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Citation: 111 Harv. L. Rev. 1025 1997-1998

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BOOK REVIEW

A BOOK OF LAUGHTER AND FORGETTING: KALMAN'S "STRANGE CAREER" AND THE MARKETING OF CIVIC REPUBLICANISM

THE STRANGE CAREER OF LEGAL LIBERALISM. By Laura Kalman.¹
New Haven: Yale University Press. 1996. Pp. viii, 375. \$42.50.

*Reviewed by Nomi Maya Stolzenberg*²

I. THE HISTORIANS' COMPLAINT

When I was a student at Harvard Law School in 1985, I attended a symposium. I no longer remember the topic, but the tenor of the talks and the basic plot of the event — for it turned into something of a spectacle — remain in my memory. In a large law school auditorium, monitored by the oil-painted visages of bygone legal sages, students and faculty members had gathered to hear Bernard Bailyn, one of the forgers of the "republican synthesis"³ in American history, Isaac Kramnick, a historian of political thought and a critic of the republican synthesis, and two legal scholars who were exploring the revisionist implications of the republican synthesis for American law, my teachers, Frank Michelman and Richard Parker.

In the mid-1980s, it was still breaking news in the legal academy that the Lockean tradition of classical liberalism and individual rights was not the only conception of politics to have shaped the ideas and actions of American political actors and lawmakers. In place of the liberal consensus school of historiography, which had held that Ameri-

¹ Professor of History, University of California, Santa Barbara.

² Professor of Law, University of Southern California. I would like to express my gratitude for the assistance I received in preparing this Book Review from many parties, including Cristina Rodriguez-Rios, Katie Waitman, Judith Levine, Stewart Reiser, Ruth Gavison, Nancy Kopell, Uriel Procaccia and the Hebrew University Law School, the Van Leer Jerusalem Institute, the research staff of the USC Law School Library, and the members of the USC Faculty Women's Writing Group. I am grateful, for their comments, criticisms, and suggestions, to Willy Forbath, Ariela Gross, David Myers, and Gabriel Stolzenberg, as well as to my colleagues who participated in Laura Kalman's faculty workshop at USC Law School, in which she synopsized her book and in which the idea for this Book Review was born. I also wish to thank Laura Kalman for her comments and openness to criticism.

³ The term "republican synthesis" seems to have been coined by Shalhope in his definitive essay, *Toward a Republican Synthesis*, and it refers to the group of historical works that collectively establish the thesis that a political philosophy devoted to the values of active civic participation and the common good informed American political history. Robert E. Shalhope, *Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography*, 29 WM. & MARY Q. 49, 49 (1972).

can history was unified by the persistence of a single, liberal, individual rights based framework of values,⁴ a group of historians had documented the existence of another set of ideas animating American history — the value of individual sacrifice for the sake of the common good; active citizenship or civic participation; a wide distribution of property among the citizenry; a deliberative model of politics; and a notion of personal independence or individual autonomy distinct from one based on the morés of commercial activity, freedom of contract, and (later) wage labor.⁵ These ideas are not easily reconciled with the prevailing understandings of liberalism. Moreover, when their lineage was examined, they appeared to lead back, not to Locke and the tradition of natural rights, but rather to eighteenth-century Scottish Enlightenment thought, seventeenth-century Old Whig Opposition thinkers, such as James Harrington, and the Florentine renaissance thought of Machiavelli and his contemporaries. Although the historians who contributed to the republican synthesis disagreed over precise antecedents, periodization, and even terminology,⁶ they all maintained that an alternative tradition of American political thought first dominated,

⁴ See William W. Fisher III, *The Defects of Dualism*, 59 U. CHI. L. REV. 955, 972–74 (1992); William W. Fisher III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 STAN. L. REV. 1065, 1066 (1997) (providing definitions, discussions, and critiques of the consensus school of American historiography) (citing John P. Diggins, *Consciousness and Ideology in American History: The Burden of Daniel J. Boorstin*, 76 AM. HIST. REV. 99, 111–12 (1971); John Higham, *The Cult of the 'American Consensus': Homogenizing Our History*, 27 COMMENTARY 93, 98–99 (1959); and Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11, 12–25 (1992)); Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 536 (1995).

⁵ The publication of Bernard Bailyn's *The Ideological Origins of the American Revolution* and Gordon S. Wood's *The Creation of the American Republic, 1776–1787*, magisterial books, constituted "landmark[s] in the . . . republican synthesis," Shalhope, *supra* note 3, at 69, which, along with J.G.A. Pocock's *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*, have tended to overshadow the other books and articles that were seminal in developing the republican synthesis.

At a moment when the enthusiasm for the republican synthesis may be waning, it is particularly important to note these neglected works. Caroline Robbins is credited as the first historian to initiate the "approach which would gradually erode" the liberal consensus position and elevate the role of republican thought. *Id.* at 51 (citing Caroline Robbins, *Algernon Sidney's Discourses Concerning Government: Textbook of Revolution*, 4 WM. & MARY Q. 267 (1947)). Shalhope also notes, as important way-stations in the development of the republican synthesis, works by Douglass Adair, Richard Buel, Jr., H. Trevor Colbourn, Stanley Elkins and Eric McKittrick, Oscar and Mary Handlin, Cecelia Kenyon, Perry Miller, and Neal Riemer. *See id.* at 51–65; *see also* Flaherty, *supra* note 4, at 537 (providing a more modest assessment of Robbins's role).

⁶ For details about these disputes, *see*, for example, Flaherty, cited above in note 4, at 541, and Robert E. Shalhope, *Republicanism and Early American Historiography*, 39 WM. & MARY Q. 334, 335–46 (1982). With respect to differences in terminology, one commentator has observed that "curiously the word *republicanism* does not figure prominently in [Bailyn's] text." JOYCE APPELBY, *LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION* 280 (1992); *see also* Rodgers, *supra* note 4, at 18 (noting that "those in the circle of Pocock's influence" first used the phrase "country ideology" in lieu of "republicanism").

then contested with, and eventually was dominated by, the “ideology”⁷ of rights-based liberalism. This republican synthesis elevated ideas, values, and belief systems from the status of epiphenomena (to which they were relegated by rival materialist views of history) to the status of major protagonists in history. It did not replace conventional liberalism as much as displace it by relocating it amid a cacophonous contest of rival ideas and belief systems. This new view of the course of American political history *made ideas matter*. It seemed ripe with implications for understanding the political and philosophical commitments that historically undergirded, and continue to develop through, the law.

As a recent college graduate, I was sophisticated enough to be imbued with the currently fashionable academic outlook, but naïve enough not to know it. Consequently, I spent most of my first year of law school believing it my own private and piquant observation that the philosophical tensions and contradictory values evident in the law — contradictions highlighted by the critical legal scholars then enlivening the Harvard Law School curriculum — were a latter-day incarnation of the old battle between classical liberalism and republicanism. Emboldened to share my observation with one of my professors, I was astonished to learn from her that Frank Michelman was working on the very same idea! Astonishment quickly gave way to embarrassment once I realized that not only Michelman, but seemingly every faculty member and his brother were pursuing the implications of the republican synthesis in American history for contemporary law.

This, then, was the atmosphere in which we gathered to hear a founding father of the republican synthesis speak with his supposed intellectual descendants, the legal scholars who were building upon his and other historians’ insights. Imagine my surprise, then — imagine the collective shiver of surprise that rippled across the room — when Bailyn joined Kramnick in criticizing the “republican revival” in law, and followed Michelman’s remarks with a scathing attack, not only on Michelman, but on the whole lot of legal scholars who were misusing history. Bailyn tweaked Michelman and the rest for the twin sins of anachronism and presentism⁸ — for mistakenly transposing a belief system rooted in the Revolutionary period to contemporary times

⁷ A specialized sense of “ideology” was central to the republican synthesis. According to this usage, “ideology” does not refer to a person’s political beliefs in the narrow, conventional sense, but rather to belief systems that are understood to be “political” in the sense of being laden with particular values that serve particular interests. So conceived, “ideology” is often equated with the “discourse” or “language” of a particular social group. This understanding of ideology derives from structuralist and post-structuralist thought. For further discussion, see note 38 and p. 1032 below.

⁸ “Presentism,” a term familiar to historians, refers to the projection of contemporary concerns onto the past by those who recount history. This concept is discussed further at pp. 1033–34 and pp. 1035–37 below.

without regard for differences of context. The whole effort of pursuing the legal "implications" of the republican synthesis, Bailyn let us know, was ridiculous.

This was all a bit much. Having just recovered from my embarrassment at discovering that everybody knew that republican ideas continued to contest with the dominant liberal ideology in American law, I was now being instructed that this common knowledge was laughable.

Bailyn was not the only one to complain, as Laura Kalman's recently published book, *The Strange Career of Legal Liberalism*, the latest contribution to this literature of complaint, makes clear. Many historians — joined by a number of political theorists and legal scholars — have voiced concerns about the "republican revival" underway in legal scholarship in tones that range from judicious to dismissive to derisive.⁹ Taken together, these criticisms create the impression that legal scholarship on republicanism is not just misguided, but risible. Intentionally or not, this literature of complaint is easily read as urging law professors, who are untrained in the methods of historical scholarship, to "forget about history" — especially the history of civic republicanism.¹⁰ Although Kalman herself argues that legal scholarship should not abandon history altogether, her book displays the central concerns of critics like Bailyn, as well as their tone of ridicule.

⁹ See Flaherty, *supra* note 4, at 529; Hendrik Hartog, *Imposing Constitutional Traditions*, 29 WM. & MARY L. REV. 75, 77–81 (1987); Linda K. Kerber, *Making Republicanism Useful*, 97 YALE L.J. 1663, 1664–72 (1988); G. Edward White, *Reflections on the "Republican Revival": Interdisciplinary Scholarship in the Legal Academy*, 6 YALE J.L. & HUMAN. 1, 4 (1994) [hereinafter White, *Reflections*]; G. Edward White, *The Studied Ambiguity of Horwitz's Legal History*, 29 WM. & MARY L. REV. 101, 110–11 (1987) [hereinafter White, *Studied Ambiguity*]. The litany of objections by historians was repeated in criticisms of republicanism-oriented legal scholarship by non-historians, including political theorists, see Don Herzog, *Some Questions for Republicans*, 14 POL. THEORY 473, 481–91 (1986), and legal scholars, see Larry G. Simon, *The New Republicanism: Generosity of Spirit in Search of Something to Say*, 29 WM. & MARY L. REV. 83, 90–92 (1987); Mark Tushnet, *The Concept of Tradition in Constitutional Historiography*, 29 WM. & MARY L. REV. 93, 93–94 (1987) [hereinafter Tushnet, *Concept of Tradition*]; Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, 71 CHI.-KENT L. REV. 909, 925–32 (1996) [hereinafter Tushnet, *History-in-Law*]. Other legal scholars have criticized legal scholarship about civic republicanism on nonhistorical, normative grounds. See, e.g., Kathryn Abrams, *Law's Republicanism*, 97 YALE L.J. 1591, 1603–08 (1988); Derrick Bell & Preeta Bansal, *The Republican Revival and Racial Politics*, 97 YALE L.J. 1609, 1609–11 (1988); Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801, 897–98 (1993).

¹⁰ Hence the title of this Book Review. Milan Kundera's unforgettable novel, *The Book of Laughter and Forgetting*, explores the uses of ridicule and the "airbrushing" of history as devices for silencing political opposition in the context of the Soviet invasion of Prague following the "Prague Spring" in 1968. See MILAN KUNDERA, *THE BOOK OF LAUGHTER AND FORGETTING* 3–34 (Aaron Asher trans., Faber & Faber 1996) (1978). By interesting coincidence, J.G.A. Pocock, one of the targets of ridicule in Kalman's book, couches his most candid self-reflection on the political and personal motivations underlying his historical work in the same setting of the doomed Prague Spring. See J.G.A. POCKOCK, *POLITICS, LANGUAGE, AND TIME* at xi (1971).

The great popularity among law professors of the republican school of historiography gave rise to complaints about its faddishness, a charge calculated to embarrass the proponents of the so-called "republican revival" in law.¹¹ Historians do have legitimate grievances and methodological concerns about how legal academics conduct scholarship on civic republicanism. But all too often their litany of objections has been couched in mocking tones, suggesting a degree of disagreement belied by the historians' own more careful accounts.

In part, the legal scholarship on republicanism was caught in the crossfire of a dyspeptic debate within the discipline of American history.¹² Legal scholars writing about republicanism were, in effect, joined as co-defendants in the historians' brief against their colleagues who were advancing the republican synthesis. According to the critics in this historiographical dispute, civic republicanism had ceased to be a relevant factor in American political thought by the late eighteenth century.¹³ By that time, a "wholehearted ideology of the market" and "liberal individualism" had permeated the American mindset, as evidenced by the writings of figures as diverse as Thomas Jefferson, Alexander Hamilton, and Thomas Paine.¹⁴ According to the critics of the republican synthesis, its proponents were factually mistaken in minimizing, if not outright denying, the ascendancy of liberal ideas by the end of the eighteenth century. The rise of liberal thinking "push[ed] aside" civic republicanism, rendering it obsolete, according to the critics.¹⁵ The proponents of the republican synthesis failed to recognize the supplanting of republican ideas by liberal ones. Moreover, they had to strain to *avoid* this recognition, which they did by stretching the terms of their own analysis beyond recognition in order to sustain the characterization of leading American thinkers and movements as republican, notwithstanding those figures' and move-

¹¹ See, e.g., APPLEBY, *supra* note 6, at 23 ("Like a magnet, republicanism has drawn to it the filings of contemporary discontents with American politics and culture."). However, as every observer of fashion knows, nothing fuels faddishness better than the scorning of fads — the drive to be "beyond" fads being the very engine of fashion, in academia no less than in any other fashion-driven domain. See Malcolm Gladwell, *The Coolhunt*, THE NEW YORKER, Mar. 17, 1997, at 78, 78 ("The act of discovering what's cool . . . causes cool to move on, which explains the triumphant circularity of cool-hunting . . .").

¹² The major critics of the republican synthesis in American historiography have been Joyce Appleby, see APPLEBY, *supra* note 6; John Diggins, see JOHN PATRICK DIGGINS, *THE LOST SOUL OF AMERICAN POLITICS: VIRTUE, SELF-INTEREST, AND THE FOUNDATIONS OF LIBERALISM* (1984); and Isaac Kramnick, see Isaac Kramnick, *Republican Revisionism Revisited*, 87 AM. HIST. REV. 629 (1982). See Rodgers, *supra* note 4, at 23.

¹³ See Kramnick, *supra* note 12, at 630, 660–63.

¹⁴ On Hamilton, see, for example, Isaac Kramnick, *The "Great National Discussion": The Discourse of Politics in 1787*, 45 WM. & MARY Q. 3, 8 (1988). For interpretations of Jefferson as rooted in the liberal tradition, see APPLEBY, cited above in note 6, at 291–319; Kramnick, cited above in note 12, at 644–45; and note 165 below. On Paine, see Rodgers, cited above in note 4, at 27.

¹⁵ Kramnick, *supra* note 12, at 664.

ments' evident embrace of such republican horrors as commercial activity, the value of industry and hard work, and the credos of individualism and natural rights.¹⁶ According to the opponents, the concept of republicanism "slithered all across the landscape"¹⁷ as historians of republicanism labored to construct "hybrid republican visions,"¹⁸ composed of equal parts republicanism and liberalism, or, even more ambitiously, elaborated a "lumbering, massively complicated taxonomy" to allow for the wide variations in American political ideas.¹⁹ Thus, the conception of republicanism developed by the proponents of the republican synthesis was faulted for its complexity and slipperiness,²⁰ which rendered the framework of analysis "too confusing to be useful"²¹ because it ended up describing virtually everything.²²

Alternatively, critics faulted the analytical framework of the republican synthesis for its reductiveness and oversimplifications.²³ By focusing on the tensions between liberalism and republicanism, the republican synthesis "squeezed out massive domains of culture — religion, law, political economy, ideas of patriarchy, family, and gender, ideas of race and slavery, class and nationalism, nature and reason"²⁴ that ostensibly lay outside both liberal and republican worldviews. Not only did the analysis ignore systems of thought extrinsic to liberalism and republicanism; it also presented an overly dichotomous view of the relationship between the two systems. As one critic put it, "[i]n imagining liberalism and republicanism as competing structures, we have underemphasized the fuzziness of the boundaries between the two at many points in their history."²⁵

¹⁶ See Rodgers, *supra* note 4, at 29; see also APPLEBY, *supra* note 6, at 277–90 (discussing the meaning of republicanism to American historians); Kramnick, *supra* note 12, at 662 ("Citizenship and the public quest for the common good were replaced by economic productivity and hard work as the criteria of virtue."); *id.* at 636–57 (describing the importance of Lockean liberalism to late-eighteenth-century American political thinkers).

¹⁷ Rodgers, *supra* note 4, at 32.

¹⁸ *Id.* at 37 (quoting Linda K. Kerber, *The Republican Ideology of the Revolutionary Generation*, 37 AM. Q. 474, 491 (1985)) (internal quotation marks omitted).

¹⁹ *Id.* at 27 (describing the implications of Gary Nash's characterization of late-eighteenth-century artisan ideology in GARY B. NASH, *URBAN CRUCIBLE* (1979)).

²⁰ See *id.* at 36 (criticizing the historians' "retreat to more complicated and defensible positions").

²¹ Kramnick, *supra* note 12, at 661.

²² See APPLEBY, *supra* note 6, at 277 ("Once having been identified, [republicanism] can be found everywhere."); Kerber, *supra* note 9, at 1663 ("Like the classic psychologists' test design of the old woman and the young woman embedded in the same drawing, once historians were taught to see the elements of classical republicanism in the texts of the founding generation it became, for a while, hard to see anything else.").

²³ See Rodgers, *supra* note 4, at 16–18.

²⁴ *Id.* at 17.

²⁵ Hartog, *supra* note 9, at 77; see APPLEBY, *supra* note 6, at 287 ("Indeed, many writers managed to think in both languages, pointing out the dangers of political corruptions from extended patronage while analyzing the new market economy with a totally different vocabulary.")

The critics attributed these faults to deficiencies in the methodology employed by the historians of republicanism. Methodological variations among the contributors to the republican synthesis defy a simple summary of "the methodology" that came under attack. But it is fair to say that all of the major contributors to the republican synthesis endorsed some version of the view "that men act not simply in response to some kind of objective reality but to the meaning they give to that reality."²⁶ Furthermore, they understood that such "meaning" does not emanate exclusively from the conscious intentions of individuals; rather, individual intentions (conscious and unconscious) emanate from an autonomous (or at least semi-autonomous) realm of ideas, a realm (that some would come to call "discourse," others "ideology," "culture," or "language") "where the ideas operate, as it were, over the heads of the participants, taking them in directions no one could have foreseen."²⁷ In elaborating their conception of the nature of ideas and the method of study that was accordingly called for, the contributors to the republican synthesis were fighting battles on many fronts. On the one hand, they squarely rejected the behaviorist view of many materialist historians that "ideas were . . . cooked up pieces of thought served by an aggressive and interested minority to a gullible and unsuspecting populace."²⁸ On the other hand, they opposed the "obsession with motives"²⁹ characteristic of earlier idealist histories, even as they shared with the idealists a basic belief in "the importance of ideas."³⁰ Departing from the polarized positions of both the idealists and the materialists, proponents of the republican synthesis sought to "dissolve the distinction between conscious and unconscious motives, between the Revolutionaries' stated intentions and their supposedly hidden needs and desires, a dissolution that involves somehow relating beliefs and ideas to the social world in which they operate."³¹ Insisting that "rhetoric was never detached from the social and political reality," they maintained that rhetoric therefore "becomes the best entry into an understanding of that reality."³² Accordingly, the method they adopted was to put the "emphasis on ideas,"³³ to look for historical evidence of the rhetoric of a given period (usually texts), and to interpret such textual evidence with an eye to both its "manifest" and "latent" mean-

²⁶ Gordon S. Wood, *Rhetoric and Reality in the American Revolution*, 23 WM. & MARY Q. 3, 19 (1966).

²⁷ *Id.* at 23.

²⁸ *Id.* at 19. A variety of schools of materialist history and "history from the bottom up" presented themselves as alternatives to the previously regnant liberal consensus school of American history in the 1960s and 1970s.

²⁹ *Id.* at 17.

³⁰ *Id.* at 4.

³¹ *Id.* at 16.

³² *Id.* at 31.

³³ *Id.* at 3.

ings,³⁴ all the while making the “effort to relate the world of interior, subjective experiences to the course of external events.”³⁵ “Working out from the strict genealogy of ideas to the broader aspects of political thought where ideas connect with more general social assumptions and attitudes,” the methodological aspiration of the republican synthesis was that historians would be “able to enter private worlds” of thought and belief “otherwise closed to them.”³⁶

The methodology articulated above by Bernard Bailyn, Gordon Wood, and J.G.A. Pocock (and adumbrated by earlier American historians of ideas) owes a great debt to structuralist and post-structuralist thought — frameworks of analysis that the detractors of the republican synthesis disparaged for emphasizing “the structuring and deterministic power of ideas.”³⁷ As the critics saw it, the history of ideas had blossomed into the historical study of “ideology”³⁸ at the same time that ideology itself was being redefined, in other disciplines, to refer broadly to the conceptual “languages” or “vocabularies” embodying different cultures’ belief systems.³⁹ The detractors of the republican synthesis objected to this methodology on various grounds. According to some, it was unduly “intellectualistic”;⁴⁰ by focusing upon texts and writings, it neglected “the social situation.”⁴¹ By the same token, the methodology was held to be incurably elitist, because the texts that supply the chief evidence of the studied discourse, almost by definition, were produced by members of the more influential and privileged classes.⁴² On top of this, critics charged that the focus on discourse and ideology finessed the issues of causation that the historian is obliged to explain.⁴³ Though the proponents of the republican synthe-

³⁴ See Bernard Bailyn, *The Challenge of Modern Historiography*, 87 AM. HIST. REV. 1, 10-11 (1982).

³⁵ *Id.* at 19.

³⁶ *Id.* at 20.

³⁷ Rodgers, *supra* note 4, at 21; see also APPLEBY, *supra* note 6, at 23 (arguing that the republican vision “relif[es] on an anthropological understanding of how societies structure consciousness”); White, *Reflections*, *supra* note 9, at 6-7 (discussing how republicanism complemented the rise of structuralist interpretations of history).

³⁸ See White, *Reflections*, *supra* note 9, at 7 (“Thus ideas became ideology, and a complex relationship between text and cultural context, between ideas and material forces in a culture, was posited. Republicanism came to be viewed as a vast political language, a manifestation of a ‘cultural system.’”).

³⁹ See Clifford Geertz, *Ideology as a Cultural System*, in IDEOLOGY AND DISCONTENT 47, 47-76 (David E. Apter ed., 1964).

⁴⁰ See Rodgers, *supra* note 4, at 12; see also APPLEBY, *supra* note 6, at 141 (arguing that “the Neo-Whig interpretation” — one of the numerous terms used to refer to the republican synthesis — “is idealist”). But see *id.* at 188 (offering a more subtle characterization of the republican synthesis as a “blend of idealist and behaviorist concepts” (emphasis added)).

⁴¹ APPLEBY, *supra* note 6, at 142; see also *id.* at 135 (“[T]he reality of power relations has faded away much like the Cheshire cat, leaving nothing behind but the smile of culture.”).

⁴² See, e.g., White, *Reflections*, *supra* note 9, at 30.

⁴³ See APPLEBY, *supra* note 6, at 141. As Appleby noted:

sis sought to transcend the sterile debate between materialist and idealist interpretations of historical change, and to circumvent the issue of causation altogether,⁴⁴ their detractors accused them of “emphasiz[ing] the limitations on individual conduct as a generative force in history.”⁴⁵ Most alarmingly, the republican synthesis “has surreptitiously inserted into our history the conviction that reality is socially constructed.”⁴⁶

As the critics saw it, there was an explanation for all of this. According to their detractors, the historians who developed the republican synthesis had latched on to structuralist and post-structuralist views because they served present-day needs.⁴⁷ As one critic put it, “the republican paradigm, in its late stages, became a resting place for alternatives to the ‘liberal,’ individualistic, ‘capitalist’ messages of political orthodoxy in the 1980s.”⁴⁸ Others emphasized its responsiveness to political and intellectual desiderata within the academy: the republican synthesis supplied historians of a leftist bent with an interpretive framework that transcended the no longer persuasive assumptions of earlier Progressive and Marxist histories without lapsing back into liberal apologetics. Thus equipped, leftist historians “rolled out” the “linguistic constructions” of eighteenth-century republicanism “without a blush of anachronism,”⁴⁹ and applied them to the nineteenth-century working class, the American South, and women’s history, heedless of their associations with conservative, elitist, and patriarchal institutions.⁵⁰ Presentism, the selective interpretation (or distortion) of history in order to serve a political agenda — otherwise known as

The English Commonwealth tradition has done yeoman service for American historians, but it is after all a passive complex of concepts unable to move men by itself. It cannot be used like some *deus ex machina* to explain the causes for belief. Examining the content of the revolutionary mind does not relieve the historian of the responsibility for explaining what compelled belief . . .

Id.

⁴⁴ See *id.* at 285.

⁴⁵ White, *Reflections*, *supra* note 9, at 11. Their theoretical presuppositions were thus — according to their detractors — both anti-materialist and “anti-individualist.” See *id.* The result was a view of “ideas . . . having operative force through their *control* of experience,” APPLEBY, *supra* note 6, at 188 (emphasis added), and of “[h]istorical actors . . . *imprisoned* by culture,” White, *Reflections*, *supra* note 9, at 11 (emphasis added), who, “[f]ar from grasping reality, . . . were in the *grasp* of a ‘peculiar inheritance of thought,’ which *forced* them to interpret” events around them in a particular way, APPLEBY, *supra* note 6, at 162 (emphasis added).

⁴⁶ APPLEBY, *supra* note 6, at 278. For another discussion attempting to relate the methodological controversies regarding the republican synthesis to the philosophical controversy over “social constructionism,” see Mark Bevir, *Mind and Method in the History of Ideas*, 36 *HIST. & THEORY* 167 (1997).

⁴⁷ See White, *Reflections*, *supra* note 9, at 12.

⁴⁸ *Id.*

⁴⁹ Rodgers, *supra* note 4, at 28.

⁵⁰ See *id.* at 28–32.

"roaming through history looking for one's friends"⁵¹ — thus accounted for the ever more anachronistic extensions of the republican paradigm.

Given this vociferous opposition to republican historiography, it is unsurprising that legal scholars who relied upon this historiography came to share the blame. However, legal scholars of republicanism were also singled out for special criticism.⁵² According to the critics of the republican revival, if the historiography of republicanism hinted at presentist concerns, the legal literature on republicanism was completely saturated with them. One especially strident detractor charged that "[t]he law professors who recently have discovered the debate — Frug, Sunstein, Ackerman, and most prominently Michelman — have

⁵¹ White, *Reflections*, *supra* note 9, at 20 (quoting Morton J. Horwitz, *Republican Origins of Constitutionalism*, in TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS 148, 148 (Paul Finkelman & Stephan Gottlieb eds., 1991)) (internal quotation marks omitted).

⁵² The legal scholarship on civic republicanism canvassed a wide variety of topics, including, for example, the modeling of the republican ideal of active self-government by courts, see Frank I. Michelman, *The Supreme Court, 1985 Term — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 65–77 (1986) [hereinafter Michelman, *Traces*]; Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 544, 593–613 (1986); the use of civic republican conceptions of corruption and properly functioning government to animate more powerful process-based theories of judicial review, see Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1581 (1988) [hereinafter Sunstein, *Republican Revival*]; Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 291 (1986) (arguing that judges should adopt an approach to review of administrative decisions that forces deliberation); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 52 (1985) [hereinafter Sunstein, *Interest Groups*]; Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1144 (1986); the manifestation of civic republican conceptions of property, see GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970* (1997); Gregory Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273, 286–302 (1991); Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1330 (1987) [hereinafter Michelman, *Possession vs. Distribution*] (discussing republican traditions of property that emphasize an inclusionary response that seeks broad distribution of those material goods necessary for the political competence of the citizenry); the reflection of the civic republican ideal of active participation in collective self-government in local government law doctrines, see Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1067–73 (1980); Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Modes of Local Government Legitimacy*, 53 IND. L.J. 145, 149 (1977–1978) [hereinafter Michelman, *Political Markets*] (describing a public interest model of government legitimacy that emphasizes deliberation, virtue, and the public good); a civic republican vision of lawyering, see Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 258–66 (1990); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 11–19 (1988); the merging of civic republican and liberal themes in the constitutional doctrine of privacy, based upon the role of the family in inculcating civic (liberal) virtue, see Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955, 972–979, 1021–24 (1993); civic republican themes in contemporary criminal law, see Stuart A. Scheingold, Toska Olson & Jana Pershing, *Sexual Violence, Victim Advocacy, and Republican Criminology: Washington State's Community Protection Act*, 28 L. & SOC'Y REV. 729, 732–34 (1994). Other works identified with the republican revival include: MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 1–17* (1988); Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1070–71 (1984); and Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57, 57–58 (1987).

made only a slight pretense of being faithful to conventional historical sources. They have extracted a meaning for republicanism that 'fits' with their own versions.⁵³ According to another, "republicanism" was swept up in the legal literature "as shorthand for everything liberalism was not,"⁵⁴ rendering both liberalism and republicanism as "abstractions with a veneer of history."⁵⁵ Charges of ahistoricism and anachronism abounded.⁵⁶ The historians of the republican synthesis may initially have been responsible for distorting the concept of republicanism, by projecting it into the nineteenth century, but then legal scholars "further distorted the original concept."⁵⁷ The latter charge enabled historians of republicanism, like Bernard Bailyn, Gordon Wood, and Linda Kerber, who were on the receiving end of the criticisms in the historians' debate, to join in the attack on legal scholars for their misuse of history.⁵⁸ Historians, who were at each others' throats over whether civic republicanism had persisted until the end of the eighteenth century, proclaimed in unison the folly of characterizing more recent and even contemporary legal ideas as republican.

Historians portrayed the legal scholars' abuse of history as at once willful and accidental, cynical and naive. Charges of anachronism tended to rest on a view of law professors as ignorant of the canons of historical evidence and of historical expertise,⁵⁹ uneducated in the proper use of primary and secondary sources, and oblivious to the basic historicist commitment not to wrench past events out of their proper historical context.⁶⁰ By contrast, charges of presentism presup-

⁵³ White, *Studied Ambiguity*, *supra* note 9, at 110.

⁵⁴ Rodgers, *supra* note 4, at 33.

⁵⁵ *Id.* at 34.

⁵⁶ See, e.g., Kerber, *supra* note 9, at 1672 ("It is anachronistic and unnecessary to reach back over the last two hundred years to claim the republicanism of the early modern era.")

⁵⁷ White, *Reflections*, *supra* note 9, at 32.

⁵⁸ Linda K. Kerber made seminal contributions to the republican synthesis in LINDA K. KERBER, *WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA* 265-88 (1980). She contributed to the criticism of the republican revival in law in Kerber, cited above in note 9, at 1663-64. Kalman quotes some of Wood's critical remarks about the republican revival in legal academia (pp. 175-76).

⁵⁹ Kalman makes that charge, (p. 191) as does Tushnet, see Tushnet, *Concept of Tradition*, *supra* note 9, at 96-98. But cf. Morgan Cloud, *Searching Through History; Searching For History*, 63 U. CHI. L. REV. 1707, 1745 (1996) (book review) ("I am not worried about partisan arguments relying upon historical materials as long as we treat them as lawyer's briefs and not as sources of historical truth.")

⁶⁰ Critics of the republican revival frequently invoke "historians' standards" and the "canons" of historical scholarship. See, e.g., Flaherty, *supra* note 4, at 552-55 (noting that historical critiques of legal scholarship presuppose the existence of standards that guide the practice of history, and laying out the most basic standards); Tushnet, *History-in-Law*, *supra* note 9, at 932, 934 (invoking "historians' standards" and identifying "get[ting] the facts right" as the most basic, "least demanding" one); White, *Reflections*, *supra* note 9, at 28 (invoking "the traditional canons of the historical profession" and asserting that the scholarship of the republican revival exploited their apparent collapse). These assertions build on a body of scholarship treating the relationship of

law to history more generally. See, e.g., Cloud, *supra* note 59, at 1708 n.5; Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122 n.13; John Phillip Reid, *Law and History*, 27 LOY. L.A. L. REV. 193, 193 (1993).

Phrases such as "canons of proof" and "methodological standards" may be misleading if they are taken to imply the existence of a fixed set of rules prescribing the method for identifying historical evidence analogous to the legal rules of evidence and/or rules concerning its proper interpretation. The implication is misleading for several reasons. First, few if any contemporary historians subscribe to the belief that raw historical data, or pure facts, exist apart from the process of interpretation. See Bevir, *supra* note 46, at 177-79, 184 (elucidating the reigning view that "what we would count as a verification of a proposition depends at least on some of the other beliefs we accept as true"; that "there are no given empirical facts"; and so, accordingly, "no historical interpretation is unquestionable"); Carlo Ginzburg, *Just One Witness, in PROBING THE LIMITS OF REPRESENTATION: NAZISM AND THE "FINAL SOLUTION"* 82, 85 (Saul Friedlander ed., 1992) (observing that "[m]any contemporary historians would probably react with a certain embarrassment to the crucial word *preuves* (proofs)"). (It should be noted, however, that Ginzburg himself registers objections to such skepticism.) Because historians widely accept the dependency of the meaning of facts on the preexisting beliefs of the interpreter, they generally reject the notion of a process of historical verification that rests on a strict distinction between empirical facts and nonempirically based knowledge. Instead they maintain that history is an essentially interpretive discipline, in which the presentation of supporting facts is inseparable from the process of interpretation. See Bevir, *supra* note 46, at 177-84.

If the "canons," "standards," or "rules of evidence" of the historical discipline are taken to refer to a single, agreed-upon method of interpretation, this formulation is also misleading. Over the past decades, schools of historical interpretation have proliferated. See Bailyn, *supra* note 34 (describing the variety of contemporary schools of historical method); Scott Mandelbrote, *History, Narrative, and Time*, 22 HIST. EUR. IDEAS 337, 341-42 (1996) (same).

Given the absence of a single favored method of interpretation, or a fixed set of "canons of historical proof" or "rules of evidence," it is probably better to understand such phrases to refer loosely to a set of injunctions that have historically guided the practice of history, such as the "admonition that historians should devote themselves to the task of determining what actually happened," Robert William Fogel, *"Scientific" History and Traditional History, in ROBERT WILLIAM FOGEL & G.R. ELTON, WHICH ROAD TO THE PAST? TWO VIEWS OF HISTORY* 5, 28 (1983); the injunction not to take historical events out of context, but rather to understand their meaning in light of the specific context in which they occurred; the exhortation "to emphasize the pastness of the past," Tushnet, *History-in-Law, supra* note 9, at 916; the injunction to be "impartial," detached, and objective, see Cloud, *supra* note 59, at 1710; the exhortation to be "comprehensive," in other words, not to leave out data, especially inconvenient data or relevant historiographical accounts that challenge one's own historical thesis, see *id.* at 1709; and finally, and most basically, the admonition to keep facts straight. As Tushnet observes, many of these vague admonitions are indistinguishable from the rules for effective argument in any field, see Tushnet, *History-in-Law, supra* note 9, at 932 & n.91, and hence do not serve to define "canons of proof" unique to the discipline of history. Others, such as the striving for objectivity, impartiality, or facticity, have been the subject of enormous controversy, at least since the time of the "crisis of historicism." See *infra* note 100.

The most scrupulous and useful account of "historians' standards" produced so far in the context of the debate over the republican revival is Martin Flaherty's. Acknowledging the longstanding controversies that surround the possibility of establishing objective historical truths, see Flaherty, *supra* note 4, at 551 & n.122, Flaherty wisely opts to specify the standards that govern what professional historians deem to be "historically convincing" rather than "historically true," *id.* at 551, namely: "getting elementary facts straight," *id.* at 552, by which Flaherty evidently means not contradicting what historians commonly accept as established facts; supporting historical propositions with a "thorough reading, or at least citation, of both primary and secondary source material generally recognized by historians as central to a given question" (rather than "mak[ing] a fetish of one or two famous primary sources"), *id.* at 553; "viewing, or at least attempting to view events, ideas, and controversies" in their historical context (rather than

posed a highly cynical view of “lawyers . . . experienced in the artful manipulation of historical sources to serve adversarial positions in contemporary disputes,”⁶¹ who were opportunistically using history “as a legitimating source for contemporary arguments designed to secure discrete policy objectives.”⁶² As one critic explained, “[h]istorians are more comfortable thinking of themselves as engaged in the act of uncovering, of eliciting from the discourse of past societies elements of argumentation which will enable us to understand these societies in all their distance and strangeness,” whereas legal theorists, such as Sunstein, seem to be calling upon readers to endorse republicanism, today.⁶³

The political agenda ascribed by critics to the “republican revival” in legal scholarship gave rise to one final objection. In addition to its alleged distortions of the historical record, its methodological deficiencies qua history and its recycling of the conceptually flawed definitions of republicanism drawn from the republican synthesis, the legal scholarship devoted to republicanism was criticized by historians on frankly normative grounds. Working in the “ironic” tradition of history-writing, in which events from the past are used to illustrate how actions intended to promote one set of values perversely end up having the opposite effect, historians argued that the promoters of the republican revival were relying on an ideology that, contrary to their own progressive political aspirations, was actually conservative.⁶⁴ Only a “romanticized construction[] of the past”⁶⁵ could have blinded the legal theorists to the reality of the existence of dependent classes — women and children, slaves, laborers, nonfreeholders — whose exclusion from the class of political actors eligible to participate in the affairs of the republic “was *essential* to the republican view of the world, not an easily correctable accident.”⁶⁶

By now, these criticisms have been repeated many times, but their targets have rarely given a direct response — perhaps because the

“pick[ing] and choos[ing] facts and incidents ripped out of context”), *id.* at 554. Flaherty’s account has the virtue of sidestepping yet-to-be resolved methodological challenges, while nonetheless stipulating criteria for measuring nonhistorians’ success in meeting the historians’ scholarly conventions.

⁶¹ White, *Reflections*, *supra* note 9, at 16.

⁶² *Id.* at 25; see also Hartog, *supra* note 9, at 78 (referring to “the fashion of investing republicanism with the colors of our official constitutional opposition discourse”).

⁶³ Kerber, *supra* note 9, at 1664–65.

⁶⁴ For descriptions of the ironic tradition of history-writing in the historiography of American law, consult Robert W. Gordon, *The Struggle Over the Past*, 44 CLEV. ST. L. REV. 123, 125–26 (1996). Gordon identifies “ironic history” as an important subcategory of the “critical mode” of history, which is “used to destroy, or anyway to question, the authority of the past” via “the argument that well-intentioned past enactments have brought about the reverse of their intended results.” *Id.*; see also Tushnet, *History-In-Law*, *supra* note 9, at 915 (describing the irony “story-line” in historiography).

⁶⁵ Kerber, *supra* note 9, at 1672.

⁶⁶ *Id.* at 1665.

scholarship on republicanism has always raised and addressed many of the critics' chief concerns in numerous self-reflective methodological ruminations.⁶⁷ In the absence of a direct response to the critics, one might well ask whether the criticisms of the republican revival are valid. Are they even *coherent* as a body of complaints — that is, are they consistent with each other? And if not, which (if any) of them are the tenable ones? How can we go about verifying (or falsifying) the claims at issue? And, most importantly, are these questions even worth considering? Or should we just, as the critics seem to be urging, put civic republicanism to rest?

These questions are occasioned by the publication of Laura Kalman's book, a book written with the express intention of "putting the final nail in the coffin" of civic republicanism in legal theory.⁶⁸ Not the least of Kalman's virtues is that she weaves together the various strands of historians' complaints against the republican revival in legal scholarship into a clear and simple line of argument. Kalman, who has written previously on the American legal academy,⁶⁹ has embedded the historians' complaint in a lively story about the social, intellectual, and, above all, political forces that led American legal scholars to "[t]urn to [h]istory," (p. 132) in general, and to civic republicanism, in particular, during the 1980s. In good historicist fashion, she fleshes out the context in which this history-minded scholarship emerged, and does not shrink from the supposed obligation of the historian to "explain the causes for belief"⁷⁰ — in this case, the belief of liberal law professors in the republican synthesis. Indeed, the case she makes against the application of this historiographical synthesis to law is so unequivocal that, by the end, the reader is left wondering why intelli-

⁶⁷ Among the very few direct responses to the critics are J.G.A. Pocock, *Introduction: The State of the Art*, in *VIRTUE, COMMERCE AND HISTORY* 1 (1985); J.G.A. Pocock, *To Market, to Market: Economic Thought in Early Modern England*, 10 *J. INTERDISC. HIST.* 303 (1979); and Cass Sunstein, *The Idea of a Usable Past*, 95 *COLUM. L. REV.* 601 (1995), the first of which does not explicitly identify particular critics, but nonetheless addresses many of the most common methodological objections to the republican synthesis. So much of the work on civic republicanism is interlaced with critical self-reflections regarding the meaning and utility of the concept of discourse, the conceptual distinction between civic republicanism and liberalism, the normative implications of civic republicanism in its material manifestations, and the question of its survival in the face of "liberal hegemony" that it would be difficult to identify it all — indeed, it is difficult to identify works on republicanism that do *not* contain these internal criticisms. See, e.g., Pocock, *supra*, at 4–5 (responding to the problem of the hermeneutic circle); Michelman, *Traces*, *supra* note 52, at 17–18 (characterizing civic republicanism as a heuristic device and "deviationist doctrine"); Wood, *supra* note 26, at 12–20 (criticizing Bailyn and other "Neo-Whig" historians for their anti-Tory bias); see also William E. Forbath, *The Shaping of the American Labor Movement*, 102 *HARV. L. REV.* 1109, 1208–11, 1235–36 (1989) (recognizing "the language of law in America" as "a tradition of discourse with divergent and conflicting strands").

⁶⁸ This quote comes from introductory remarks by Laura Kalman at a USC workshop on February 14, 1997.

⁶⁹ See LAURA KALMAN, *LEGAL REALISM AT YALE, 1927–1960* (1986).

⁷⁰ APPLEBY, *supra* note 6, at 141.

gent and well-intentioned people ever bothered with republicanism. Paradoxically, the more reasons that Kalman adduces to explain why liberal legal scholars seized on the history of republicanism, the more inexplicable (because the more implausible) the whole phenomenon becomes. One is left to wonder.

Or not. The clear intention, and likely effect, of Kalman's book is not to leave the reader wondering but, rather, to convince the reader that the application of the conceptual vocabulary of republicanism to our legal system is misguided and wrong — wrong, historically and wrong, normatively. No more questions. But, as one who senses that the nail being driven into the coffin is coming dangerously close,⁷¹ I feel compelled to raise some questions, most of which have been addressed before in the self-critical methodological reflections that have formed an important component of the literature advancing the republican synthesis from its beginning, yet which are forever being forgotten amid the laughter that emanates from the oppositional literature of complaint.

Let me, then, seize this opportunity and take a closer look at Kalman's book.

II. KALMAN'S VERSION: CIVIC REPUBLICANISM DIDN'T EXIST, AND IT'S A GOOD THING, TOO

The Strange Career of Legal Liberalism is not solely concerned with civic republicanism. Indeed, in the first 150 pages the republican revival is not addressed. Instead, Kalman more broadly aims to describe and explain the *predicament* faced by liberal law professors who have struggled to maintain their "faith in what has been called 'the cult of the Court'" (p. 4). As Kalman tells it, this belief in the liberal judicial activism epitomized by the Warren Court was tested by critiques from both the right, in the form of conservative theories of originalism and law and economics, and the left, in the form of Critical Legal Studies and a host of "postmodern" antifoundationalist theories questioning the possibility of fair and unbiased methods of interpretation.⁷²

⁷¹ For the sake of full disclosure, I should indicate that I have written about civic republicanism in three publications. See Nomi Maya Stolzenberg, "He Drew a Circle That Shut Me Out": *Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581 (1993); Nomi Maya Stolzenberg & David N. Myers, *Community, Constitution, and Culture: The Case of the Jewish Kehilah*, 25 U. MICH. J.L. REFORM 633 (1992); Note, *Political Rights as Political Questions: The Paradox of Luther v. Borden*, 100 HARV. L. REV. 1125 (1987). I leave it to the reader to decide whether this makes me a partisan of republicanism. In the same spirit of disclosure, perhaps I should also indicate that during the mid-1980s, I studied civic republicanism with Frank Michelman in a weekly tutorial, and provided research assistance to Kathleen Sullivan as she was working on a critical assessment of the work of Michelman and others. See Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713 (1988).

⁷² Kalman uses the term "postmodern" loosely and broadly to refer to "Foucault and other intellectuals" who spawned "a variety of trends" and "theories ranging from antifoundationalism to

Readers may bristle at some of Kalman's caricatures, such as the frequent equation of law and economics with Richard Posner's conservative brand,⁷³ but those of us who inhabited the world of legal academia anytime between the late 1970s and the early 1990s are likely to find ourselves in familiar territory. Kalman's descriptive flair and her near-encyclopedic coverage of the major works, as well as a staggering number of the lesser ones, produced during this period accurately conveys the spirit in which the various schools of thought were *apprehended* by many legal scholars who saw themselves at the uneasy center of an increasingly fragmented, politicized, and polarized intellectual world. Instead of an overview of all of the major movements to appear in American legal academia during this time, Kalman provides the reader a particular vantage point from which to understand the scholarship of liberal legal scholars as a response to the context in which it was produced. In this story, liberal legal scholars are the major protagonists. All other scholars provide a background and assume importance only insofar as the "liberal legalists" employ them to argue for the agenda of an activist liberal Court. Conservative originalism aids their project as a foil. As a means to an end, civic republicanism is placed in the foreground and becomes a major protagonist in its own right.⁷⁴ Despite its confinement to relatively few pages spread over three chapters,⁷⁵ the controversy over civic republicanism forms the heart and soul of Kalman's story — not only because it played such a large role in liberal legal scholarship in the mid-1980s, but also because it engaged with the discipline of history, thereby raising gen-

deconstruction," as well as the "linguistic turn" which she glosses as "shorthand for the theory that language created or produced meaning, consciousness, and thought, rather than reflecting or expressing them" and which she associates with Rorty, Pocock, Skinner, Geertz, and Kuhn (pp. 97–100).

⁷³ For example, Kalman describes how Richard Posner "symbolized the movement" (p. 78) and generally uses him as a proxy for law and economics. Although Kalman acknowledges the presence of some liberal progressive versions of law and economics (p. 81), she generally identifies law and economics with free market conservatism (pp. 77–82).

⁷⁴ Kalman neglects to mention the attention given by a number of the contributors to the republican revival to the question of the compatibility of an "activist" judiciary with a republican conception of politics. She likewise fails to note the misgivings about "judicial activism" expressed by these same scholars. See, e.g., RICHARD D. PARKER, "HERE THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO 65–77 (1994); CASS SUNSTEIN, THE PARTIAL CONSTITUTION 123–61 (1993); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1528–32, 1536–37 (1988).

⁷⁵ Kalman's discussion of the republican revival begins in the middle of chapter five (pp. 143–63) and continues through chapters six (pp. 171–82) and seven (pp. 208–12). The centrality of the republican revival to Kalman's book is foreshadowed by the first page of her prologue, in which her first observation is that "[t]he debate between Gordon Wood and J. G. A. Pocock is refought in the law reviews" (p. 1). Presumably Kalman is referring to the debate over whether the civic republican tradition informed only early colonial thought, as Wood argues, or persisted and perhaps even persists to this day, as Pocock has suggested. Early on, she refers explicitly to "the republican revivalists" and asserts that their "turn to history holds both promise and peril" (pp. 8–9).

eral issues dear to Kalman's heart about the relationship between history and law.

As a historian, a J.D., and the author of two earlier, highly regarded books on American law and the legal academy,⁷⁶ Kalman seems particularly well suited to address these issues. Drawing upon her earlier work on the history of legal realism, she begins by sketching the intellectual background to her story, charting the origins of modern-day political liberalism in the New Deal and tracing the development of liberal legal theory from pre-World War II legal realist critiques of conservative legal formalism through post-war institutional process theories of government and law (pp. 13-42). The chief protagonist of her story is "legal liberalism," which she defines "to refer to trust in the potential of courts, particularly the Supreme Court, to bring about 'those specific social reforms that affect large groups of people such as blacks, or workers, or women, or partisans of a particular persuasion; in other words, *policy change with a nationwide impact*'" (p. 2).⁷⁷ Loosely speaking, it is a worldview, philosophy, ideology, or (Kalman's preferred term) "faith," supposedly held by liberal law professors and social reformers since the 1950s and the landmark opinion of *Brown v. Board of Education*⁷⁸ (pp. 1-2). Tied to political liberalism, defined here in its conventional sense of opposition to right-wing or conservative politics, legal liberalism relies upon judicial activism to foster change in a liberal direction (pp. 2, 247 n.1). Kalman ends her first chapter with a description of liberal legalism's "glory days," from 1962-1969, when "[t]he Court made liberals happy" (p. 43) with its program of progressive judicial activism (pp. 42-44). "The Warren Court made the 1960s a good time for the law schools," (p. 49) notwithstanding the difficulty of reconciling the value of judicial activism with the value of democracy and the legacy of legal realism's critique of the courts. Although Kalman acknowledges that, as early as *Brown*, liberal legal scholars struggled with their skepticism about judicial activism and their desire to support the progressive ends favored by the courts at that time (pp. 27-42), and increasingly divided into pro- and anti-activist camps (pp. 44-49), she views the division as a relatively benign "family quarrel" (p. 48) that did not yet present a

⁷⁶ These books are LAURA KALMAN, *ABE FORTAS: A BIOGRAPHY* (1990) and KALMAN, cited above in note 69.

⁷⁷ Here Kalman quotes GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 4 (1991).

⁷⁸ *Brown v. Board of Educ.*, 347 U.S. 483 (1954); see also *Brown v. Board of Educ. (Brown II)*, 349 U.S. 294, 301 (1955) (requiring that the state desegregate the public schools "with all deliberate speed"). "Legal liberalism" is not to be confused with the Critical Legal Studies construct, "liberal legalism," which includes conservative libertarianism along with other expressions of classical Lockean liberalism in law. Kalman briefly discusses the Critical Legal Studies concept of liberal legalism (pp. 85-86 (quoting Karl Klare, *Law-Making as Praxis*, 40 *TELOS* 123, 132 n.28 (1979))).

serious challenge to the dominant faith in legal liberalism and the Warren Court (p. 56).

Moving into the 1970s, the first changes that Kalman registers are: the advent of the Burger Court, "the politics of [which] were not exactly clear" (p. 58); the handing down of *Roe v. Wade*,⁷⁹ which "plunged constitutional theory into 'epistemological crisis,' rekindling interest in . . . the alleged conflict between judicial review and democracy" (p. 59); and the influx of professors oriented toward, and often trained in, the humanities and social sciences, coupled with the increasing interest of law professors in other academic disciplines (pp. 60-93). According to Kalman, many law professors "predisposed toward political liberalism" (p. 67) "became enamored of political philosophy" (p. 62), especially the work of John Rawls, because it seemed "to justify the Court's enforcement of a governmental duty to provide for individuals' 'minimum welfare'" (p. 63) and other civil rights (pp. 66-67), while answering charges of insufficient constraints on judicial discretion (pp. 62-68). But by the mid-1970s, "law professors [had] become estranged from the Supreme Court" (p. 64), and "the search for objective foundations of justice . . . seemed ever more elusive" (p. 67). By the mid-to-late 1970s, as Kalman tells it, legal liberalism was engulfed by doubts about the political direction of the courts, and, more profoundly, about the possibility of objective and normatively justifiable modes of judicial interpretation. These deeper doubts were expressed most saliently in the debate over "interpretivism" (pp. 71-77). The situation grew more polarized as "the law professorate began to attract individuals with more diverse politics, who challenged the liberal consensus," (p. 77) with the result that doubts internal to legal liberalism were increasingly expressed as attacks *on* legal liberalism (p. 87). Here, Kalman introduces highly synopsisized versions of law and economics (pp. 77-82) and of critical legal studies (pp. 82-87) as the chief antagonists, from the right and the left, respectively. Thus she paints a picture of "legal liberalism besieged" (p. 77) by attacks from every political direction. (The universe portrayed by Kalman generally divides neatly into only two political directions, the right and the left, with liberalism occupying the left/center, leaving little room for more ambivalent, conflicted, or complex political positions.)

Kalman concentrates almost exclusively on intellectual forces and minimizes other forms of institutional politics. She does note the "entrance of women and people of color into the[] ranks" of law school faculties as another cause of the "palpable angst" and "malaise" (p. 94) among law professors by the end of the 1970s, but puts more emphasis on the rise of interdisciplinary scholarship, the perceived decline of traditional doctrinal scholarship, and "a larger crisis taking place in

⁷⁹ 410 U.S. 113 (1973).

the social sciences and humanities" (pp. 94–97). Kalman refers briefly to "postmodernism" and "a variety of trends," naming Michel Foucault, Richard Rorty, and Thomas Kuhn, as well as J.G.A. Pocock and his collaborator Quentin Skinner, as the heralds of a "linguistic turn" (pp. 97–100). This roll-call functions as a brief segue to the "crisis" that Kalman tells us legal liberalism faced in the 1980s (pp. 101–31). According to Kalman, liberal legal scholars initially responded to the challenges to objective interpretation posed by critical theory, ranging from hermeneutics to poststructuralism, by trying to "coopt" them (p. 101). In her rather cynical view, "the interpretive turn proved a god-send, which allowed [liberal law professors] to question the existence of objective foundations of justice without throwing up their hands" (p. 115). But ultimately, the ground was too shaky. "Whereas legal liberalism seemed fragile in 1980, by the middle of the decade it appeared dead, a historical relic" (p. 131). Then — and here we reach the centerpiece of Kalman's *mise-en-scène* — "[a]lmost precisely at this point, history came to the rescue" (p. 131).

The first form of history in law that Kalman notes is the "jurisprudence of original intention," the theory of constitutional interpretation promoted by certain scholars and prominent conservatives in the Reagan administration like Attorney General Edwin Meese (pp. 132–35). In Kalman's view, although originalism was attacked by almost all liberal and left law professors and derided by historians (pp. 135–38), its critics failed to produce a "principled alternative" (p. 138).⁸⁰ This failure was particularly vexing because, according to Kalman, constitutional discourse *requires* giving some sort of interpretive authority to the past and, in some way, "honoring the wishes of those who framed and ratified the Constitution" (p. 138). As a result, "[m]ost law professors . . . wanted to hang onto moderate originalism" (p. 138), and "[s]ome legal liberals determined to appropriate originalism for themselves" (p. 139). Enter civic republicanism, stage left.

At this point, Kalman presents a catalogue of historically based arguments against legal scholarship on civic republicanism (pp. 143–63, 171–90). Kalman digests virtually the entire literature of objections to civic republicanism into a well-wrought storyline that historicizes the "republican revival" in academic law (p. 143). (Unfortunately, she tends to emphasize the more polemical aspects of other historians' complaints at the expense of their more careful and subtle formulations of the issues.) In Kalman's book, the "turn to history" (p. 139) and civic republicanism appears first as "a way of coopting originalism by likening it to republicanism," which was "a strategic move to steal the thunder of conservative originalists" (p. 156). As Kalman sees it,

⁸⁰ Here Kalman quotes *THE SENATE, THE COURTS AND THE CONSTITUTION: A DEBATE 12* (Center for National Policy ed., 1986) (remarks of Michael W. McConnell).

"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).

The rest of the book details the "marketing attempts" (p. 160) of Michelman, Sunstein, and other purveyors of republicanism to an audience of legal liberals eager for an intellectual product that could "steer" them between a discredited "objectivism," on the one hand, and nihilism or "irrationalism," on the other (p. 159), while reconciling their "communitarian longings" (p. 156) with their commitment to democracy and individual rights (p. 159). Kalman interlaces her description of these "marketing attempts" (p. 160) with a review of the standard litany of historians' objections to the republican synthesis in law. Her argument, boiled down to its essence, consists of five points.

First, "[t]here was no historical pedigree" for civic republicanism in American law (p. 175) because civic republicanism had been decisively and irretrievably vanquished by liberalism by the time the nation and its legal institutions were founded (p. 176). In other words, civic republicanism did not inspire the Framers of the Constitution or in any other way determine the meaning, or inform the content, of American law, as a matter of *historical fact*, so "the claim to a pedigree distorted the historical record" (p. 176). Let us call this the *factual objection* to the republican revival.⁸¹

Second, the promoters of the republican revival overcame the *factual objection* only by disregarding the essential differences between the two systems of thought and "transforming republicanism into a law-centered paradigm" (p. 154). Republicanism had always been defined by its opposition to a law-centered paradigm of legally protected rights. By "boiling up a republican stew, which included a pinch of pluralism," (p. 156) scholars like Sunstein were able to recharacterize figures like Madison, and famous texts like *Federalist 10*, as exponents of republicanism despite the commitment they exhibited to liberal pluralist values. Only by effectively denying the essential differences between republicanism and liberalism were scholars like Sunstein and Michelman able to construe the founders' attachment to liberal ideas as "evidence" of devotion to republicanism. By eliminating the distinc-

⁸¹ As I note in Part IV, the claim that civic republicanism failed to endure (or ceased to exist) as a tradition in American law is tempered by Kalman's (and other critics') recognition that civic republicanism was an influential tradition of thought in early American history, that it became integral or synthesized with liberal thought, and/or that it endured in some vestigial form. These more modest claims are inconsistent with the claim that civic republicanism lacks a "historical pedigree." Only the latter claim supports the conclusion that the proponents of the republican revival "distort the historical record" in claiming that a civic republican tradition in law exists. The less tendentious claims, by contrast, indicate wide areas of agreement between the proponents and their critics. I use the formulation "civic republicanism didn't exist" as shorthand for the more tendentious position that undergirds the *factual objection*.

tive characteristics of republicanism, they also eliminated any historical connection between civic republicanism, as understood today, and civic republican thought as it existed historically (p. 176). Let us call this *conceptual objection I*. A second, seemingly contradictory conceptual objection to the republican revival is developed in the fourth point below.

The first two points concern the claim that civic republicanism was never incorporated into American law prior to its "revival." Kalman's third point pursues an alternative argument. Here, Kalman claims that even if the law had been shaped by civic republican thought, that ideology does not support the progressive values of inclusion, equality, and community touted in the revival. On the contrary, history shows that civic republicanism is essentially "reactionary" (p. 177),⁸² because it is necessarily enmeshed with the values and institutions of patriarchy, militarism, and various other forms of domination and exclusion (p. 237). The progressive values that the supporters of the republican revival were promoting are liberal, not republican ones. This is the *normative objection* to the republican revival.

Fourth, the contrast between republicanism and liberalism is based upon a false dichotomy. The promoters of the republican revival, like the exponents of the republican synthesis upon which they relied, asserted a "binary" view of republicanism and liberalism that distorts the reality that "[n]one of the historical participants, including the Founding Fathers, ever had any sense that he had to choose or was choosing between republicanism and liberalism, between Machiavelli and Locke" (p. 174).⁸³ From a historical perspective, republicanism is a complex term that has been subject to many different interpretations and often fused with liberal values and ideas; consequently, it is not sound historical interpretation to characterize republicanism and liberalism as mutually exclusive categories (p. 174). This is *conceptual objection II*.

Finally, the factual, conceptual, and normative errors made by the marketers of the republican synthesis are attributable to their methodological mistakes, or put more nicely, to the "[m]ethodological differences" that "make law and history peculiar bedfellows" (p. 192). Legal scholars, like lawyers, necessarily use history "for advocacy purposes" (p. 185) and ascribe "prescriptive authority" to the past (p. 154) in ways that make "the historian . . . recoil" (p. 185). In their endeavor to endow the past with normative authority for the present, their work is too "presentist" to qualify as good historical scholarship within the professional norms of that discipline. In this instance, the deployment of

⁸² Here Kalman quotes GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC*, 1776-1789, at 59 (1969).

⁸³ Here Kalman paraphrases Gordon S. Wood, *Ideology and the Origins of Liberal America*, 44 WM. & MARY Q. 628, 634 (1987).

the “history” of civic republicanism was presentist in the basest sense — ahistorical and anachronistic in the strained connections it drew between contemporary communitarian and eighteenth-century republican values, counterhistorical in its distortions of the historical record, and completely political and strategic in its motivations. Bluntly, the republican revival was either wishful thinking, or sheer political opportunism. Let us call this the *methodological objection*.

After reviewing, and basically endorsing, these objections to the republican revival, Kalman turns to a consideration of the more general role that history and historians could appropriately play in the law and legal arguments. Given the law’s inescapably normative orientation toward the past, Kalman sees only two feasible options. The expounders of legal arguments can avoid the mistakes made by the republican revival either by avoiding historical arguments altogether and adopting a purely ahistorical approach to determining the imperatives of the law in light of the needs of the day, or by deploying a blatantly presentist view of the past, unapologetically “using” history (p. 193) for advocacy purposes. Curiously, Kalman ends up advocating the latter approach and urging historians not to criticize such uses of history as presentist forms of political advocacy, but rather to lend their expertise to the construction of *better*, more “credible versions” of “lawyers’ history” (pp. 199–205, 229). Historians can, and should, “help” (p. 236) tame the excesses of presentism by ensuring that lawyers’ history does not diverge from the historical record (p. 205) while recognizing the need for conferring normative authority on the past, identifying it with the present, and selectively shaping the story to fit the immediate purposes of legal argument (pp. 193–94, 201–11, 221–29, 236–40).

From this view, the legal scholarship on civic republicanism is to be rejected not because it is presentist history, but rather because it is *unconvincing* presentist history. Kalman’s basic argument is that the republican revival fails because the historical record clearly indicates that civic republicanism did not inform the political and legal system that we inherited from the Founders. Even if it had, Kalman further argues, civic republicanism is (or at least may be) a morally objectionable philosophy of government and law (lawyers may recognize the strategy of arguing “in the alternative” here). In sum, civic republicanism didn’t exist (at any point in time relevant to determining the content of American law), and it’s a good thing, too. The “republican revival” in legal scholarship is accordingly discredited, as are any future efforts to apply the terms of civic republican discourse to American law.

III. METHODS OF IRONY AND IRONIES OF METHOD

It would be a folly to persist in seeing civic republicanism as a "visionary alternative" if indeed it is not;⁸⁴ but it would be just as regrettable to abandon republicanism as a source of insight if the critics are wrong. Highly reputable and intelligent persons are making powerful arguments on both sides of the debate. The question is, who is right?

In today's highly specialized and still essentially disciplinary (as opposed to interdisciplinary) world, we are obliged to rely extensively on the opinions of others who have earned a reputation as experts in their field. I am not a historian,⁸⁵ and therefore I am not fully equipped to judge the validity of historians' conclusions. Even if I were a historian, my expertise would necessarily be confined to certain subjects and I would therefore be entitled, as well as obliged, to defer to the opinions of experts in other areas. Thus, Kalman, whose area of specialty is twentieth-century American history and law, has not inappropriately relied upon the authority of specialists in eighteenth- and nineteenth-century political thought in making her case against the republican revival.⁸⁶ Accordingly, if there are problems with the historians' complaint, it may be fair to say that Kalman herself is not primarily responsible for these problems.

At this point, we must confront a very fundamental problem. If I, as a nonexpert in the relevant historical fields, lack the training and knowledge to judge the historical arguments adequately, how can I make an intelligent choice whether to abandon the republican synthesis in law?⁸⁷ The principle of deference to reputation, eminence, and expertise⁸⁸ does not help because there are highly reputable experts weighing in on both sides of the debate. True, the weight of opinion among Americanists is now heavily on the side of the critics. Yet Pocock has continuously suggested that republican ideas may persist, *in*

⁸⁴ See Michelman, *Traces*, *supra* note 52, at 17-18.

⁸⁵ I am tempted to add "but I play one on TV" (or rather, in the media of the legal academy, law reviews, workshops, and conferences). That legal scholars publish law-related articles in law journals as legal scholars ought, perhaps, to be regarded as an adequate admission of the limits of our historical expertise. Frank Michelman has given a particularly clear example of this signaling. See *id.* at 36 n.175 (stating "I am not an historian by trade, and I do not offer this Foreword as historical research").

⁸⁶ Kalman relies chiefly on Joyce Appleby and Linda Kerber, as well as Daniel Rodgers, G. Edward White, Hendrik Hartog, and Mark Tushnet. Oddly, Kalman neglects Isaac Kramnick's critique.

⁸⁷ Note that the historians' objection is *not* that legal scholars have failed to consult secondary historical sources recognized by historians as central to the topic, for example, Pocock, Bailyn, Wood, Kerber, Appleby, Kramnick, and Diggins. Nor is the charge that the legal scholars have misunderstood, misreported, or misinterpreted the secondary sources. Rather, their quarrel seems to be with the secondary sources themselves and their "application" to ongoing and contemporary aspects of law.

⁸⁸ Cf. Flaherty, *supra* note 4, at 551 (discussing the idea of deference to scholarly specialists). And of course, there is always the further problem: whom do we trust to tell us whom to trust?

transformed forms, even after rights-based and marketplace ideologies assume dominance,⁸⁹ and whatever else may be said about him,⁹⁰ Pocock is no slouch. So, too, a number of well-respected nineteenth-century labor historians continue to advance the republican synthesis in their work.⁹¹

In attempting to evaluate the opposing positions in this debate, it is helpful to distinguish the element of the historians' complaint that is based on factual evidence (the "historical record") from the element that is based on a view of the logical properties and conceptual implications of the basic terms of the political philosophies that are the subject of historical study. In drawing this distinction, I do not mean to imply that fact-gathering is the essence of the discipline of history, whereas interpretation is not, nor do I mean to imply that historical facts exist apart from interpretation. Quite the contrary, I happily accept the reigning consensus that history is an essentially interpretive discipline, and that the greatest historical contributions consist in creative yet persuasive interpretations of the data.⁹² Nonetheless, the historical method relies on making empirical propositions that rest on facts presented as such.⁹³ Thus, what I call the *factual objection* to the republican revival depends upon assertions about what did or did not

⁸⁹ See, e.g., POCOCK, *supra* note 10, at ix-x, 145-46 (underscoring the complexity of "the dialectic between ancient civic virtue and modern commercial civility" and emphasizing that "the history of discourse is not a simple linear sequence in which new patterns overcome and replace the old, but a complex dialogue in which these patterns persist in transforming one another").

⁹⁰ Kalman has plenty of other things to say about Pocock. For example: "Historians may have been more influenced by Bailyn and Wood . . . than by Pocock. As humanists, they judged work by scholarly and literary standards" (p. 173). In addition, she repeats Rodgers's comment that "the difficulty of *The Machiavellian Moment* 'was so notorious that few actually scaled it,'" (p. 173 (quoting Rodgers, *supra* note 4, at 16)), and reports J.H. Hexter's taunt about "Pocock's '112-word sentences,'" (p. 173 (quoting J.H. Hexter, *Republic, Virtue, Liberty, and the Political Universe of J. G. A. Pocock*, in *ON HISTORIANS: REAPPRAISALS OF SOME OF THE MASTERS OF MODERN HISTORY* 255, 261 (1978))).

⁹¹ See NASH, *supra* note 19; Forbath, *supra* note 67. The proposition that republicanism may well have survived, albeit transformed, receives further support from other works of intellectual and legal history that are based upon a similar notion of conceptual transformation, applied to different belief-systems. See, e.g., Reva B. Siegel, *Home as Work: The First Women's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 *YALE L.J.* 1073 (1994) (elaborating a theory of "modernization" in which apparent changes in the law are merely modernized versions of traditional practices that persist essentially unchanged, despite surface differences). Siegel's work is also a good illustration of the ironic mode of historiography. See *supra* p. 1037.

⁹² See Tushnet, *History-in-Law*, *supra* note 9, at 914 ("Few practicing historians think that all they do is dig up facts no one knew before.") (citing HAYDEN WHITE, *METAHISTORY* (1973), and HAYDEN WHITE, *TROPICS OF DISCOURSE: ESSAYS IN CULTURAL CRITICISM* (1978)). Likewise, Kalman notes that "[a]cademic lawyers should stop viewing historians as repositories of useful facts and become more sensitive to the varieties of historical interpretation" (p. 206). For a fuller explication of the reigning view of history as an essentially interpretive discipline, see the discussion in note 60 above.

⁹³ See Flaherty, *supra* note 4, at 552; see also Tushnet, *History-in-Law*, *supra* note 9, at 914 (arguing that historians "operate . . . under the constraint that a historian can use a particular story line only when it has some — often minimal — support in the sources").

occur — what people did or did not think — that are supposed to be backed up by factual evidence. Similarly, the *methodological objection* to the republican revival is based upon a defense of the historical method, including the very notions of proof and historical verification that presumably undergird the factual claims that make up the *factual objection*.

By contrast, the *normative objection* cannot depend upon these “canons of proof” in the same way. Our interpretations of the normative content of past practices and utterances are inevitably refracted through the prism of our current framework of values. Normative judgments about the content of historical belief-systems are interpretations *of* the facts; they cannot, then, be proved *by* the facts that they purport to interpret, except in the most circular or rhetorical sense.⁹⁴ So, too, the two *conceptual objections* to the republican revival consist of interpretive claims about the data. The historical record may be viewed as illustrating or even supporting an offered conceptualization or as contradicting that conceptualization. But it cannot *prove* or disprove the validity of any such conceptualization, because we have no access to the historical data apart from one scheme of conceptualization or another — except insofar as what we mean by “prove” is precisely to find (or, if you prefer, make) convincing illustrations.⁹⁵

The dependence of history upon the historian’s normative and conceptual schemes should not be cause for hand-wringing, let alone nihilistic despair (or the more common response of reactions *against* nihilistic despair). Quite the contrary, the extrafactual, interpretive components of the historical endeavor indicate points of contact with other disciplines and modes of human reasoning which constitute promising resources for increasing historical *and* nonhistorical understanding. Although the interpretive dimension of history remains firmly in contact with the data produced according to the historical method’s “canons of proof,” it does not depend exclusively upon historical expertise. The normative and conceptual claims that historians make about the nature of a political philosophy (like civic republicanism) illustrate this point most vividly. In making claims about the definition of a belief-system and in drawing distinctions between its

⁹⁴ To refer to an argument as rhetorical is by no means to denigrate it, but merely to note its dependency on the hermeneutic circle, a dependency that undermines the more objectivist conceptions of proof presupposed by some versions of the historians’ objections. For a fine analysis of the roots of modern hermeneutic theory in classical rhetoric, and of the linkage between rhetoric and law, see KATHY EDEN, *HERMENEUTICS AND THE RHETORICAL TRADITION* (1997).

⁹⁵ Another way to put this is to say that historical proofs generally consist of nothing but apparent and compelling links between data (primary source material) and interpretive conceptualizations — a fairly pedestrian point among philosophers and students of historiography. But it is one that, if granted, undermines the critics’ claim that the republican revival ignores the historical record, because *both* the proponents and the detractors of the republican revival make arguments that rest on the felt resonance between the evidence presented and the interpretations of it that they offer.

essential and nonessential features, the historian embarks on "excursions" into intellectual domains that specialize in determining the boundaries and the relationships between different concepts.⁹⁶ The point is not that making theoretical (conceptual or normative) claims is not part of the historical method. The opposite is true; historical analysis cannot proceed — it would be vacuous — without making such claims. The task of defining belief-systems is necessary for the discipline of history and belongs within its boundaries. Moreover, that task cannot be accomplished without making conceptual, if not normative, claims. However, such claims are not the *exclusive* property of historical analysis because they do not depend *uniquely* upon historical expertise.

Two positive implications of the nexus between historical and other forms of intellectual analysis are of immediate relevance to our project. First, there is a considerable amount of intellectual "space" in the historians' arguments that can be assessed by the nonhistorian, with all due humility and without making false pretenses to historical expertise; and second, the historian has resources outside of her own discipline to draw upon for furthering her own project of historical depiction and explanation. The points of contact between historical and nonhistorical analysis represent, not a breakdown in reason, but rather intellectual spaces where *mutually* respectful conversation can and should take place, with due — but unexaggerated — deference to each participant's respective areas of expertise.

In this spirit, I would like to offer the following critique of the historians' complaint, after which I will return to the possible contributions that nonhistorical and, in particular, legal-doctrinal modes of analysis might make to the history of civic republicanism. Far from wishing to have the last word, I offer this critique in the hope of restarting the conversation about the applicability of civic republicanism to American law. Moreover, I hasten to remind the reader that, even if I am correct about the existence of serious flaws in the historians' argument against applying the republican synthesis to law, it does not follow from my argument that the republican synthesis necessarily *is* applicable to American law. It simply suggests that the republican synthesis may be applicable and that the question of its applicability is still worth pursuing.

A. *A Curiously Formal Argument*

Ironically, the very methodological deficiencies that the critics ascribe to the scholarship of the republican revival are exhibited in the literature of complaint. If we adhere to the historical method, it seems

⁹⁶ Kalman also refers to historians' "excursions into other disciplines," but in the service of a different point (p. 180).

reasonable to expect the factual claims made in that literature to be substantiated by supporting evidence. But what is most striking about the historians' argument against the republican revival is the paucity of the evidence offered.⁹⁷ It does not require historical expertise to observe that crucial factual assertions are supported weakly, if at all, in the literature. Instead of factual support, the historical argument against the republican revival rests heavily on conceptual and theoretical claims that depend upon a curiously formal, essentialist — and, most ironically, ahistorical — conception of the nature of the political philosophies in question. More precisely, *conceptual objection I* posits an essentialist conception of both civic republicanism and liberalism, which is contradicted by *conceptual objection II*. This contradiction undermines the normative and factual objections in the historians' complaint, and results in a troubling misrepresentation not only of civic republicanism, but also of liberalism, its supposed foil.

Conceptual objection I asserts that the scholarship on republicanism obscures the essential differences between civic republicanism and liberalism. Two key premises underlie this criticism: first, that civic republicanism and liberalism each possesses an essential, core meaning that persists essentially unchanged over time; and second, and most crucially, that these core meanings do not overlap.⁹⁸ Thus, it is said that republicanism is essentially hostile to commerce and the values of the market, as well as to individualism, privatism, and a "law-centered paradigm" of individual rights.⁹⁹

⁹⁷ I must emphasize that I do not mean that the critics do not present actual data. Appleby and Kramnick, in particular, present ample primary source material. See, e.g., Kramnick, *supra* note 12, at 636–51 (utilizing extensive primary source materials including political pamphlets and treatises from the periods under consideration). But they draw the negative inference that civic republicanism ceased to inform political thinking by the end of the eighteenth century from the positive evidence of widespread commitments to values and motifs commonly associated with liberal thought. What this evidence fails to address — either by way of support or refutation — is the proposition that republicanism was transformed, yet persisted as a distinct tradition of thought, by absorbing into itself these very motifs and values. Thus, the arguments they present *against* the presence of republican ideas rest less on direct evidence than on essentially conceptual points, in particular the assumption of a strict dichotomy between liberal and republican ideas. See Lance Banning, *Jeffersonian Ideology Revisited: Liberal and Classical Ideas in the New American Republic*, 43 WM. & MARY Q. 3, 12 (1986) (arguing that denials of the republican character of certain historical figures, such as Adam Smith, rest on the mistaken view that the presence of ideas and values linked to liberalism logically implies the absence of civic republican ideas); Jeffrey C. Isaac, *Republicanism vs. Liberalism? A Reconsideration*, 9 HIST. POL. THOUGHT 349, 369–73 (1988) (same).

⁹⁸ The first proposition is not, strictly speaking, necessary to support the claim that the meanings of republicanism and liberalism are dichotomously opposed. Only the latter claim is required by the critics' objection to blurring the boundary line between the two. However, the critics commonly couple the latter objection with assertions about each philosophy's supposedly immutable content.

⁹⁹ See Kerber, *supra* note 9, at 1664–65. See generally Kramnick, *supra* note 12, at 632–33, 637, 642, 646–47 (differentiating civic republicanism from urban and commercial interests and

There are many problems with this view, not the least of which is that it seems to contradict the second conceptual objection in the historians' argument against the republican revival. *Conceptual objection II*, after all, reproaches the scholars of republicanism for asserting a false dichotomy between liberalism and republicanism. Here, the critics' premise is that neither liberalism nor republicanism can be reduced to a set formula, a list of necessary and sufficient conditions that endures over time. This premise is more consistent with the basic tenets of historicism than *conceptual objection I*.¹⁰⁰ *Conceptual objection I* defines civic republicanism and liberalism in a way that endows them with qualities of completeness, coherence, and consistency over time. This way of looking at belief-systems is entirely appropriate to a discipline like analytic philosophy, ethics, moral theory, or theology (and, arguably, the method of common law), whose task is to expose and, when possible, reconcile and eliminate any logical contradictions or conceptual flaws. But it is not the historian's task to reconcile logical contradictions in the belief-systems that she studies,¹⁰¹ and, for this reason, she tends to be more open to the possibility that philosophical systems may lack coherence and consistency, and, more basically, that coherence and consistency may be unattainable. This openness to inconsistency is a characteristic virtue of a historicist approach to the study of ideas.¹⁰² Indeed, pointing out the existence of endemic ambiguities, irresolvable conflicts, contradictory values, and irreducible ten-

from individualist themes of meritocracy, equal opportunity, freedom of conscience, and individual rights).

¹⁰⁰ As Dwight E. Lee and Robert N. Beck observe in their article, *The Meaning of "Historicism"*, historicism's "meaning has varied greatly and has often been obscure." Dwight E. Lee & Robert N. Beck, *The Meaning of "Historicism"*, 59 AM. HIST. REV. 568, 568 (1954). Perhaps the classic definition of historicism was offered by Friedrich Meinecke. In Meinecke's formulation, "[t]he individuality concept and individual development are . . . the two polar, mutually related . . . , basic concepts of the historical treatment that is called historicism in the proper sense." *Id.* at 571 (quoting FRIEDRICH MEINECKE, *DIE ENTSTEHUNG DES HISTORISMUS* 642 (1936)) (internal quotation marks omitted). The principles of individuality and development reflect the historian's commitment to grasping a historical object in its own discrete context. They also reflect the "idiographic" function of the historian — that is, the impulse to grasp the single event in its manifold dimensions. Notwithstanding the dizzying variety of interpretations of the modern historian's function that have been proposed, the Meineckean criteria of contextual specificity and historical dynamism provide a solid foundation for understanding the term historicism. For my purposes, the general definition offered by Robert Gordon in his seminal article on historicism in *American legal theory* is perfectly serviceable. See Robert W. Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017, 1017 n.1 (1981) (defining "historicism" to refer "to the perspective that the meanings of words and actions are to some degree dependent on the particular social and historical conditions in which they occur, and to interpretations and criticisms that are suggested by that perspective").

¹⁰¹ See POCOCK, *supra* note 10, at 6–11.

¹⁰² *But see* Bevir, *supra* note 46, at 168, 180–87 (arguing that historians of ideas should apply a "presumption of coherence" to the belief-systems they study); *id.* at 168–72 (faulting Pocock for attacking the "myth of coherence"). Obviously, I disagree with Bevir on this point; it seems to me that the hallmark of a historical approach is to let neither a presumption of coherence nor a presumption of internal inconsistency bias the interpretation of the beliefs held by people in the past.

sions is one of the most distinctive and valuable contributions of the historicist approach to the understanding of our philosophical traditions.

In its most tendentious formulations, *conceptual objection I* issues in a denial of the proposition that civic republicanism is a tradition, that is, an ongoing, evolving, loosely held together set of perceptions, values, stories, and ideas, transmitted and transformed, with continuities and ruptures, from one generation to the next.¹⁰³ The denial that civic republicanism is an enduring tradition reflects not only an ahistorical, essentialist conception of civic republicanism (and of liberalism) but also, on a deeper level, an ahistorical, essentialist view of traditions and historical change. The critics argue against imputing concepts such as legal or natural "rights," or the value and dignity of commercial activity, to civic republicanism on the grounds that such concepts "should not have strayed from the language of liberalism,"¹⁰⁴ as if the scholars of the republican synthesis and republican revival (and not the historical actors whose views they are describing) are responsible for this "transgression" of the boundaries. In so doing, they do more than attribute a specious logical coherence to each political theory. They also assume a false dichotomy between tradition and change.¹⁰⁵ There is, after all, no disagreement that ways of thinking and speaking about politics evolved, with the result that, by the end of the eighteenth century, no one (of worldly influence) thought about commerce and rights in the same unequivocally hostile manner that had been typical in earlier periods. The disagreement is about whether these adaptations to the expansion of commerce and private rights marked the end, or merely the transformation, of a still authentically republican tradition (albeit a tradition now infused with liberal ways of thought).

¹⁰³ The most explicit rejection of the view that civic republicanism is a tradition occurs in Tushnet, *Concept of Tradition*, cited above in note 9, at 93-99. Tushnet's argument is based on a definition of "tradition" as a self-conscious identification with a complex of ideas that coalesced into a coherent whole in the past, some of which the followers of the tradition continue to adhere to and some of which they reject. Such a narrow focus upon conscious self-conception precludes the intellectual historian from identifying the ongoing influence of, say, the tradition of classical rhetoric on modern hermeneutics, or of pagan traditions on Christianity and Judaism simply on the grounds that adherents of the latter-day traditions do not recognize the extent to which they remain under the influence of earlier, supposedly superceded ideas. I see no reason to adopt such a restrictive definition of tradition. Although none of the other critics employs this idiosyncratic definition, their arguments against the ongoing influence of civic republicanism similarly imply a view of civic republicanism as an ossified set of ideas, relegated to the past, rather than a living tradition. See, e.g., Kerber, *supra* note 18, at 484 (referring to civic republicanism as "absolutely frozen at a standstill").

¹⁰⁴ Rodgers, *supra* note 4, at 29.

¹⁰⁵ See generally Katherine T. Bartlett, *Tradition, Change, and the Idea of Progress in Feminist Legal Thought*, 1995 WIS. L. REV. 303 (discussing and critiquing this dichotomy).

The former position assumes an "oppositional view of tradition and change"¹⁰⁶ from the standpoint of which transformation is tantamount to the death of a tradition. Such a strict dichotomy between continuity and change is necessary to support the supersessionist¹⁰⁷ position that liberalism simply supplanted civic republicanism. This dichotomous view of continuity and change may profitably be contrasted with "a view that sees tradition and change as mutually embodied rather than as opposites," according to which the identity of a tradition is "formed through the ongoing accretions and syntheses of old and new understandings."¹⁰⁸ It may seem ironic to find the dichotomous view of tradition and change expressed by historians. It is ironic. Yet it must be observed that, ahistoricist though it is, such a dichotomous view is distressingly commonplace among historians, and understandably so. It is, quite simply, incredibly difficult to represent the occurrence of *both* change *and* continuity *at the same time*. As a result, those who undertake the challenging task of rendering rupture and continuity simultaneously — of describing *transformations* in traditions, practices, and ideas — are perpetually misunderstood as emphasizing one element to the exclusion of the other.

The *normative objection* relies upon this false dichotomy between continuity and change that undergirds the conceptual dichotomy between liberalism and republicanism. Thus, historians claim, on the one hand, that morally objectionable practices, such as militarism, slavery, and patriarchy, are "*essential* to the republican view of the world, not an easily correctable accident"¹⁰⁹ and, on the other hand, that "the distinctiveness of liberalism, certainly in the eighteenth century, stemmed from its novel critique of patriarchy."¹¹⁰ In other words, republicanism is essentially conservative, sexist, and exclusionary in its thrust, while liberalism is essentially progressive, antipatriarchal, and democratic. The historians' complaint contains explicit assertions that liberalism is antipatriarchal, and incompatible with slavery and other

¹⁰⁶ *Id.* at 305.

¹⁰⁷ In its original usage, "supersessionism" referred to the Christian theological principle that held that Judaism had been an early stage of, and then was superseded by, Christianity. See generally Gavin I. Langmuir, *The Faith of Christians and Hostility to Jews*, in 29 *STUDIES IN CHURCH HISTORY: CHRISTIANITY AND JUDAISM* 77, 80-82 (Diana Wood ed., 1992) (describing the doctrine as a set of "ideas scattered through the writings of individual theologians and ecclesiastics from Paul to Augustine," which held that "Judaism was superseded, that Jews could not understand the spiritual meaning of their own scriptures, that they had killed Christ, that though they were being divinely punished for it, their continued existence [in a degraded condition] served to demonstrate the truth of Christianity"). More recently, the term "supersessionist" has acquired the meaning of a pejorative applied to such historical accounts of Judaism. By analogy, "supersessionist history" refers more generally to a particular type of "winner's history" in which a successor tradition is illegitimately described as surpassing and supplanting its predecessor.

¹⁰⁸ Bartlett, *supra* note 105, at 305.

¹⁰⁹ Kerber, *supra* note 9, at 1665.

¹¹⁰ Hartog, *supra* note 9, at 81.

forms of exclusion. Some critics of the republican synthesis go as far as suggesting that liberalism was necessary to rescue us from patriarchy, slavery, feudalism, and other forms of domination.¹¹¹ Without liberalism, they seem to be saying, we would be stuck in the oppressive past.

Removed from the context of the complaint against republicanism, this "white knight" vision of liberalism seems preposterous, and I doubt that any historian would seriously endorse these propositions. On the contrary, outside the context of the republicanism debates, some of the finest (and most widely respected) recent historical work is dedicated to revealing the complex interrelationships that have existed between liberal ideas and patriarchy,¹¹² slavery,¹¹³ racism, and other forms of exclusion. To recognize that liberalism (like republicanism) has historically been enmeshed with oppressive practices, values, and institutions does not necessarily mean that liberalism is morally irredeemable. Critical Race Theory is but one example of a fruitful analysis derived from the recognition of liberalism's moral ambivalence and consequent dual functions as both a source of mystification and legitimation for oppressive regimes and a basis of criticism of those same regimes and a source of visionary alternatives.¹¹⁴ Of course, there is a

¹¹¹ See APPLEBY, *supra* note 6, at 185 (claiming that "[d]eliverance from the strictures of classical republicanism came from the ideology of liberalism"); Hartog, *supra* note 9, at 81–82; Kerber, *supra* note 9, at 1668–69.

¹¹² For history exploring connections between liberalism and patriarchal institutions, see MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 289–307 (1985). Theoretical expositions of the links between liberalism and patriarchy are contained in SUSAN MOLLER OKIN, *WOMEN IN WESTERN POLITICAL THOUGHT* 197–230 (1979), and CAROLE PATEMAN, *THE SEXUAL CONTRACT* 1–18 (1988).

¹¹³ The controversy about how to integrate Jefferson's support of slaveholding with his general political philosophy highlights slavery's place in American liberal thought. See GEORGE M. FREDRICKSON, *THE ARROGANCE OF RACE: HISTORICAL PERSPECTIVES ON SLAVERY, RACISM, AND SOCIAL INEQUALITY* 202 (1988); EDMUND S. MORGAN, *AMERICAN SLAVERY AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* 4 (1975).

¹¹⁴ Critical Race Theory's basic insight that liberalism is neither all bad nor all good derives in good measure from, and is certainly reinforced by, the historical study of liberalism and generally reflects a historical approach. See generally PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991) (exploring positive and negative effects of legal language in the context of race relations in the United States); Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 *HARV. L. REV.* 985 (1990) (arguing that only a historically specific analysis, rather than the more abstract theoretical analyses of CLS, can expose both the liberating and legitimating dimensions of liberalism); Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 *HARV. L. REV.* 1331 (1988) (arguing that CLS failed sufficiently to appreciate the pragmatic use of legal rights in the battle against race discrimination). Unger's work likewise builds upon liberalism's dual — liberatory (transformative) and oppressive (legitimizing) — aspects. See ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986). Kalman recognizes that Critical Race Theory's appreciation of the duality of liberalism is rooted in its "historically sensitive way" of understanding that political tradition (p. 177). But she fails either to integrate her appreciation of liberalism's duality into her normative assessment of civic republicanism, or to recognize that scholars of the republican revival offered an equally "historically

special sense in which the white knight vision of liberalism is true: according to dialectical theory, the material, historical manifestations of liberalism are only approximations of the ideal. These imperfect realizations should not be confused with the Real (in other words, the ideal), which we continually strive to attain. But from the standpoint of ideal dialectical theory, republicanism can make the same claims; it too articulates a vision of equality and liberty. As a historical statement, the idealized view of liberalism expressed in the *normative objection* is no more persuasive than the idealization of republicanism. From a historical standpoint, the idealization of liberalism that animates the historians' complaint is sheer nonsense, and it illustrates the gravest danger posed by the repudiation of the republican synthesis: that the normative opposition to republicanism will promote a moral whitewashing of liberalism. A dichotomous view of change and tradition tends to blind us to the possibilities for progress that are necessarily embedded in the past by blinding us to the imperfections in our reigning value systems. A nondichotomous view of change and tradition¹¹⁵ permits a twofold response to the critics' normative objection.¹¹⁶ Simply put, on the one hand, republicanism was not and is not all bad and, on the other hand, liberalism was not and is not all good.

The fact of the matter is that *both* sides sometimes employ the dichotomous conception of liberalism and republicanism and at other times reject it. Instead of criticizing this apparent inconsistency, we might, in good historicist fashion, try to understand it.¹¹⁷ That liberalism and republicanism were not, as a historical matter, "acoustically separated,"¹¹⁸ and that men and women, struggling to grasp the changing world around them, grafted the ideas of one upon the other in a variety of more or less systematic ways, does not imply that all (or any) of the basic value conflicts historically enacted in the classical republicanism-liberalism opposition were transcended. To assert that

sensitive" — in fact, the same — way of understanding liberalism as that presented in Critical Race Theory.

¹¹⁵ See Bartlett, *supra* note 105, at 305.

¹¹⁶ Lest it be said that historians are only properly concerned with accuracy, and not with the strategic potential of different ways of viewing intellectual traditions, recall that the *normative objection* of the historians' complaint is precisely that the republican revival is nonstrategic with respect to its political goals. Most of the critics indicated or implied that they "personally" shared the progressive political objectives of the law professors they criticized; Kalman is particularly upfront about this, noting that "this book is one legal liberal's history of legal liberalism" (p. 9). See also APPLEBY, *supra* note 6, at 132–39 (faulting Pocock's interpretation for being conservative).

¹¹⁷ Cf. POCOCK, *supra* note 10, at 12 ("[T]o analyze the logical structure of a statement — as we already know, and as has been the recurrent theme of this critique — is not to bring out its concrete character as a historical phenomenon.").

¹¹⁸ On the concept of acoustic separation, see Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984). Pocock discusses the permeability of different domains of political discourse in POCOCK, cited above in note 10, at 16–23.

liberalism simply supplanted republicanism is to maintain a supersessionist and fundamentally ahistorical view, which virtually all of the critics, in their more historicist-minded moments, reject.¹¹⁹ But once we reject the supersessionist view in favor of syncretism or merger, it is sensible, *for some purposes*, to use the terms republicanism and liberalism to point to conflicting values, and *for other purposes*, to point up the agreements and relationships between them. For good reason, both sides of the debate employ both of these kinds of usage.¹²⁰

Inasmuch as the critics' objection to blurring the boundary line is directed against the excessive complexity of the conceptual apparatus of the republican synthesis, it carries more than a faint whiff of blaming the messenger. Indeed, at least one critic readily concedes that the more nebulous the definition of republicanism is, the closer it comes to describing accurately the way actual men and women thought about politics.¹²¹ As this critic tacitly acknowledges, there is always a tension in historical scholarship between the desire for accurate representations and the need to impose order upon the represented reality. Life is chaotic. Scholarship shouldn't be.¹²² Therefore, just as a healthy

¹¹⁹ See, e.g., White, *Studied Ambiguity*, *supra* note 9, at 109 (asserting that "liberalism did not so much suppress republicanism as evolve out of it, maintaining republican assumptions far into the nineteenth century and discarding them only painfully").

¹²⁰ For the dichotomous usage on the republican revival/republican synthesis side, see, for example, J.G.A. Pocock, *Virtues, Rights, and Manners*, in VIRTUE, COMMERCE, AND HISTORY, cited above in note 67, which insists upon the "marked[] discontinuit[ies]" between the "oppos[ing]" vocabularies of rights discourse and civic republicanism, *id.* at 37, 39–46; Horwitz, cited above in note 52, which differentiates liberalism from republicanism, *see id.* at 66–67; Michelman, *Traces*, cited above in note 52, which characterizes civic republicanism and liberalism as "opposites" contesting with each other, *see id.* at 18, 21. For the nondichotomous usage on the republican revival/republican synthesis side, see, for example, Pocock, cited above, which examines how scholars redefined civic virtue to reconcile it with the concept of rights, *see id.* at 48–50; Horwitz, cited above in note 52, which warns against mistaking these ideal types for the complexities of real, historically-existing thought, in which the "variables" that "constitute each of these categories" will "combine and recombine" in a variety of ways, *id.* at 69; Michelman, *Traces*, cited above in note 52, which explores possible "reconciliations" of the core values of positive and negative liberty, conventionally associated with civic republicanism and liberalism, respectively, *see id.* at 31–36. For the dichotomous usage on the critics' side, see, for example, Appleby, cited above in note 6, which characterizes civic republicanism and liberal political and economic thought as "competing ideologies," "rival" or "contending . . . paradigms" that could not be assimilated with one another, and denying "evidence . . . of a mingling," *id.* at 163–64, 185, 323, 326; Kramnick, cited above in note 12, which distinguishes sharply between the two traditions, *see id.* at 661–63. For the nondichotomous usage on the critics' side, see, for example, Appleby, cited above in note 6, which criticizes the theoretical assumption that "one language . . . precludes the coexistence of [the other]" and observing that "many writers managed to think in both languages," *id.* at 287; Kramnick, cited above in note 14, which describes the "confusion of idioms" and "overlapping of political languages" in 1787, *id.* at 12.

¹²¹ See Rodgers, *supra* note 4, at 27 (claiming that one scholar's "massively complicated taxonomy" was "as paradigmatically unworkable as it may have been close to real life").

¹²² As Imre Lakatos said, "history is frequently a caricature of its rational reconstructions." IMRE LAKATOS, *PROOFS AND REFUTATIONS: THE LOGIC OF MATHEMATICAL DISCOVERY* 84 n.2 (1976); *see also* Cloud, *supra* note 59, at 1707 ("If history could be told in all its complexity and detail it would provide us with something as chaotic and baffling as life itself; but because it can

dose of complexity is desirable (even if it impedes comprehensibility), some degree of oversimplifying is inevitable. Every piece of historical analysis makes this trade-off between oversimplification and complexity. It is rather a cheap shot, then, for critics to fault the legal scholarship on republicanism for both overstating and understating the distinction between republicanism and liberalism, especially when the critics themselves (naturally and inevitably) make the same "mistakes."

We have already seen that rejecting the conceptual distinction between liberalism and republicanism undermines the *normative objection* to the republican revival. By the same token, rejecting the conceptual dichotomy also undermines, or at least severely qualifies, the basic factual claims made in the historians' complaint. In order to contend that republicanism played no role in determining the content of the legal system, it is necessary to deny its integral connection with liberalism; conversely, in order to support that integral connection, it is necessary to grant at least the *possibility* that republicanism did survive in some form, albeit a vestigial one, in the legal system. The *normative objection* depends upon the supersessionist view of liberalism supplanting republicanism, which itself is a kind of factual claim. If one rejects the supersessionist view and believes that republicanism has somehow integrated or synthesized with liberalism, how can republicanism simply "no longer exist?"¹²³ This question points to a basic tension between the predicate of the *factual objection* — civic republicanism ceased to exist — and the antidichotomous premise of *conceptual objection II* — republicanism merged with liberalism. Once one accepts the antidichotomous view, maintaining the argument that republicanism "has no historical pedigree" becomes a non sequitur — especially if that claim suggests that, as a matter of historical fact, republicanism did not inform the legal system. If republicanism merged with liberalism and if liberalism animated the legal system, then (in the absence of an account of how republicanism separated from liberal ideology) it follows that republicanism also animated the legal system.

Whether one conceives of the fusion of liberal with republican ideas that undoubtedly occurred as a dialectical synthesis, a syncretic borrowing, an artless or an artful pastiche, the result was anything but a monolithic, univocal point of view. The complex result eludes simple labeling as "liberalism and *not* republicanism" without qualification. Semantics aside, the real issue is whether, subsequent to the ascendancy of liberal thinking, conflicting values and systems of thought

be condensed there is nothing that cannot be made to seem simple . . ." (quoting HERBERT BUTTERFIELD, *THE WHIG INTERPRETATION OF HISTORY* 97 (1968)) (internal quotation marks omitted).

¹²³ It should be clear by now that I use this phrase as shorthand for the proposition that republicanism was not a significant formative influence on our legal system.

continued to be expressed in the law and in other political arenas, and if so, whether these ideological conflicts are historically rooted in the "systems of filiation and derivation" that historians, such as Bailyn and Pocock, undertook to uncover.¹²⁴ The answer to the first question is clearly yes. The answer to the second is less clear — which is to say that it remains an open question, one well worth pursuing.

B. *A Question of Evidence*

At this point one would like to turn to the evidence from the historical record. Thus far, we have only rehearsed an array of theoretical possibilities; which of these possibilities was actually realized must be borne out by the facts. But when we look closely at the structure of the critics' argument, we see that the "evidence" consists largely (though not exclusively) of conceptual and methodological claims. These claims include the controversial dichotomization of republicanism and liberalism, and the various charges of "presentist" motivations that make up the *methodological objection*. Bolstered by heavy irony, these methodological and conceptual claims largely substitute for factual data in the construction of the historical narrative of republicanism's obsolescence.¹²⁵

Thus, the *factual objection* to the republican revival rests heavily on the evidence that most politicians and formative influences involved in the founding of the nation exhibited the absorption of the values of the newly emergent proto-capitalist theories of political economy, as well as the imprint of theories of natural, or at least individual, rights¹²⁶ — as if it followed from this evidence that contrary schemes of value were necessarily supplanted. This assertion is an obvious non sequitur — the fact that one scheme of values attains dominance at most implies that rival schemes are subordinated, subsumed, or transformed, not necessarily that they altogether vanish. The fact that Jefferson, for example, embraced the value of commerce and the ideas of Scottish political economists like Adam Smith no more logically implies the absence of republican elements in his thinking than does the writing of the New Testament imply the elimination of the Old.¹²⁷

¹²⁴ Bailyn, *supra* note 34, at 18. By "systems of filiation and derivation," Bailyn evidently means to refer to the lines of intellectual influence and lineage connecting past and present ideas. *Id.*

¹²⁵ Again, I do not mean that the critics fail to present factual data, but that they base their case against the presence of civic republicanism in the American political and legal system chiefly on conceptual and interpretive claims. Moreover, they generally disregard legal doctrines, case holdings, judicial opinions, and other aspects of legal practice as sources of evidence relevant to determining the ideological content of the law. *See supra* note 97.

¹²⁶ *See* APPLEBY, *supra* note 6, at 29, 31, 34–57, 58–89.

¹²⁷ *But see id.* at 253–57; Banning, *supra* note 97, at 16–17. Clearly, the meaning of the Old Testament is radically transformed by the development of Christianity (indeed, it is only from the vantage point of Christianity that it makes sense to refer to the Hebrew Bible as the Old Testament). But this, the original case of "supersessionism," hardly spelled the simple disappearance of

Just as one cannot automatically infer the supersession of Old Testament ideas from the emergence of Christianity (notwithstanding Christian polemics to the contrary), so too, one cannot infer the elimination of civic republican discourse from the simple fact that ideas once vigorously opposed by republicans attained prominence in American political and economic discourse.

In addition to evidence of the pervasiveness of the language and concepts conventionally associated with liberalism, the critics also rely upon the alleged methodological defects of the scholarship of the republican revival as a sort of indirect proof of its factual errors.¹²⁸ The base presentist, political motivations ascribed to the republican revival become, in this line of argument, a kind of circumstantial evidence of the nonexistence of republicanism in the history of American law. This strategy of argument is not altogether unreasonable. The all too fortuitous coincidence of a scholar's research findings with his normative orientation always warrants skepticism. But we should not mistake skepticism for proof. Having raised the manipulation (or disregard) of the historical record as a *plausible* or *possible* inference to draw from the suspiciously convenient gratification of the scholar's values, the question remains whether that inference is a *probable* one. Troublingly, the critics of the republican revival go even further by suggesting that opportunistic distortions of the historical record undoubtedly took place and/or that the republican synthesis is not supported by evidence.¹²⁹

The argument that derives historical error from the supposed methodological deficiencies of the scholarship of the republican revival depends on several factual postulates about the nature of that scholarship. Insofar as they tether their *factual objection* ("civic republicanism didn't exist") to the supposed deficiencies of the scholarship of the republican revival, the critics' complaint depends on showing that the scholarship is actually lacking in the ways that the critics say it is. More specifically, insofar as their claims depend upon assertions of political convenience and opportunism, they require evidence that the motivations of the scholars of the republican revival were really tainted in the way suggested. Ultimately, though, and most crucially,

the "conceptual vocabulary" of the Hebrew Bible, let alone Judaism, notwithstanding the ensuing dominance of Christianity.

¹²⁸ See, e.g., Rodgers, *supra* note 4, at 33-34 (basing the conclusion that legal scholars misunderstood the true relationship of republicanism to liberalism on observations about those scholars' alleged desire to attach a "vener of history" to the contemporary critique of liberalism). Kalman also supports the absence of a "pedigree" for republicanism with charges of presentism (p. 179).

¹²⁹ See, e.g., APPLEBY, *supra* note 6, at 159 (referring to the republican synthesis as "a quagmire of explanations which rely more upon theories of social psychology than evidence"); *id.* at 338 (asserting that "the republican revisionists have gone beyond their evidence"); Kramnick, *supra* note 12, at 664 (noting that "[w]hen allowed to speak for themselves," the texts of eighteenth-century radicals "tell a different story" from that offered by republican revisionism).

the claim that republicanism “didn’t exist” depends upon direct evidence, not of the content of the scholarship or of the authors’ intent, but rather of the *absence* of republican ways of thinking *in the law*. For even were the scholarship of the republican revival persuasively demonstrated to be defective as alleged, it would not follow that the authors’ claims about the influence of civic republicanism on legal doctrine are erroneous. To support that claim, recourse must be made to the legal material in which doctrine is expounded. What judges, lawyers, or other historical actors who expounded legal doctrine actually said must surely be evidence pertinent to the question of republicanism’s “existence” in our legal system.

Once we take stock of the different types of factual postulates involved in the historians’ complaint, two points become apparent: first, how separable these postulates are from one another despite their rhetorical packaging as a seamless whole; and second, how difficult it must be to prove conclusively the absence, as opposed to the presence, of an intellectual influence (any influence, not just republican) from any corner of the law.

Let us consider the first point concerning the authors’ motivations that supposedly undermine the methodological integrity of the scholarship qua history by examining three possible scenarios for the writing of the republican revival. In the first scenario, scholarship is purely disinterested, unguided by any political, cultural, or normative predilections of the researcher. In the second scenario, the research is not value-free in this stringent way; the scholar cannot help but view her subject through the lens of her own value system, and the story she weaves out of the evidence consequently reflects her cultural and normative orientation. In this scenario, the researcher’s work inevitably carries a normative message that accords with her own political views. But, *assuming the existence of criteria that distinguish between good and bad historical scholarship*,¹³⁰ that is, between valid and invalid

¹³⁰ To some, the positing of such historiographical criteria may be reminiscent of the punch line in the old joke about economists’ figuring out how to open a can on a desert island — “assume a can opener.” The point of that joke, that such an assumption is question-begging and that the discipline of economics is devoid of the intellectual foundations necessary to support its crucial assumptions, may be applicable to history as well. Historians struggle to articulate criteria that distinguish good from bad history (for example, Nazi revisionist history), insisting that some such standards must be established, although encountering great difficulty in articulating what these criteria should be. See generally JOYCE APPLEBY, LYNN HUNT & MARGARET JACOB, *TELLING THE TRUTH ABOUT HISTORY* 283 (1994) (suggesting that some combination of perception and pragmatic standards can distinguish between valid and invalid assertions); Ginzburg, *supra* note 60, at 92–96 (discussing Hayden White’s distinction between “positive’ historical inquiry” and “proper history” in the context of the Holocaust). Kalman discusses this struggle in her book; she also exhibits the ambivalence that results from the failure to resolve it. On the one hand, she “dispute[s] the implication that ‘good’ scholarship must or can be ‘disinterested’” (p. 171). On the other hand, she asserts that “to the historian, there are no ‘lessons from the past[,]’” (p. 180), and insists that “[t]here is a difference between using the past for presentist reasons and dissimulating” (p. 171). But, although Kalman is insistent that there are and must be criteria to distinguish valid

historical accounts, the existence of such “presentist” motivations in the second scenario does not invalidate the quality of the scholarship qua history. In the third scenario, by contrast, presentist motivations give rise to false accounts of the past. The basic distinction between scenario two and scenario three is that in the second scenario what we might call “soft” presentist motivations happily coexist with, perhaps even give birth to, valid historical accounts, whereas in the third scenario “hard” presentism motivates historical falsifications.

Virtually every historian today, including Kalman and her fellow critics, agrees that the value-free inquiry described in the first scenario is not an accurate — and perhaps not even a desirable — picture of how historical research is, or could be, conducted (pp. 181–84). Rather, that view is universally criticized as a relic of nineteenth-century historiography when history was likened to an objective science.¹³¹ The rejection of this scenario as a plausible description of historical scholarship leaves the second and third scenarios as potential alternative characterizations of republican revival scholarship. Once we identify these two different versions of presentism, another non sequitur in the historians’ complaint becomes apparent. If the claim is merely that the scholars of the republican revival view the past through the lens of their own present-day political concerns (the second scenario), the point is unexceptionable and inconsequential: by definition, all interpretive scholarship is presentist because absolute objectivity is impossible. For the claim of presentism to have any sting, the critics must have in mind the third scenario, in which presentism leads to historical distortions or falsehoods. And to support this claim, showing that the scholars of the revival were, in some sense, motivated by present-day, political concerns, or that the normative content of the scholarship gratifies these political predilections, is not enough. Even assuming that the critics’ claims about the authors’ political intentions are well-founded,¹³² it does not follow that the schol-

from invalid history — like good from bad presentism — she does not articulate any particular criteria. Similarly, she maintains that “significant differences exist between lawyers’ legal history and historians’ legal history,” but goes on to articulate only one: namely, that “[h]istorians study change over time, ‘historical processes rather than nonhistorical states — things that happen rather than things that are’” (p. 188 (quoting DAVID HACKETT FISCHER, *HISTORIANS’ FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT* 280 (1970))). I have no intention myself of settling the question whether standards distinguishing historically valid from invalid accounts exist, let alone what they are. These matters are longstanding questions in the philosophy of history. See generally CHARLES R. BAMBACH, *HEIDEGGER, DILTHEY, AND THE CRISIS OF HISTORICISM* (1995) (describing efforts to construct criteria for history and criticisms of these attempts). For purposes of my argument, I can grant the existence of such standards. If there are none, my argument is only strengthened.

¹³¹ See, e.g., Fogel, *supra* note 60, at 8–11 (describing the late-nineteenth-century scientific model of history).

¹³² The assumption is a charitable one as even the critics’ assertions about the slant of the law professors’ political views are generally unsupported by any sort of factual evidence or direct proof; instead, in a sort of academic analogue to judicial notice, the critics rely on those views be-

arship is defective qua history, as the second scenario demonstrates. Kalman herself allows that the mere presence of presentist motives does not automatically imply a failure to comport with the standards for good historical research; indeed, she insists that all history must be presentist in some sense (p. 181).¹³³ However, she leaps over these allowances for “soft presentism” when she asserts that the presentism of the republican revival disqualifies it as serious historical scholarship (pp. 184–85).

There are two possible ways of understanding Kalman’s claim and the *methodological* and *factual* objections of the historians’ complaint. Kalman and the other historians upon whom she relies might simply be asserting the basic predicates of presentism displayed in both the second scenario (“soft presentism”) and the third scenario (“hard presentism”). However, to demonstrate that the republican revival exhibits hard, rather than soft, presentism, Kalman and her fellow critics must offer proof that the scholarship fails *otherwise* to honor the standards of the historical method. In the absence of such proof, all that Kalman and the critics whom she follows succeed in demonstrating is that the authors lacked the kind of objectivity prescribed by the nineteenth-century scientific model — a kind of objectivity that none of the critics is willing to endorse. If that is all that has been shown, then, for the reasons stated above, the conclusion that the scholarship of the republican revival is bad qua historical scholarship remains unsupported.

What, then, is the evidence adduced to demonstrate that the scholarship of the republican revival not only is colored by the politics of its authors (a banal truism), but also fails to comport with the standards of the historical method? The simple answer is remarkably little. All too often, charges of presentist motivations are used rhetorically to give rise to the (logically weak) inference that such standards are lacking.¹³⁴ This argument is circular: we know that the scholarship is presentist in the basest sense because it fails to satisfy the methodo-

ing a matter of common knowledge, and further assume that the scholarship of the law professors they criticize is in fact informed by these views. Similarly, the critics generally fail to explore (or even recognize) ambivalencies and tensions internal to the political “progressivism” they ascribe to their targets with respect to such difficult issues as judicial activism and the balance of legislative and judicial power, the balance between collective prerogatives and individual rights, the relationship between negative and positive liberty claims, and the tension between the values and policies associated respectively with autonomy and equality.

¹³³ “[M]any historians are . . . ambivalent about presentism. Indeed, behind historians’ hostility to anachronism lies their own uncertainty about presentism. Historians take it as a truism that each generation must write its own history” (p. 181). However, Kalman also notes that “[s]ince any attempt to give history ‘presentist’ implications is by definition ahistorical, it is as easy to show that lawyers’ legal history is ahistorical as it is to shoot fish in a barrel” (p. 179). See also *supra* note 130 (identifying the ambivalence in Kalman’s expressed views about the implications of presentism for the validity of historical scholarship).

¹³⁴ See sources cited *supra* note 128; see also APPLEBY, *supra* note 6, at 133 (“One sometimes gets the impression that Pocock entered the world of civic humanism as a scholar and remained to become a partisan.”).

logical standards of the historical discipline; we know that the scholarship fails to satisfy the standards of the historical method because it was motivated by base presentism. To be fair, the charge of base presentism draws its strongest support from claims about the historical record. A *factually wrong* historical analysis in the republican revival would be very strong, albeit indirect, evidence of a methodological defect. Thus, the charges of presentism (in the base, undermining sense) depend heavily upon the *factual objection*.

But if this is the basis for the *methodological objection*, the problem, as we have remarked before, is that the so-called *factual objection* consists largely of dubious conceptual assertions and interpretive claims about the mutual exclusivity of liberal and republican discourse. We are back to where we started: on fairly weak ground for demonstrating the factual error of the republican revival.

But let us suppose that the case for hard presentism *was* substantiated. Even supposing that the professors who "marketed" the republican revival were guided by political motivations of the basest, most opportunistic sort, having complete disregard for the historical record and the historical method; even supposing that they completely failed to support their case that civic republicanism *did* exist in American law; the claim that civic republicanism is *not* a tradition in American law still does not follow. To support the latter claim requires demonstrating the *absence* of ideas that can be traced back to the tradition of republicanism from any corner of the law, and that obviously is very hard to do. In fact, none of the critics has attempted to make this demonstration. Generally, the critics exhibit little if any interest in actual legal doctrine and simply do not bother to look at legal doctrine, or other evidence of the intellectual content of the law, subsequent to the founding.¹³⁵ The most that the critics could say, then, (assuming

¹³⁵ Kalman does not consider any cases or legal doctrines in her discussion of the merits of the republican revival; nor do Appleby, Hartog, Kerber, or Kramnick. In the space of two articles criticizing the republican revival, G. Edward White offers one sentence referring vaguely to case law, and that is a reference offered to substantiate the existence of republicanism as a "mainstream ideology" at the time of the Marshall Court. White, *Studied Ambiguity*, *supra* note 9, at 108. Tushnet's writings on civic republicanism are themselves a study in ambiguity in this respect: his work that affirms the presence of civic republicanism in American law is replete with citations to cases by way of illustration, *see* TUSHNET, *supra* note 52, whereas his work critiquing the republican revival thesis does not adduce cases, opinions, or doctrines as evidence of the political and philosophical content of the law, *see* Tushnet, *Concept of Tradition*, *supra* note 9; Tushnet, *History-in-Law*, *supra* note 9. Among the few critical assessments of the republican revival that do discuss legal cases or doctrines are Richard H. Fallon, *What is Republicanism and Is It Worth Reviving?*, 102 HARV. L. REV. 1695 (1989), which considers the application of civic republican principles to legal "questions about the propriety of various forms of state aid to children in parochial schools," *id.* at 1716-17; Gey, cited above in note 9, which discusses civic republicanism's supposed applications to First Amendment doctrine, *see id.* at 866-71, and denies that civic republicanism is inconsistent with *Bowers v. Hardwick*, *see id.* at 876-77; and Sullivan, cited above in note 71, which considers the implications of civic republicanism for the constitutional rights of voluntary associations, *see id.* at 1720-21. The latter two of these critiques are uncon-

counterfactually that they supported their other claims), is that nobody has made a good case for the argument that republicanism *did* inform American law. This claim clearly does not suffice to prove that republicanism left no mark upon American law.

Of course, the case against the republican revival would still be of considerable scholarly value (again, assuming it was better supported) even if its conclusions were more limited in scope than originally suggested. And perhaps critics can be forgiven for a little rhetorical excess in their zeal to correct the inflated claims of the republican revival. Perhaps the critics simply mean to suggest that the promoters of the republican revival failed to sustain their burden of proof, and that, in the absence of sustaining this burden, the *presumption* should be that republicanism in our legal system has "no historical pedigree" (p. 176).¹³⁶

C. *The Burden of Proof*

But why should the burden of proof be allocated this way? What is most troubling about the historians' complaint, besides the potential mischaracterization and denigration of a considerable corpus of scholarship, is the critics' seeming lack of interest in the underlying historical question: whether the conflicting value systems and modes of argument exhibited in various areas of legal doctrine are traceable to civic republicanism and liberalism and the complicated interrelationship between them. Curiously, historians are actively discouraging others from taking an interest in this *historical question* when it must be granted that the answer to that question is far from settled. The publication of Kalman's book may well portend a precipitous decline in the number of publications explicitly pursuing the applicability of the discourse of republicanism to legal doctrines.¹³⁷ One might attrib-

cerned with the historical question of whether civic republican principles animated legal decisions and doctrinal formulations. Fallon, far from denying the value of looking to the law as evidence of the influence of civic republicanism, urges scholars to analyze legal decisions to see if "relatively complex paradigms" of liberalism and republicanism manifest "patterns of convergence and divergence concerning ultimate conclusions about what the law ought to be." Fallon, *supra*, at 1717. It should be noted in this regard that Fallon's assessment of the republican revival is not wholly negative. Rather, his article supports the value of ongoing inquiry into the question of civic republicanism's influence in American law.

¹³⁶ See Kerber, *supra* note 9, at 1671; Tushnet, *Concept of Tradition*, *supra* note 9, at 95-96.

¹³⁷ The results of an attempt to tabulate and compare the number of law journal articles devoted to civic republicanism written each year in the past 12 years (since 1986) are inconclusive. Our compilation indicates a peak of 95 articles discussing civic republicanism and its revival written in 1996. Only 40 articles were counted in 1997, but the year was not yet over when we undertook the count. Even a tapering down to 40 hardly qualifies as the end of interest in civic republicanism. Our compilation indicates that, beginning with a count of five articles in 1986 and seven articles in 1987, the number of articles discussing civic republicanism steadily grew, year by year, to reach the mid-40s by the early 1990s, and the low- to mid-90s by 1995 and 1996. However, this analysis does not differentiate criticisms from contributions to the revival, and thus can be regarded as only a highly limited source of information.

ute such an expected decline to the natural life-cycle of a fad — there is no denying Kalman's unexceptionable assertion that the republican revival became faddish — but fads are made, in good measure, by pronouncing them to be such. The pronouncement that an enthusiasm is a fad (as opposed to, say, a "paradigm shift") seals its fate as such, and virtually assures and hastens its ending.

One might expect those who decry faddishness in academia, as Kalman and her fellow critics do, not to be deterred from pursuing the historical question of civic republicanism's influence on legal reasoning by the banging halt of an emptied bandwagon or by the perceived inadequacy of past scholarship on the subject. On the contrary, these factors should only be spurs to undertaking *better* historical investigations of the question, if the question is worth pursuing.

Whether it *is* worth pursuing is the real question. In order to test the wisdom of the dismissive answer to it now being proposed, consider how the critics' recommendation will work in practice. I will draw here, for purposes of illustration, on an area of legal doctrine with which I have some familiarity — the constitutional jurisprudence of public education and the First Amendment. Other doctrinal areas¹³⁸ could serve equally well. The basic point is that many areas of legal doctrine exhibit a pattern of arguments and counterarguments that reflects recurring conflicts of value and contesting modes of reasoning.¹³⁹ Granting this much, the question is whether there is any historical warrant for calling these contrasting or contesting modes of reasoning "republican" *or* "liberal." There *is* a real basis for concern that in doing so, we run the risk of collapsing the differences between republicanism as it was understood in the eighteenth century, nineteenth century, and today. But the same danger exists with respect to liberalism. Of course, fundamental changes separate eighteenth-

¹³⁸ For example, property law, *see* Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273, 333 (1991); the constitutionality of campaign finance limitations, *see* Michelman, *Possession vs. Distribution*, *supra* note 52, at 1340-50; the law of voting rights, *see id.*; and local government law doctrines, *see* Frug, *supra* note 52.

¹³⁹ The legal scholarship devoted to exhibiting and analyzing conflicting doctrines, values, and modes of argument in the law is so vast that it would be absurd to try to catalogue it. Not only is the existence of recurrent value conflict the basic premise of critical legal scholarship, *see, e.g.*, MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960* (1992); UNGER, *supra* note 114, at 109-17; Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976), but the same premise also informs countless other legal analyses not identified with critical scholarship.

century liberal discourse from “political liberalism” today.¹⁴⁰ Yet Kalman sees utility in applying the same term to, and maintaining a historical connection between, the liberalism of then and now, notwithstanding the radical changes that have occurred in its conceptualization. In maintaining this connection, Kalman honors the reality of liberalism as a living tradition.

Bearing in mind the requisite sensitivity to change over time, we still have the question of how to verify the “pedigree” or historical roots of ideas expressed today. We *should* be wary lest surface resemblances be mistaken for historical linkages. I confess that I have no idea how to verify the lineage of ideas expressed at any point in time. I would like to think that the tracing of lines of historical influence, as opposed to simply assuming that ideas that sound similar are historically related or embodied in a historical tradition, is an area in which legal scholars could have much to learn from historians. It is not for me to say whether the characterization of legal and political ideas as “republican” (or “liberal”) is a nonfalsifiable proposition, or whether or how that matters. What I can do is make the following observations, which seem to me to be relevant in thinking about whether to follow the critics’ recommendations to abandon the enterprise.

Consider these oft-quoted passages drawn from judicial opinions concerning constitutional challenges to various aspects of public education:

“[P]ublic education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.” . . . [P]ublic education [must] “inculcate] fundamental values necessary to the maintenance of a democratic political system.”¹⁴¹

The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers — and indeed the older students — demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class.¹⁴²

¹⁴⁰ For example, we do not today consider liberal political philosophy compatible with restricting the franchise to white male freeholders, even though that was the prevailing liberal understanding in the eighteenth century. Similarly, notwithstanding a relatively small group of contemporary libertarians calling for a radical diminution in the size of government, most contemporary understandings of liberalism support a far more expansive and centralized administrative state than eighteenth-century liberals ever contemplated. Understandings of both the scope and the subject matter of the individual rights protected by a liberal state have changed substantially between the eighteenth century and today.

¹⁴¹ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (quoting CHARLES A. BEARD & MARY R. BEARD, *THE BEARDS' NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968), and *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979)).

¹⁴² *Id.* at 683.

[Education] is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.¹⁴³

Because of the essential socializing function of schools, local education officials may attempt "to promote civic virtues," and to "awake[n] the child to cultural values." Indeed, the Constitution presupposes the existence of an informed citizenry prepared to participate in governmental affairs, and these democratic principles obviously are constitutionally incorporated into the structure of our government. It therefore seems entirely appropriate that the State use "public schools [to] . . . inculcat[e] fundamental values necessary to the maintenance of a democratic political system."¹⁴⁴

If these passages do not constitute a sufficient body of evidence, consider the words of Justice Felix Frankfurter in the first Supreme Court case to address the constitutionality of compulsory flag salute ceremonies in public school. There, the Court upheld the constitutionality of the compulsory flag salute ceremony, described by Justice Frankfurter as "a common experience," which is "designed to evoke in [children] appreciation of the nation's hopes and dreams, its sufferings and sacrifices," and which is to be shared by children "at those periods of development when their minds are supposedly receptive to its assimilation."¹⁴⁵ The "safeguard[ing] of the nation's fellowship"¹⁴⁶ and "the promotion of national cohesion"¹⁴⁷ through "the binding tie of cohesive sentiment"¹⁴⁸ were, according to Justice Frankfurter, the "ultimate foundation of a free society,"¹⁴⁹ and therefore constitutionally legitimate objectives, which outweighed the perceived infringement upon the children's freedom of belief. These goals were "fostered," continued Justice Frankfurter, "by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization."¹⁵⁰

One would be hard pressed to account for these — and countless other judicial statements in a similar vein — as simply straightforward expressions of liberalism. The promotion of national cohesion, the inculcation of fundamental values by the state, the promotion of civic virtues and good citizenship, the binding tie of national sentiment — these precepts are sheer republicanism. And lest one be tempted to

¹⁴³ *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

¹⁴⁴ *Board of Educ. v. Pico*, 457 U.S. 853, 876 (1982) (Blackmun, J., concurring in part and concurring in the judgment) (quoting *Ambach*, 441 U.S. at 77, 80, and *Brown*, 347 U.S. at 493).

¹⁴⁵ *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 597 (1940), *overruled by West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

¹⁴⁶ *Id.* at 591.

¹⁴⁷ *Id.* at 595.

¹⁴⁸ *Id.* at 596.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

dismiss Justice Frankfurter's words on the ground that his holding was quickly overruled, consider the language in which Justice Jackson, the author of the overruling opinion, expressed his opposition to Justice Frankfurter's position and denied that the judiciary lacks the institutional competence to second-guess the political branches in matters such as these. In Justice Jackson's words:

[T]he task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence. These principles grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through the mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs. We must transplant these rights to a soil in which the laissez-faire concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls.¹⁵¹

Notwithstanding their difference of opinion over the constitutional legitimacy of mandatory flag salutes, Justice Jackson and Justice Frankfurter were clearly in agreement in rejecting the classical liberal vision of limited government and an unregulated market, and in embracing a more complex vision, in which individual rights paradoxically *depend* upon strong government and social integration. The expression of such ideas and sentiments in a large number of judicial opinions, and transcending disagreements over particular holdings, must be accounted for in any argument about the existence of republican themes in American legal discourse.

The question that relates to the critics' proposed burden of proof is not whether passages such as these definitively reveal the imprint of republican discourse, but rather whether they support that proposition as a reasonable hypothesis. I submit that they do for the following reasons. Firstly, anyone who has studied the canonical works of republicanism must be struck by the similarity between passages like these and classical republican discourse. Of course, as I noted before, this in no way proves a historical linkage; it does, however, draw into question the strongest charges of presentism hurled at the scholars of republicanism who allegedly followed their political convictions instead of the evidence. Minimally, if there is a substantive and rhetorical overlap between passages like those quoted above and the canonical statements of republicanism, then there is good reason to believe that both sets of statements affected the scholars who contributed to the republican revival *as evidence* (even if their political predilections also affected them).

¹⁵¹ West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 639-40 (1943).

But is there *enough* of a rhetorical resemblance to support the existence of homology as a reasonable historical hypothesis? Certainly, these passages express beliefs, like the appropriateness of the inculcation of values by the state and the primacy of citizenship, that are difficult to reconcile with liberal values, like freedom of individual belief and the relative unimportance of active participation in politics as a locus of personal freedom. Moreover, the beliefs articulated here are certainly similar, albeit at a fairly high level of generality, in substance and in form to those historically expressed as part of the republican tradition. The empirical observation of such a similarity is, I would suggest, precisely what gave rise to the hypothesis that civic republicanism is an enduring tradition in the law.

The alternative to viewing this as a reasonable historical hypothesis would be steadfastly to resist any possibility of associating the manifest conflict of values exhibited in the case law with the historical debate between liberal and republican ideas. If we follow the recommendation of Kalman and her fellow critics, we must rule out such a historical connection, a priori. We then have to account for the appearance in doctrinal argument of value structures that are at odds with conventional forms of liberal argument without making reference to the historical dialogue between liberal and republican ideas. To abide by this injunction, either we must identify *different* historical antecedents (although the critics do not suggest any particular alternative lines of intellectual lineage) or find ways of conceptualizing the contesting value-structures exhibited in doctrinal argument that have *no* historical referent. We might, for example, employ ungainly but recently coined (ungainly *because* recently coined) terms, such as "communitarian," to refer to the values placed upon civic participation in the public realm, the public interest, and the necessity of inculcating shared values.¹⁵² Or we might contrast a "public interest" model of

¹⁵² It is beyond the scope of this Book Review to provide a full account of the relationship between republicanism and communitarianism. The latter is a contemporary term, which refers to a body of work in political theory and sociology, chiefly associated with Michael Sandel, Charles Taylor, Michael Walzer, and Alasdair MacIntyre. See ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (1981); MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 147-54 (1982); CHARLES TAYLOR, *SOURCES OF THE SELF* (1989); MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983). The relationship of contemporary communitarianism to the historic tradition of civic republicanism is complex. The obvious affinity between the two is displayed in some, but not all, contemporary works. For example, Michael Sandel's *Democracy's Discontent: America in Search of a Public Philosophy* makes the connection between communitarianism and civic republicanism, and the works by Taylor and Walzer cited above do not. Insofar as communitarianism both criticizes liberal individualism and the dominance of the market and upholds the values of participation in communal life and the pursuit of the common good, the attraction of communitarian theorists to civic republicanism is understandable. See Isaac, *supra* note 97, at 350. However, the value of group membership and participation in communal life, insisted upon by communitarians, does not automatically translate into republican (or what we might today call democratic) notions of freedom, equality, and civic participation in governance, nor is the "community" necessarily equivalent to

politics to a model of “public choice” based on the assumptions of methodological individualism and rational choice theory.¹⁵³ We can, it seems, make up whatever neologisms we want to describe the differences between the contesting value systems observed in law — as long as we do not adopt terms that harken back to the republican past.

But why should we adopt such a resolutely ahistorical view of our legal doctrines? The argument rests on a few slender strands — the observation that the Framers of the Constitution embraced liberalism and the value of commerce and of individual rights; the claim that the ostensibly “nonliberal” values that appear in legal arguments are actually liberal ones.¹⁵⁴ But this argument is weaker than it seems once we recall our objections to essentializing and dichotomizing liberal and republican values. It may well be true that the apparently nonliberal (more precisely, nonindividualist) values articulated in the case law can readily be reinterpreted as liberal ones. So, for example, we may observe that the values whose inculcation by the state the Court affirms are conventionally liberal ones, such as freedom of individual choice, democracy, tolerance, and racial and religious equality. But the fact that “nonliberal” (or better, nontraditional liberal) values (such as the value of state-sponsored value inculcation or “national cohesion”) are *intertwined* in the case law with classically liberal values in no way undermines the hypothesis that we are witnessing an ongoing dialogue

the “state.” For these reasons alone (but there are many more), it would be a mistake to treat communitarianism as a synonym for civic republicanism. See Stolzenberg, *supra* note 71, at 660–65.

¹⁵³ This is precisely the language that Frank Michelman used before making the historical link to the debates between liberalism and republicanism in early American history. See Michelman, *Political Markets*, *supra* note 52, at 158–87. One can fruitfully read Michelman’s body of work as an illustration of how a legal scholar’s observation of the substantive value conflicts exhibited in the law evolved into a recognition of the similarity, and likely homology, between those conflicts and the historic debate between liberalism and republicanism.

¹⁵⁴ Perhaps the strongest — because the most basic — argument against the historical linkage of legal doctrines to civic republicanism is that the presupposition of all doctrinal argumentation — that the values being argued for are to be recognized, protected, and enforced by the courts, often in the form of rights — bespeaks the “law-centered paradigm” to which classical republicanism historically objected. In the education cases, for example, the values to be “inculcated” by the state are precisely the values of freedom of conscience and individual freedom of choice, along with the commitments to reason, tolerance, and pluralism that make freedom of choice, and a liberal polity made up of autonomous, independent individuals, possible. These values and commitments are readily characterized as commitments to the individual rights, and to the preconditions to the effective exercise of those individual rights, whose protection by law is characteristic of a liberal society. But neither appreciating the liberal character of the values whose inculcation by the state is affirmed nor recognizing the (partial) dependency of the protection of these values on a “law-centered paradigm” of judicially enforced rights and prerogatives takes away from the republican character of the state promotion of common values. On the contrary, this recognition suggests a complex interdependency between the themes and values conventionally associated with liberalism and republicanism, respectively. See Stolzenberg, *supra* note 71, at 651–60. Anne Dailey discusses a similar blending of liberal and republican themes within the constitutional doctrine of privacy, under which parents are viewed as responsible for inculcating liberal values in their children. See Dailey, *supra* note 52, at 1016–17.

between liberal and republican ideas, unless we misguidedly cling to the ahistorical view of liberalism and republicanism as mutually exclusive categories. On the contrary, once we abandon that premise, we can view the hypothesis that judicial opinions addressing the prerogatives of public education evince republican ideas as potentially offering support for the proposition that republicanism and liberalism are historically intertwined.

As for the former claim, at least two problems undermine the probative value of the proposition that the Framers of the Constitution embraced, and accordingly enacted, a liberal framework of values — and, therefore, not a republican one. First, the conclusion depends once again upon the same false dichotomy between republicanism and liberalism that led to the mischaracterization of judicial discourse as exclusively “liberal” because it contains recognizably liberal ideas. Beyond this false dichotomy problem, discussed at length above,¹⁵⁵ the argument based on the Framers’ alleged political philosophy reflects a highly selective approach to what counts as evidence of the formative intellectual influences on American law. More specifically, the argument reveals a fixation on the framing of the Federal Constitution to the exclusion of all the other sources of American law, including state constitutional and statutory law, federal statutory law, and, perhaps most critically, the vast body of common law that predates *and largely survived* the implementation of the Federal Constitution.

It is typical and perhaps understandable for critics who are not trained in law to concentrate on the Constitution, and to tend to disregard statutory and common law, particularly the more arcane and technical aspects of legal doctrine.¹⁵⁶ The latter, after all, is a highly specialized body of discourse that requires considerable legal expertise to be comprehended fully (or even, in some instances, located); whereas the framing of the Federal Constitution represents one of the most visible and seminal political acts in the nation’s history. But although this may explain *why* the common law has been neglected in the histo-

¹⁵⁵ See *supra* p. 1045.

¹⁵⁶ John Reid’s work, which exhaustively canvasses case law in addition to other sources, is exceptional in this regard. See, e.g., JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF LAW* (1993); JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY TO LEGISLATE* (1991); JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY TO TAX* (1987). A sampling of Reid’s voluminous work can be found in Flaherty, cited above in note 4, at 543 n.88. Flaherty identifies Reid as one of the members, along with Julius Goebel, Thomas C. Grey, and Barbara Black, of the neglected “Legal School” of American history, whose “legal backgrounds . . . set them apart” from other constitutional historians. *Id.* at 541–45 (citing Barbara A. Black, *The Constitution of Empire: The Case for the Colonists*, 124 U. PA. L. REV. 1157 (1976), and Jack P. Greene, *From the Perspective of Law: Context and Legitimacy in the Origins of the American Revolution*, 85 S. ATLANTIC Q. 56 (1986)). Reid’s criticisms of the republican synthesis are thus grounded in the type of evidentiary base I have suggested is too often lacking in the more familiar critiques.

rians' complaint, it in no way diminishes the *evidentiary value* of the case holdings and judicial opinions in which the common law — and, for that matter, the elaboration of statutory and constitutional law — consists. The question whether American law reflects republican discourse cannot be settled without reference to this body of law. Even if we put aside the controversy over how to characterize the ideology of the Framers and assume *arguendo* that they all unequivocally embraced liberalism to the complete exclusion of republican ideas, that tells us little, if anything, about the content of the common law or statutory law (or, for that matter, the various state constitutions as they have been interpreted by the respective state courts). What that content is — what type of discourse or discourses it contains — can only be determined by actually examining it, a task that requires a considerable amount of legal expertise, and then establishing the “systems of filiation and derivation”¹⁵⁷ in which it is contained, a task that requires the expertise of the historian of ideas. It is, in other words, a compound task that requires the collaboration of those expert in doctrinal analysis and those familiar with the currents of intellectual discourse in American history. Without undertaking such a collaboration, we simply cannot answer the question whether republicanism persisted in American law.

D. *An Open Question*

Is the persistence of republicanism a reasonable enough historical hypothesis to merit the considerable investment of intellectual resources required for its verification? In addition to the rhetorical resemblance between certain strands of judicial discourse and classical republican discourse, our general understanding of the nature of the common law offers further support for the reasonableness of the hypothesis. The common law, after all, is rooted in English feudal law. It long predates the pivotal events of nation-founding and Constitution-framing, and historical studies of the common law tend to support the conclusion that pre-Revolutionary common law doctrines survived largely intact in one area of law after another.¹⁵⁸ Property, contracts, torts, and the criminal law, laws governing employment relations and the formation and conduct of business enterprises, laws governing family relations and sexual relations, rules regulating churches and other voluntary associations, poor laws, vagrancy laws, slavery law, the laws of libel and slander, the laws of credit and debt — in short (or

¹⁵⁷ Bailyn, *supra* note 34, at 18.

¹⁵⁸ See WILLIAM NELSON, *THE AMERICANIZATION OF THE COMMON LAW* 68 (1975). Many feminist histories document the persistence of common law doctrines, despite apparent legal reforms. See, e.g., NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK* 229–30 (1982); MARYLYNN SALMON, *WOMEN AND THE LAW OF PROPERTY IN THE EARLY REPUBLIC* at xvi, xvii (1986).

rather, in large), the whole mass of rules, doctrines, and legal holdings, outside the rarefied "heights" of constitutional law, by which most aspects of human life are governed have long reflected at least as much continuity with as divergence from the English common law.

It should not be necessary for me to emphasize that by insisting upon the continuities in the common law, I do not mean to imply the absence of change; evolution is the essence of the common law. But this is change that, even when truly radical, *contains* continuities with the past.¹⁵⁹ Study after historical study shows that even our most willful acts of legal rupture turn out, in retrospect, to be more continuous with the past than we either imagined or intended,¹⁶⁰ in good measure due to the conservative force of the common law and judicial reasoning. The revelation of such unintended continuities, a staple of the "ironic" mode of history,¹⁶¹ is often concealed until the historian's attention shifts from written constitutional or statutory law to its application in the context of litigation, as evidenced by lawyers' arguments and judges' written and oral decisions.¹⁶²

Given the strong tendency of previous historical studies of the common law to confirm that the emphasis placed on change by law reformers and political historians alike papers over deep continuities in the law, it seems all the more reasonable to advance the hypothesis that republican discourse has persisted in legal doctrine. I would even go further and suggest that the persistence, as opposed to the eradication, of republican discourse in the common law is a highly *probable* finding.

The republican revival in legal scholarship advanced this hypothesis. Perhaps the legal theorists who contributed to this scholarship could have done more to emphasize the necessarily speculative nature of the hypothesis that the law has been shaped by the dialectical encounter between liberal and republican discourse. Perhaps they should have more explicitly couched their conclusions as historical *hypotheses*, rather than as matters of historical *fact*. But even if the legal scholarship on republicanism failed to be sufficiently tentative with respect to its historical assertions (and in this regard, is it so different from "real" historical scholarship?), it seems odd that the response should be to abandon interest in the historical questions that it explored, and in the corpus of legal doctrines, arguments, and judicial holdings that the legal scholars treated as evidence relevant to disposing of the basic ques-

¹⁵⁹ See Bartlett, *supra* note 105, at 330-31 (describing and advocating "the embodiment view" of tradition and change).

¹⁶⁰ See, e.g., Siegel, *supra* note 91, at 1076-79.

¹⁶¹ See *supra* p. 1037.

¹⁶² See KERBER, *supra* note 58, at 119-20; SALMON, *supra* note 158, at 107-08; Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2128-29 (1994).

tion: whether a tradition of republican discourse animates American law.

It is doubly odd to have this recommendation for historical myopia issuing from historians. There could hardly be a deeper irony than that of historians using the ironic mode of history, to demonstrate the failure of legal scholars to honor the historical method, as a *substitute* for proofs based upon the historical method. Irony is not argument. Suspicion is not proof. Conceptual disagreements are not evidence. A refusal to look at cases and doctrines after the period of the framing of the Constitution as potential sources of evidence about the intellectual content of American law will not advance the project of historical investigation. And ridiculing the republican hypothesis — rather than simply insisting upon the fact that it is “only” a hypothesis — far from settling the question, ensures that it stays open, all the while cutting us off from our own political and legal traditions, whatever they may turn out to be. Critics like Kalman may well succeed — they may be succeeding already — in “driving the final nail in the coffin” of the republicanism “fad” of the 1980s; but the coffin is empty.

IV. THE MARKETING OF CIVIC REPUBLICANISM

There is another story that can be told about the “marketing” of republicanism, one that uses the term “marketing” differently from the way that Kalman uses it. The basic outlines of this alternative understanding of the marketing of civic republicanism have already been suggested by scholars in several different fields, including, but not limited to, some of the original proponents of the republican synthesis in American history, and the republican revival in American law.¹⁶³ According to this story, civic republicanism existed as a recognizable tradition in European political discourse from the time of the “Machiavellian moment” identified by Pocock,¹⁶⁴ and continued to evolve, in a variety of permutations, through the seventeenth century. It informs English Opposition thought and, in the eighteenth century, views elaborated by Scottish Enlightenment thinkers.¹⁶⁵ Undoubtedly,

¹⁶³ The story builds on those portions of the work by Pocock, Kerber, Michelman, Sunstein, Alexander, and others that emphasize the occurrence of a process of conceptual synthesis and integration, whereby republican themes were incorporated into liberal thought. Other works that conform to this basic outline include, inter alia, Jeffrey Isaac, *see* Isaac, *supra* note 97, at 351, and James T. Kloppenberg, *see* James T. Kloppenberg, *The Virtues of Liberalism: Christianity, Republicanism, and Ethics in Early American Political Discourse*, 74 J. AM. HIST. 9, 28–33 (1987). The story draws further from works by ALEXANDER, cited above in note 52, and William E. Forbath, *Caste, Class, and Equal Citizenship* (Jan. 21, 1998) (unpublished manuscript, on file with the Harvard Law School Library).

¹⁶⁴ *See* J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975).

¹⁶⁵ Lance Banning and Joyce Appleby have debated the question whether Jefferson is appropriately characterized as a republican. *See* Joyce Appleby, *Commercial Farming and the “Agrar-*

this does not exhaust the variety of forms that republican thought took, political discourse in general being permeable, malleable, adaptable to a variety of circumstances, and susceptible to diverse, even conflicting, interpretations.¹⁶⁶ Yet despite its malleability, republican discourse long remained aloof from a new set of values that emerged as part of the profound shift in economic and political relations that took place (gradually over centuries) in England and Europe, a shift that we summarize all too briefly here as the movement from feudalism to capitalism or market-based economies.¹⁶⁷ Freedom of contract, the value of economic activity, the primacy of the individual and individual will, the necessity of religious pluralism and tolerance along with the concomitant privatization of values and religious faith — all of these ideas, which we loosely dub “liberal,” initially developed apart from, and occasionally in opposition to, republican ideas.¹⁶⁸ Republican discourse increasingly found itself in an antagonistic relationship

ian Myth” in the *Early Republic*, 68 J. AM. HIST. 833, 849 (1982) (arguing against characterizing Jefferson’s ideas as republican ones); Joyce Appleby, *What Is Still American in the Political Philosophy of Thomas Jefferson?*, 39 WM. & MARY Q. 287, 308 (1982) [hereinafter Appleby, *Still American*] (same); Banning, *supra* note 97, at 13 (arguing for that characterization). Much of the debate over the characterization of Jefferson’s thought on the republican-liberal axis turns on the characterization of the philosophy of Adam Smith and other figures of the Scottish Enlightenment, which strongly influenced Jefferson’s thinking. For Appleby, the debt that Jefferson owes to Adam Smith clinches Jefferson’s liberal credentials. See Appleby, *Still American*, *supra*, at 300. But this argument assumes that Smith is correctly characterized as nonrepublican — a debatable assumption. See DONALD WINCH, ADAM SMITH’S POLITICS 7, 41–43 (1978); see also POCOCK, *supra* note 164, at 423–61 (describing the emergence of the civic republican tradition in eighteenth-century Scottish political economy); J.G.A. POCOCK, *The Mobility of Property and the Rise of Eighteenth-Century Sociology*, in VIRTUE, COMMERCE, AND HISTORY, *supra* note 67, at 103, 123 (“The last of the civic humanists was the first of the Scottish economists.”); Horwitz, *supra* note 52, at 65 (holding up the “recent publication of Smith’s *Lectures on Jurisprudence*” as an “astounding confirmation” of the civic republican lineage of his thought); Isaac, *supra* note 97, at 369–70 (supporting Winch’s thesis that Smith should be viewed as an exponent of civic republicanism); cf. GARRY WILLS, INVENTING AMERICA: JEFFERSON’S DECLARATION OF INDEPENDENCE 196–206 (1979) (providing support for the view that Jefferson and the Scottish Enlightenment thinkers who influenced him are not reducible to classical liberalism). But see Kramnick, *supra* note 12, at 633.

¹⁶⁶ It would be nice to be able to dispense with this characterization of the nature of political discourse as a proposition that goes without saying. Yet the challenge to the coherence of traditions of political thought remains controversial. See *supra* note 102.

¹⁶⁷ See, e.g., APPLEBY, *supra* note 6, at 23 (emphasizing the emergence of capitalism as an important part of the “story of liberalism”); *id.* at 135–39 (describing liberalism as an “alternative conceptual mode,” which, unlike civic republicanism, not only took cognizance of capitalism but came to terms with it); Kramnick, *supra* note 12, at 661 (asserting hostility of civic republicanism to values and interests associated with commerce).

¹⁶⁸ See APPLEBY, *supra* note 6, at 167 (emphasizing the independent roots of liberal and civic republican thought, and tracing only the latter to writings extolling the free market economy); ISAAC KRAMNICK, REPUBLICANISM AND BOURGEOIS RADICALISM 5 (1990) (emphasizing the “distinct history” of liberalism, originating in “the grand transformation wrought in the Europe of the sixteenth, seventeenth, and eighteenth centuries by the rise of Protestantism and capitalism”); *id.* at 7 (recognizing liberalism’s “utterly new understanding of the individual and society”); POCOCK, *supra* note 120, at 39–45 (stressing initial lack of connection between ideas of individual rights and civic republicanism).

with the emergent value structures of liberalism, individualism, and capitalism. But as the domain of commerce expanded and notions of free trade and liberal notions of individual freedom grew more popular, the tension between republicanism and liberalism became increasingly evident and their relationship more complex.¹⁶⁹

Although their discourses opposed each other, point by point, value for value, the encounter between republicanism and liberalism had the effect of changing both of them, drawing the two together in ways that have yet to be sufficiently unraveled. Tentatively and very generally, we can say that each system exploited the values as well as the weaknesses and ambiguities of the other. There had always been some degree of commonality between them in their general aspirations for freedom and political equality. Both their contradictions and agreements created ample common ground on which the contradictions and tensions inherent in each system could continue to be played out. Liberalism, for example, was hardly inseparable from the notion of democracy in its early formulations,¹⁷⁰ and it may well be that future historical investigations will show that republican discourse was instrumental in joining liberalism to the value of democracy.¹⁷¹ Thus, liberalism may well have been transformed by virtue of its encounter with republicanism.

The transformations in republican discourse are, if anything, even more apparent. Initially opposed to commerce and commercial activity as incompatible with the sort of "virtue" required for competent participation by citizens in the political domain, civic republicanism could hardly have survived if it had failed to accommodate the values associated with the expanding role of commerce in the lives of the citizens of Western nations. One possibility, of course, is that it did not

¹⁶⁹ See, e.g., APPLEBY, *supra* note 6, at 164–66 (describing the hostility of eighteenth-century opposition writers to the pursuit of profit and forms of corruption made possible by the liberal market economy); J.G.A. POCKOCK, *Authority and Property: The Question of Liberal Origins, in VIRTUE, COMMERCE, AND HISTORY*, *supra* note 67, at 51, 68–69 (describing civic republicanism's discomfort with the rise of mobile property); Kramnick, *supra* note 12, at 653 (describing late-eighteenth-century resistance to Lockean ideas, such as "[t]he praise of achievement and talent, the ideology of equal opportunity, and the cult of industry and productivity").

¹⁷⁰ See C.B. MACPHERSON, *THE LIFE AND TIMES OF LIBERAL DEMOCRACY* 21–22 (1977).

¹⁷¹ As a theory of individual rights, including those of religious freedom, freedom of association, freedom of contract, and private property rights, liberalism was neither necessarily (as a theoretical matter) nor immediately (as a historical matter) opposed to a monarchical system of government; nor did it automatically translate into an endorsement of democratic principles of governance. Republicanism may well have supplied liberalism (as it evolved from a pro-monarchical to an anti-monarchical, "democratic" theory) with the key concepts of citizenship and the public sphere of civil society, without which liberalism could not have been transformed from a theory of individual rights, negative liberty, and economic freedom into a theory of liberal democracy, liberal sovereignty, and political rights. See Isaac, *supra* note 97, at 357–59 (arguing that "[r]epublicanism . . . furnished liberalism" with the "civic vocabulary" that defines the individual as an active participant in the political community, and not merely an agent pursuing her self-interest in the private realm).

survive, but that seems rather a remote one.¹⁷² A historian should hardly be surprised by, and should certainly not be hostile to, finding that civic republican discourse, instead of giving up the ghost, adapted to change, and found ways to accommodate commercial activity into its value structure. That is not to say that there was no resulting tension between the earlier anti-commercial and the newer pro-commercial ideas; but the existence of tensions within an intellectual tradition ought not to be a problem for a historian of ideas. And of course, the tension between pro-commercial and anti-commercial ideas was bound to appear within liberalism as well.

In addition to adapting to the pervasiveness of commerce, the republican tradition incorporated concepts of rights, pluralism, and tolerance for individual differences. Perhaps in its original, classical form, civic republicanism did unequivocally oppose the model of freedom ("negative liberty") embodied in legally protected individual rights. (But perhaps not.)¹⁷³ Whether the civic republican vision of "public freedom," consisting in active participation in political life, was always opposed to the vision of freedom consisting in private rights, or whether, to the contrary, the two visions have always been conceptually related to one another, albeit in a complex way, is a complicated theoretical question. Arguably, the civic republican tradition had always contained notions of negative liberty, if only as a predicate of positive liberty.¹⁷⁴ (For that matter, it is even arguable that civic republicanism had also always contained a positive vision of commerce in addition to its more familiar antagonism to the values of the market.) These differing characterizations of civic republicanism's relationship to the values of individual liberty, rights, and market activity turn on the interpretation of the conceptual implications of the core values of republicanism and, as a historical matter, on how those conceptual implications were variously interpreted in the past. Without resolving these conceptual questions, the evidence suggests that republicanism was transformed over time by an acceptance of versions of pluralism, individualism, and judicially enforced rights also associated with liberal thought.¹⁷⁵ Thus, one might say that republican discourse became "marketed," that is, it adapted to and absorbed the values of

¹⁷² See *supra* pp. 1073-74.

¹⁷³ See Michelman, *supra* note 74, at 1505 (asserting that republican thought is committed to "the idea of law, including rights, as the precondition of good politics"); Michelman, *Traces*, *supra* note 52, at 36-47 (analyzing interdependence of "republican" notions of public freedom and "liberal" concepts of negative liberty, free subjectivity, and legal rights).

¹⁷⁴ See Michelman, *Traces*, *supra* note 52, at 43-47.

¹⁷⁵ See POCOCK, *supra* note 164, at 516-26 (describing the transformation of the conception of republican virtue from one of direct participation in self-government to one entailing elected representation; analyzing the intellectual challenges posed by this process of conceptual transformation, but denying that this transformation spelled the end of a truly republican form of civic participation).

the market institutions that were gradually becoming ascendant by interpreting its own principles in ways that gave individual rights a new primacy, and made room for a vision of *le doux commerce*,¹⁷⁶ in which men who engaged in commercial and contractual transactions became, by virtue of that very involvement, sufficiently civilized to participate competently in republican politics. Increasingly, the republican virtue of political participation came to be conceptualized by Americans as a matter of political *right*.¹⁷⁷ Participating in economic exchange, once viewed as a badge of political incompetence, eventually came to be regarded as the *prerequisite* for exercising political rights (hence a new justification for excluding women, along with minors and slaves, from the franchise — by virtue of their legal incapacity to form contracts). By the nineteenth century, even “hirelings,” formerly among the lowest of the low in the eyes of the more elitist expounders of classical republicanism, might draw upon the republican notion of equal citizenship as an intellectual resource for shaping the claims of the nascent labor movement.¹⁷⁸

If we accept that republicanism was “marketed” in this way, then the confusion regarding its persistence, as opposed to disappearance, becomes somewhat understandable. It is hard to tell what ideas are reflected in a particular piece of discourse when the relationships among different bodies of thought are so conceptually complex. Casual observers should certainly be forgiven for concluding that the presence of market-based values and notions of individual rights implies the absence (or the negligible influence) of republican discourse. But serious scholars should refrain from jumping to such hasty, and conceptually simplistic, conclusions.

The story outlined above is, of course, no more (and no less) than a historical hypothesis. It draws upon the work of several American legal historians, among them William Forbath, Gregory Alexander, and James Kloppenberg.¹⁷⁹ The idea that republican rhetoric was “marketed” by absorbing the discourse of the market and individual rights

¹⁷⁶ The trope of *le doux commerce* as an agent of civilization, refinement, and moderation of the human passions was commonplace in eighteenth-century thought. See APPELBY, *supra* note 6, at 167; POCKOCK, *supra* note 165, at 103, 117 (referring to *le doux commerce* as a phrase used to express an emergent vision of commerce as a civilizing agent).

¹⁷⁷ The case of *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), provides interesting evidence of such a shift. The plaintiffs’ argument in *Luther* rested on the proposition that a republican form of government, guaranteed by Article IV of the Federal Constitution, implied that all adult white men had the right to vote. See *id.* at 38. On this premise, Rhode Island’s original constitution, which restricted the franchise to male property-holders, was viewed as being un-republican and (for that reason) unconstitutional. See *id.* The Supreme Court rejected this argument on the grounds that the precise meaning of the Republican Guarantee Clause, with regard to the proper distribution of the franchise, was nonjusticiable. See *id.* at 39. For an analysis of the implications of this holding for the meaning of republicanism, see Note, cited above in note 71.

¹⁷⁸ See Forbath, *supra* note 67, at 1122.

¹⁷⁹ See sources cited *supra* note 163.

provides at least as plausible an explanation of the evidence as that offered by the critics of the republican revival. Moreover, it is an interpretation of the evidence that makes more sense of the substantial areas of agreement between the two sides in the debate over the legitimacy of applying the republican synthesis to law. Indeed, when we take the trouble to examine the scholarship of the republican revival and the republican synthesis from which it draws, we find point after point of agreement with the views of those who imagine themselves to be its opponents.¹⁸⁰ Both sides agree that civic republicanism existed as an identifiable and influential tradition of political discourse in England, Europe, and the United States.¹⁸¹ Both sides agree that civic republicanism stood in a relationship of opposition to liberalism and theories that valorized the free market, yet that it either was or became integrally related to these same bodies of thought.¹⁸² Both sides agree that liberalism strongly influenced the framing of the Constitution¹⁸³ and became the dominant ideology by the end of the eighteenth century. Yet both sides recognize the persistence of the civic republican idiom.¹⁸⁴ Even with respect to issues of methodology, the agreement is substantial. Both sides accept the basic idea that discourse in some way "shapes reality," and hence that the history of our political institutions must include the historical examination of political discourse. Both sides regard the culture of political discourse as inherently dynamic and pluralistic, with the consequence that no tradition of political discourse can be viewed accurately in isolation from

¹⁸⁰ In summarizing the areas of agreement between the proponents of the republican revival and their critics, I do not mean to imply that there are no points of disagreement between them. Indeed, within each camp, there are differences of opinion. Although here I emphasize the commonalities both within each camp and between the two, I do not mean to imply either that the critics agree on everything, or that the proponents of the revival agree on everything, let alone that both camps are in complete agreement with each other.

¹⁸¹ See, e.g., APPLEBY, *supra* note 6, at 161-64; Kramnick, *supra* note 12, at 630.

¹⁸² For statements that republican discourse was opposed to liberal and market-based ideologies, see, for example, APPLEBY, cited above in note 6, at 334-35; POCOCK, cited above in note 169, at 66-71; Kramnick, cited above in note 12, at 662. Similar descriptions of liberalism and civic republicanism as contesting, rival ideologies can be found in the legal literature. See, e.g., Hartog, *supra* note 9, at 75-76; Horwitz, *supra* note 52, at 63-69; Michelman, *Traces*, *supra* note 52, at 21-23. Assertions that some kind of merging, synthesis, integration, or absorption occurred can be found in POCOCK, cited above in note 120, at 50; Michelman, cited above in note 74, at 1503-07, 1532-37; and Michelman, *Traces*, cited above in note 52, at 36-47. Appleby is perhaps the only critic who assiduously resists the proposition that the two traditions merged or synthesized in some fashion.

¹⁸³ See, e.g., APPLEBY, *supra* note 6, at 290; Michelman, *Traces*, *supra* note 52, at 17-18.

¹⁸⁴ See, e.g., APPLEBY, *supra* note 6, at 217 (acknowledging the "persistence" of republican ideas through the eighteenth century); Kerber, *supra* note 9, at 1671. Appleby explains this as the "persistence of ideas no longer capable of illuminating reality," APPLEBY, *supra* note 6, at 217, without explaining why ideas that do not "reflect reality" would persist, let alone what an idea that fails to reflect reality is, or why such an idea does not count as an influence on politics and law.

those with which it coexisted.¹⁸⁵ Both sides fret about the difficulties of interpretation that result from this picture of things, and the perils of absorbing all of "reality" into the overarching concept of discourse.¹⁸⁶ And both sides ponder the possibilities for rendering valid historical reconstructions of the past in the face of the inherently interpretive nature of history.¹⁸⁷ In the end, the area of agreement is so substantial, and the disagreement so narrow, that one wonders what the fuss is all about.

This is not to say that there are no substantive disagreements at all. It is a matter of real dispute whether, say, Jefferson is properly characterized as republican, or whether the new "political economy" derived from the Scottish Enlightenment, and Adam Smith himself, might properly be viewed as part of the republican tradition.¹⁸⁸ But these sorts of disagreements are minor compared to the extent of disagreement claimed in the historians' complaint. Two features of the historians' complaint have helped to exaggerate the extent of disagreement. First, Kalman and her fellow critics tend to concentrate on the few "showpieces" of the republican revival, namely two articles by Frank Michelman and a series of pieces by Cass Sunstein.¹⁸⁹ These articles are generally more programmatic in their aims and more focused on constitutional theory than other studies, by these and other legal scholars, that contain more detailed analyses of technical areas of legal doctrine, such as family law and federalism,¹⁹⁰ property law, local

¹⁸⁵ In her criticisms of the methodology and conceptual apparatus of the republican synthesis, Appleby does not object to the study of political discourse (nor even to the understanding of discourse as a repository of ideas that structure individual thought). Rather, she objects to a view of discourse that denies individual creativity and innovation, and "neglect[s] . . . the motives behind expression." APPLEBY, *supra* note 6, at 332. But as Appleby notes herself, "[i]t is possible to explore with an anthropologist's sensitivity the riches of symbolic systems without subscribing to the view that these systems possess a power to inhibit the creation of new symbols." *Id.* Contrary to her suggestion, there is no reason to think that Pocock (or any of the other contributors to the republican synthesis/revival) disagree with this view. Even Rodgers acknowledges that Pocock "never conceived of language as a prison house." Rodgers, *supra* note 4, at 35. Appleby adduces the intellectual and cultural pluralism of English and American society as a factor preventing any particular political philosophy from becoming so entrenched that it could exercise the kind of deterministic hold over individual thought that she ascribes to the concept of "ideology"; but again it appears that the pluralism, and consequent fecundity, of political discourse is a point of *agreement* between the proponents of the republican synthesis and their foes. See POCOCK, *supra* note 10, at 20-23 (stressing the inherently pluralistic character of the world of thought in which political philosophy is contained, the permeability of different spheres of discourse, and the consequent spur to intellectual innovation).

¹⁸⁶ See sources cited *supra* note 67.

¹⁸⁷ See sources cited *supra* note 67.

¹⁸⁸ See *supra* note 165.

¹⁸⁹ These works are Michelman, cited above in note 74; Michelman, *Traces*, cited above in note 52; Sunstein, *Republican Revival*, cited above in note 52; and Sunstein, *Interest Groups*, cited above in note 52. Ackerman, cited above in note 52, and Sherry, cited above in note 52, are also frequently highlighted in the critics' discussions.

¹⁹⁰ See, e.g., Dailey, *supra* note 52, at 1015-16 (identifying civic republican themes in the treatment of the scope and limits of parental authority over children under the constitutional doctrine

government law,¹⁹¹ voting rights,¹⁹² campaign finance reform,¹⁹³ and education law.¹⁹⁴ Such a selective focus makes it much easier to support the claim that the scholarship of the republican revival is methodologically defective.¹⁹⁵ Second, when Kalman and her fellow critics do recognize the places in which the proponents of the revival agree with their critics, they often characterize the statements of agreement as “concessions.”¹⁹⁶ One critic goes as far as characterizing the numerous statements by Pocock and others endorsing the nondichotomous view of republicanism and liberalism as evidence of the “decomposition” of the republican synthesis.¹⁹⁷ This sort of pathologization ignores the fact that statements of this sort, along with other methodological ruminations addressing many, if not all, of the critics’ concerns, have been voiced by the proponents of the republican synthesis *all along*.¹⁹⁸ Indeed, the republican synthesis has been marked by its preoccupation with issues of methodology as much as by its particular focus on republican discourse, and the legal scholars who incorporated this body of historical work into their own analyses of law have likewise tended to demonstrate concern with methodological problems, and have contributed to the body of methodological reflections that has *always* formed an important part of the literature on the history of republicanism.¹⁹⁹ But even if such self-critical methodological statements and conceptual refinements had not been part of the literature on republicanism from the beginning, it is unclear why later explicit

of privacy, and exploring their complex interrelationship with liberal themes); Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1888 (1995) (arguing against the nationalization of family law on the basis of the republican value of local participatory politics that, she argues, is rooted in our legal system).

¹⁹¹ See, e.g., Frug, *supra* note 52.

¹⁹² See, e.g., Michelman, *Possession vs. Distribution*, *supra* note 52, at 1330–34.

¹⁹³ See, e.g., *id.* at 1340–50.

¹⁹⁴ See, e.g., Stolzenberg, *supra* note 71, at 641–46 (identifying civic republican themes in judicial opinions regarding First Amendment challenges to public education).

¹⁹⁵ To her credit, Kalman mentions many of the neglected works in her footnotes, indicating a far more exhaustive survey of the legal scholarship on republicanism than is typically displayed in the literature of complaint. However, the substantive analyses of these articles — which present more historical evidence of the hypothesized existence of republicanism in legal discourse — barely enter her argument in the main text.

¹⁹⁶ See, e.g., Rodgers, *supra* note 4, at 36–37. Kalman makes a similar criticism, noting that “[e]ven Pocock challenged the ‘binary reading . . .’” (p. 174 (quoting J.G.A. Pocock, *Between Gog and Magog: The Republican Thesis and the Ideologica Americana*, 68 J. HIST. IDEAS 325, 344 (1987)) (emphasis added)). Appleby, it should be noted, avoids succumbing to the temptation to characterize agreement as concession. See APPLEBY, *supra* note 6, at 137 (noting that “Pocock and I are in agreement that capitalism and the social reflections it provoked did not sail smoothly into English consciousness in the modern era”).

¹⁹⁷ See Rodgers, *supra* note 4, at 36.

¹⁹⁸ See *supra* note 67.

¹⁹⁹ Of course, not all of the legal scholars who participated in the republican revival contributed equally to the sub-genre of methodological reflections. Some failed to address the concerns at all, but many did address them. See *supra* note 67.

affirmations of the more complex, nondichotomous view of republicanism and liberalism should be taken as a sign of the "decomposition" of the republican synthesis rather than of its growth and evolution.

When the smoke clears, the disagreement between the republican revival and its critics appears to be very limited. What remains is alarm that the republican synthesis has "surreptitiously inserted into our history the notion that reality is socially constructed,"²⁰⁰ and a felt need on the part of some critics to believe that objective standards for differentiating good history from bad history must exist, notwithstanding the difficulty of articulating them. The first concern is quite mystifying. What connection is there between views about the relationship of reality to language and ones about whether civic republicanism is an enduring influence in American law? The introduction of almost certainly irrelevant metaphysical concerns into the republicanism debates may be a symptom of a cultural malaise unrelated to the merits, or lack thereof, of the claims of the republican revival. The idea that legal scholars felt free to invent a history of republican thought, unrestricted by traditional norms of scholarship, and that it was adherence to the notion that "reality is socially constructed" (whatever this means) that licensed them to do so, can be supported only by doing exactly what those who advance this idea condemn — namely, by not letting facts stand in the way of believing what they strongly wish to believe. Kalman, to her credit, emphasizes methodological over metaphysical concerns in her version of the historians' complaint. But these concerns hardly serve to distinguish the critics of the republican revival from its proponents, because the critics neither resolve the long-standing debates concerning the possibilities for historical objectivity, nor articulate a clear methodological alternative.

At bottom, the historians' complaint rests on the claims that civic republicanism did not endure as a tradition in American law, and that it is an undesirable political philosophy to claim, from a normative point of view. It has been my aim to show that neither claim is adequately supported. That is not to say that the complaint raises no valid concerns; rather, it suggests that those it raises are best remedied not by jettisoning the existing legal and historical scholarship on republicanism, but by building and perhaps improving upon the existing scholarship. If the focus on liberalism and republicanism has led scholars to overlook other formative intellectual influences on the law, that is an argument for *adding* other elements to the mix, not for eliminating republicanism. If the argument for applying the republican synthesis to law has rested more on assumptions than on an adequate assessment of the evidence, that is an argument for a fuller analysis of the evidence, not for dismissing the hypothesis. As for

²⁰⁰ APPLEBY, *supra* note 6, at 278.

claims about the normative content of republicanism and the political motivations of the authors of the republican revival, much more could be said — and happily, much more has been said in works by Michelman and others that explore the moral ambiguities, pitfalls, and potential of civic republicanism as a political and legal philosophy. Normative objections to the republican revival tend to rest on a highly selective and oversimplified interpretation of the content of republicanism — as a conservative, authoritarian, exclusionary, proregulatory philosophy inherently opposed to legal rights and judicial activism. It likewise presupposes that the authors of the republican revival are uniformly and unambivalently dedicated to judicial activism aimed at supporting expansive interpretations of civil rights along with “progressive” programs of government regulation and redistribution. Thus, the critics of the republican revival tend to overlook the interpretive complexity and normative ambiguity of civic republicanism, which (like liberalism) is susceptible to various interpretations, *supporting and opposing* judicial activism, individual rights, and populist, or inclusionary, as opposed to exclusionary, views of “the People” who are entitled to participate in political decisionmaking in pursuit of the common good. If the history of republicanism demonstrates anything clearly, it is that the content of republicanism is ambiguous. It is precisely this ambiguity that attracted the attention of “liberal” legal scholars who, as Kalman aptly observes, were attempting to reconcile contemporary critiques of liberal rights discourse with an abiding belief in the aspirations of the law. If anything, one would think that the group of scholars who were so attracted by the republican synthesis would be criticized for their equivocations and “failure” to take strong, in other words, unambivalent, political stands. It is curious to find them faulted instead for being too political.

If Kalman’s book succeeds in its aim of “driving the final nail in the coffin” and discouraging further inquiry into the effect of republican ideas on law, it will be a real loss for legal scholarly inquiry. If, instead, her book sparks yet another revival of interest in the historical, normative, and conceptual questions raised by the republican synthesis, it will be a boon. That, of course, is not what Kalman intended, but it would be a fine example of historical irony.

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Published eight times during the academic year by Harvard law students.

Citations conform to *The Bluebook: A Uniform System of Citation* (16th ed. 1996), published by the Harvard Law Review Association for the *Columbia Law Review*, the *Harvard Law Review*, the *University of Pennsylvania Law Review*, and *The Yale Law Journal*.