everything in American history is equally useful for such purposes, however, the past must be edited in light of contemporary values. This helps generate the mighty engine of Whig constitutionalist history, which highlights very particular episodes in American history at the expense of others. The plausibility of Michelman's defense is weakened considerably if it is kept in mind that the neorepublicans (along with most constitutional scholars) were only really interested in one period in American

24. See Gordon S. Wood, *The Fundamentalists and the Constitution*, The New York Review of Books, 33, 39-40 (February 18, 1988).

25. See Louis Michael Seidman and Mark V. Tushnet, *Remnants of Belief: Contemporary Constitutional Issues* (Oxford U. Press, 1996).

history—the Founding. From a historicist point of view, we are indeed products of the past, but the *entire* American past is at least potentially relevant to who we are today. Understanding American constitutionalism historically means situating it within the flow of American history and particularly within the context of American political development. While this perspective may be familiar to historians and political scientists, especially those who stress the importance of institutions, it is a perspective entirely unknown to the mainstream of legal scholarship.

In its selectivity, the kind of "lawyers' legal history" practiced by originalists, neorepublicans, and by most constitutional scholars, is more akin to the history told by Hollywood than a careful attempt to come to terms with the past.[26] The great moments of American constitutional history are told time and again, with particular emphasis on the great drama of the Founding, followed by a series of quick cuts reviewing the Civil War, Reconstruction, the Dark Age of the Lochner era, the New Deal, the civil rights movement, and the Warren Court. Here the story ends and theory begins.

What is missing from this film? Only most of American political, social, economic, cultural, and intellectual history, much of which is essential context for any proper account of American constitutionalism. Contemporary American constitutional history ends, after all, not with Chief Justice Warren but with Chief Justice Rehnquist. Understanding the terrain of contemporary constitutional politics means coming to grips with, among other things, the revival of conservatism in the 1980s that began in many ways with the defeat of Barry Goldwater in 1964.

From the standpoint of Kalman's legal liberals, the 1980s was the decade of the revival of legal liberalism and the birth of neorepublicanism, a decade in which Robert Bork was banished from the "mainstream" of constitutional thought. Meanwhile, Chief Justice Rehnquist and Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, and Clarence Thomas began patiently moving the bed of the mainstream to the right. The selectivity of lawyers' legal history meant that legal liberals were poorly prepared for the new conservative age.[27] The "revival" of

26. On the difference between Hollywood history and historians' history, see generally Mark C. Carnes, ed., *Past Imperfect: History According to the Movies* (Henry Holt, 1995).

27. For an illustrative argument on the limits of litigation in favor of legal liberal causes in this new conservative age, see Mark A. Graber, *Rethinking Abortion: Equal Choice, the Constitution, and Reproductive Politics* 118-56 (Princeton U. Press, 1996).

legal liberalism only marginalized constitutional theory. The Court refused to follow the script.

If neorepublicans had been required to confront the whole of American history, they would have had to come to grips with some difficult questions. Where did American liberalism, the liberalism of the free market and the less government the better, come from? What was the relation of the ideals of the founding generation to the institution of slavery and the persistence of white supremacy? To what extent was the backlash against the Warren Court rooted in previous developments in American history, and what was the relationship between that backlash and the development of the conservative constitutional jurisprudence that came to the fore in the 1980s and 1990s? Answering such questions would have put the neorepublicans in a better position to deal with a more conservative Court. On the other hand, answering such questions might have made neorepublicanism appear less plausible. Either way, the result would have been a more realistic and less tendentious form of scholarship.

I do not mean to suggest that the neorepublicans are somehow unique in relying on selective lawyers' legal history. The problem is general and it affects most constitutional law scholarship. Kalman means to defend law professors from historians, but her account also supports the view that there is little that is scholarly about the way most law professors use history. Kalman's study supports the idea that there are important differences between the goals of lawyering and the goals of scholarship. Law professors presumably learned something about how to be lawyers in law school, but no law school has a required course on legal scholarship.

The distinction between lawyers' legal history and historians' legal history thus lets legal scholars off the hook too easily. The past can be read in many ways for many different purposes, but the recent history of legal liberalism demonstrates the problem with the argument of Kalman and others that if a reading is "useful" for the author and audience, then it should be respected and regarded as sound scholarship. Good scholarship requires maintaining a critical perspective on one's own assumptions, a perspective that encourages a search for objections and contrary evidence. By concentrating almost exclusively on the Founding and ignoring the importance of the rest of American history, Kalman's legal liberals and their originalist opponents made history a convenient handmaiden to their purposes,

rather than understanding that it is also a source of arguments and evidence against their most deeply cherished beliefs. Scholars should at least be willing to keep all of this in view.

III

Kalman writes as if legal liberalism is still a live option. While there is little doubt that there are many who keep the faith as established by the Warren Court, the question is whether legal liberalism is a still a viable form of constitutional politics. Kalman observes accurately that legal liberals turned to history and neorepublicanism "in order to justify activism by a liberal Court. . ." (p. 240) She does not go on to note that the prospect of a liberal Court seems to have disappeared. This omission is surprising for a historian. Kalman seems to have missed a change in context.

Consider the recent work of Cass Sunstein, one of Kalman's ten neorepublican scholars. Unlike Kalman, Sunstein is quite comfortable declaring that "[t]he discussion generated by the Warren Court and its successor is over. The terms of the earlier debates are increasingly anachronistic."[28] The new conservative jurisprudence and the decline of the Supreme Court as an institutional leader in American politics has changed the terrain of constitutional politics in ways that cannot be captured through an exploration of legal liberalism.

For Kalman, legal liberalism is linked inextricably with the Warren Court. For legal liberalism to continue, the legacy of the Warren Court must still have meaning. As noted earlier, she asks somewhat plaintively what will be the case that will serve as a reference point for my generation of constitutional scholars, just as *Brown* served as a reference point for the legal liberals. The possible answers to this question are none too appealing. *DeShaney v. Winnebago County Department of Social Services*?[29] *City of Richmond v. Croson*?[30] *Miller v. Johnson*?[31] *United States v. Lopez*?[32] More happily for legal liberals, perhaps, *Planned Parenthood v. Casey*?[33] *Romer v. Evans*?[34] Inspira-

28. Cass R. Sunstein, *The Partial Constitution* 1 (Harvard U. Press, 1993).
29. 489 U.S. 189 (1989).
30. 488 U.S. 469 (1989).
31. 115 S. Ct. 2475 (1995).
32. 115 S. Ct. 1624 (1995).
33. 505 U.S. 833 (1992).
34. 116 S. Ct. 1620 (1996).

tional cases seem to be in short supply. On the other hand, one or more of these cases might well serve as a reference point for legal *conservatives*, but this of course is no help to Kalman.

Kalman's discussion of legal liberalism seems to exist in a time warp. She places *Brown* on a pedestal, but time and circumstances have passed *Brown* by. Does it stand for the effective de jure desegregation of the nation's schools? Such desegregation in terms of the formal abandonment of dual school systems has been achieved. Does it stand for the effective integration of public schools? Such integration will never be achieved. Owen Fiss, one of Kalman's leading legal liberals, recently stated that "'[w]e're basically at a point where school desegregation efforts have collapsed, and Brown has been emptied of all its practical meaning, becoming just a symbol.'"[35]

One of the more revealing aspects of the Clinton presidency has been the demonstration of the tenuous relationship between legal liberalism and the Democratic party. The Clinton administration has resolutely avoided spending political capital on judicial appointments and constitutional controversies. The Reagan administration appointed leading legal conservatives to the bench; the Clinton administration has not responded in kind.[36] The Clinton administration opposed efforts to have the Supreme Court recognize a right to die.[37] As the *New Republic* recently summarized, "[t]he president's nominees [to the federal bench] are moderate and unobjectionable. The terms of debate on the courts have shifted, and the Republicans have won."[38] While the failure of the Clinton administration to advance the cause of legal liberalism has disappointed various liberal groups, it has not cost the administration any significant political support. The administration's changes in welfare policy, for example, are far more controversial in the Democratic party than its failure to support legal liberalism.

If the first Democratic president to win a second term since Franklin Roosevelt cannot produce a revival of legal liberalism,

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35. Quoted in Jonathan Rabinovitz, *School Choice is Proposed as Counter to Segregation*, N.Y. Times, B6 (January 24, 1997).

36. See Neil A. Lewis, *In Selecting Federal Judges, Clinton Has Not Tried to Revere Republicans*, N.Y. Times, A20 (August 1, 1996); Neil A. Lewis, *Impeach Those Liberal Judges! Where Are They?*, N.Y. Times, sec. 4 at 5 (May 18, 1997).

37. For a more extensive list of the right of center positions taken by the Clinton administration on various civil rights-civil liberties issues, see Jeffrey Toobin, *Clinton's Left-Hand Man*, The New Yorker 28 (July 21, 1997).

38. *Obstruction of Justice*, The New Republic, 9 (May 19, 1997).

a revival in the foreseeable future is extremely unlikely. It now appears to many observers that the Warren Court was an anomaly in American constitutionalism, a fortuitous combination of personalities and circumstances that could not last and will not be repeated.

How did Kalman miss this change in context? One clue may lie in Kalman's failure to discuss the role of the idea of consensus in contemporary constitutional theory. A reliance on some form of societal consensus on values has played a crucial role in many of the most important contemporary theories of American constitutionalism, including neorepublicanism.[39] But the development of an increasingly open and politicized conflict over the role of the judiciary in American politics during the Bork nomination and after has made the idea of consensus seem problematic at best.

Kalman's failure to discuss the idea of consensus is all the more puzzling given her endorsement of James Patterson's recently published history of America from 1945-1974.[40] One prominent theme in Patterson's book is the breakdown of political consensus over a variety of issues in the 1960s.[41] The breakdown of political consensus of course affected liberalism in general and legal liberalism in particular. The advent of the Reagan administration should have made clear that significant opposition to the legacy of the Warren Court is a permanent feature of American constitutional politics. Since legal liberalism depends on the idea of consensus, the end of consensus in matters of judicial politics meant the end of legal liberalism.

It may seem curious that legal liberalism should end with the rise of legal conservatism—doesn't legal liberalism imply its opposite? One key feature of legal liberalism that Kalman's book does not help us understand is its reliance on a politics of consensus and an appeal to an idealized set of public values presumed held by all citizens.[42] The constitutional politics of the

39. See, e.g., Bickel, *Least Dangerous Branch* (cited in note 15); Harry H. Wellington, *Interpreting the Constitution: The Supreme Court and the Process of Adjudication* (Yale U. Press, 1990); Brest, 60 B.U. L. Rev. at 226-27 (cited in note 13); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 Harv. L. Rev. 1 (1979). For an influential critique of the idea of consensus, see John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 63-69 (Harvard U. Press, 1980).

40. See James T. Patterson, *Grand Expectations: The United States, 1945-1974* (Oxford U. Press, 1996). Kalman's endorsement appears on the back of the jacket cover.

41. See id. at 442-57, 547-57, 565-68, 637-77, 706-09, 730-35.

42. See Wellington, *Interpreting the Constitution* at 83-84 (cited in note 39).

1990s is not, it is safe to say, conducive to a politics of consensus. It is a politics, after all, in which Republicans in Congress have continued their assault on the "liberal judiciary," despite the fact that the federal bench is dominated by Reagan-Bush appointees. It is ironic that this politicization of the judiciary was set in motion by the Warren Court's legal liberalism, a liberalism that assumed that all Americans of good will agreed on certain fundamental values.

With regard to the issue of abortion, for example, Mark Graber has recently argued that "[w]hen political activists recognize, however grudgingly, that principled justices can, on reflection, disagree over whether abortion rights are protected by the Constitution, the case for using litigation as the sole means for securing legal abortion collapses."[43] The logic of Graber's argument applies with equal force to all of the issues introduced into American politics by the Warren Court. Once it became apparent that there was no consensus with respect to these issues, that citizens of good will could disagree over these matters of principle, then the *raison d'être* of legal liberalism disappeared. In the absence of consensus, any litigation campaign to secure one of these contested values would of course be opposed by counter-litigation. A campaign to secure these values through liberal judicial appointments would be opposed by efforts to appoint judicial conservatives. In the 1980s and 1990s, constitutional politics caught up with the politicization and dissensus characteristic of the rest of the American politics since the 1960s. Whether based on hermeneutics, neorepublicanism, or neofederalism, legal liberalism could not survive such a politics.

Kalman's failure to confront the idea of consensus means that she cannot give any reason why the newer forms of legal liberalism (such as Ackerman's neofederalism) will in fact restore it as a viable form of constitutional politics. Neofederalism may be a theoretical and scholarly advance, as Kalman argues, but that does not have any implications for the real world of constitutional politics in the 1990s. If the younger generation of constitutional scholars is to find a source of inspiration, it will have to come from someplace other than the Court.

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43. Graber, *Rethinking Abortion* at 131 (cited in note 27).

IV

Kalman's book invites reflection not just on legal liberalism, but on the state of constitutional scholarship in general and constitutional theory in particular. By and large, Kalman is comfortable with the current state of scholarship. She is pleased that there is at least one group in the academy who are "at the barricades" ready to engage the forces of reaction.[44] If the scholarship that results lacks some of the sophistication of other work in the humanities and social sciences, Kalman is not overly concerned. It is a reasonable price to pay given that legal scholars can do what other academics cannot: represent clients, file briefs, and win cases establishing important precedents.

The problem here is that Kalman's book concerns a very particular kind of legal scholarship—theoretical scholarship concerned with American constitutionalism. There is reason to think that such scholarship should share at least some of the virtues of other academic scholarship. The chief virtue I have in mind is critical distance—a quality that is often mentioned as a necessary component of any kind of reputable scholarship. As I noted earlier, being a scholar means being willing to question your own assumptions as well as commonly held beliefs. It implies an attitude of skepticism and a willingness to search for contrary evidence.

These qualities have been in short supply in contemporary constitutional theory. The countermajoritarian difficulty, which Kalman uses as a focus for her analysis, is a case in point. Arguments about the countermajoritarian character of the Supreme Court are not purely normative. They also have a necessary element of description or explanation concerning how the American political system works. In general, however, law professors have not been willing to engage with relevant research from political scientists and historians that deals with the structure of the American political system and how that system has changed over time. Without such engagement, analysis by law professors of the place of the Court in American government will remain a matter of armchair generalizations and folk wisdom.[45]

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44. See Laura Kalman, *Garbage-Mouth*, 21 Law & Soc. Inquiry 1001, 1005 (1996).

45. See the discussion in John Henry Schlegel, *Talkin' Dirty: Twining's Tower and Kalman's Strange Career*, 21 Law & Soc. Inquiry 981, 997-98 (1996).

The relentless emphasis on normative argument typical of contemporary constitutional theory thus has significant costs. It tends to marginalize constitutional theory in scholarly debate, since legal scholars use descriptive-explanatory models that seem quaint by the standards of other disciplines. Moreover, in the absence of political consensus, the normative arguments have lost much of their persuasive force. Law professors often try to write like ideal judges: with due respect for the arguments of both sides and a sense of balance and restraint. In the superheated atmosphere produced by the constitutional politics of the 1990s, this approach is obsolete. Without the foundation provided by a truly scholarly orientation, the result at best is judicious editorializing.[46]

What would constitutional theory look like if it attempted to embrace the virtues of scholarship and reject standards of argument drawn from lawyering? In the first place, it would have to apply some critical distance to its own subject matter and consider the idea that the Court should not be at the center of constitutional theory. A more likely candidate for the subject matter of constitutional theory is the concept of constitutionalism and the study of the relationship between constitutional structures and the rest of the political system.[47] Second, as just suggested, constitutional scholars would have to take on the task of devising descriptive-explanatory theories of American constitutionalism that match the sophistication of their normative theories. Third, scholars would have to reject the idea that any particular normative project (such as legal liberalism) should be the *raison d'être* of constitutional theory. Kalman to the contrary, the chief purpose of constitutional theory is not to man the barricades, but to understand what is going on.

We will know that constitutional theory has become a truly scholarly enterprise when theorists stop caring quite so much about what the Supreme Court is doing and start caring more about what is going on in the rest of the constitutional system. When that happens, we might just get a theoretical enterprise that can help produce a viable form of constitutional politics. It

46. See the discussion in Seidman and Tushnet, *Remnants of Belief* (cited in note 25).

47. See Griffin, *American Constitutionalism* at 3-4 (cited in note 5).

is unlikely that this new form of constitutional politics will resemble legal liberalism, if only because the day of the Warren Court is past. One can hope that it will be more responsive to the problems of its time than the warmed-over legal liberalism and the strident legal conservatism that appear to be the only options at present.