

Articles

Reflections on the “Republican Revival”: Interdisciplinary Scholarship in the Legal Academy

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In a recent article in the *Journal of American History*, Daniel Rodgers attempts to sketch out the “career” of republicanism as an organizing historiographical concept. Rodgers is principally interested in establishing republicanist historiography as a “paradigm,” a status comparable to that conventionally assigned to two other significant twentieth-century historiographical concepts, which he labels “Beardian” and “Hartzian,” and which many other scholars have characterized as “progressive” and “liberal,” or “conflict”-focused and “consensus”-focused.¹

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1. The labels “Beardian” and “Hartzian” refer to the contributions of the early twentieth-century historian Charles Beard (1874-1948) and the mid-twentieth-century historian Louis Hartz (1919-1986). Beard’s historical studies, typified by *An Economic Interpretation of the*

According to Rodgers's historiographical chronology, the twentieth century has witnessed three conceptual paradigms: the "Beardian"/"progressive" paradigm, dominant throughout the 1940s, which portrayed history as an unending series of conflicts among antagonistic "classes," "groups," and "interests"; the "Hartzian"/"liberal" paradigm, emphasizing the consensual values that defined America as a civilization and profoundly limited the course and pace of cultural change, predominating from the early 1950s through the late 1960s; and the "republican" paradigm, which Rodgers seeks to characterize in far greater detail, emerging in the late sixties and "perceptibly thinning out" by 1990.²

My purpose here is not to critique Rodgers's historiographical synthesis, which I believe most historians would find useful and even illuminating. It is rather to explore, in more detail, a tiny episode in

Constitution (1913), emphasized underlying economic motives as the basic influence on human actors which precipitated historical change. The necessarily different economic "interests" of human actors and groups of actors precipitated "conflict," which Beard saw as an inevitable consequence of the economic motives of humans and thus a fundamental and permanent element of the history of American culture.

In contrast, the work of Louis Hartz, typified by *The Liberal Tradition in America: an Interpretation of American Political Thought Since the Revolution* (1955), emphasized the unique, indigenous features of American society and government, particularly the absence of monarchical and feudal traditions and the inhabitants' sense of living in an abundant, exceptional environment. Hartz's approach stressed the extent to which Americans tended to subsume political and social conflicts in a consensual ideology, "liberalism," that combined a nonhierarchical ("republican" or "democratic" as distinguished from monarchical or oligarchical) approach to political and social issues with a commitment to the ideal of an unregulated, "capitalist" economic order. Hartz's approach thus emphasized "consensus," as distinguished from "conflict," as a universal phenomenon in the history of American civilization.

Within recent historical literature, the "Beardian" and "Hartzian" viewpoints have regularly been associated with "progressive" and "liberal" historiographical perspectives. Two prominent examples are RICHARD HOFSTADTER, *THE PROGRESSIVE HISTORIANS: TURNER, BEARD, PARRINGTON* (1968), treating Beard, and Dorothy Ross, *The Liberal Tradition Revisited and the Republican Tradition Addressed*, in *NEW DIRECTIONS IN AMERICAN INTELLECTUAL HISTORY* 116 (John Higham & Paul Conkin eds., 1979), treating Hartz. The association of "Beardians" with a "progressive" perspective has not tended to spawn confusion, but the use of the term "liberal" in connection with "Hartzians" and apostles of "consensus history" may cause difficulty to nonspecialists. The term "liberal," in the context of Rodgers's discussion and other current discussions of Americanist historiography by specialists, is intended to evoke Hartz's sense of that term in *The Liberal Tradition*, and should be distinguished from other current uses of the term "liberal" to describe a political or philosophical perspective.

2. Daniel T. Rodgers, *Republicanism: the Career of a Concept*, 79 *J. AM. HIST.* 11 (1992). Since Rodgers's chronological organization and terminology are not the focus of this article, I have chosen, after this preliminary exposition, to abandon some of his terms. For my purposes the terms "progressive," "liberal," and "republican" best capture the orientation of the interpretive concepts Rodgers employs. "Beardian" historiography can be identified with Carl Becker and Vernon Parrington as well as Charles Beard; "Hartzian" historiography with Richard Hofstadter and Daniel Boorstin as well as Louis Hartz. See, e.g., Daniel R. Ernst, *The Critical Tradition in the Writing of American Legal History*, 102 *YALE L.J.* 1019, 1023 (1993). Rodgers concedes that even in his scheme, republicanism cannot be associated with a single figure, although he identifies Bernard Bailyn, Gordon Wood, and J.G.A. Pocock as germinal writers in the paradigm. See Rodgers at 15-18.

Moreover, as Rodgers acknowledges, labels such as "progressive," "liberal," and "republican" suggest the ideological, presentist dimensions of a conceptual perspective. While those dimensions may complicate and even obscure the meaning of the labels, they arguably are at the heart of any inquiry into the shifting presence of scholarly paradigms in the American academy.

Rodgers's narrative. In that episode, as Rodgers describes it, "legal philosophers discovered the terminology" of the republican historiographical paradigm in the late 1980s. He then continues:

"Natural scavengers," as one of their number wrote in 1988, [legal scholars] had been slow to sense what was transpiring. By the late 1980s, however, the law journals were full of news of a "republican revival" in legal theory. In the work of Frank Michelman, Cass R. Sunstein, Morton J. Horwitz, and others, "republicanism" was swept up as shorthand for everything liberalism was not: commitment to an active civic life (contra liberalism's obsession with immunities and rights), to explicit value commitments and deliberative justice (as opposed to liberalism's procedural neutrality), to public, common purposes (contra liberalism's inability to imagine politics as anything other than interest group pluralism).³

One might quarrel with Rodgers's characterization of what republicanism meant to those seeking to revive it, particularly his claim that the revivalists assume that one set of beliefs (e.g. "commitment to an active civic life") is necessarily opposed to another set (e.g. "obsession with immunities and rights"). For present purposes, however, I will accept Rodgers's characterization as a roughly accurate précis of the thrust of the "republican revival" in legal scholarship. By the "republican revival," I mean an episode in which legal scholars self-consciously "discovered" and extrapolated from the contributions of historians who emphasized a recurrent strain of civic-oriented, communal, and antipositivistic political ideology (the republican "tradition") in American history.

I now want to try to make some sense of the episode Rodgers describes, in particular, four implications of the episode as well as an additional one which I now raise. Why were legal scholars apparently "slow to sense what was transpiring" among historians about the interpretive possibilities (and perils) of the republican conceptual par-

3. Rodgers, *supra* note 2, at 33. In a footnote to the quoted excerpt, Rodgers cites Kathryn Abrams, *Law's Republicanism*, 97 YALE L.J. 1591 (1988) for the characterization of legal scholars as "natural scavengers." He then cites much of the literature most commonly identified with discussions of "republicanism" in legal scholarship, including work by Sunstein, Michelman, and Horwitz. Those interested in tracing that literature could profitably begin by consulting four symposia: Symposium, *1787: The Constitution in Perspective*, 29 WM. & MARY L. REV. 1 (1987); Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988); Symposium, *Roads Not Taken: Undercurrents of Republican Thinking in Modern Constitutional Theory*, 84 NW. U. L. REV. 1 (1989); and Symposium, 41 FLA. L. REV. 409 (1989) (symposium on Republicanism and voting rights).

In fairness to Rodgers, his "natural scavengers" description comes from a law professor, so that perhaps he simply intends it as a professional self-description. But he goes on to use the words "slow to sense what was transpiring," which implies a causal connection between "lateness" and "scavenging." The issue of "scavengers" will be discussed in greater detail. See discussion *infra* part III.

adigm? What, if anything, does Rodgers mean by drawing a connection between that “slow” reaction and the fact that legal scholars have been characterized as “natural scavengers”? Is Rodgers accurate in claiming that republicanism was embraced by “legal philosophers,” as distinguished from legal historians; that is, as a contemporary-oriented political theory, “contra” to “liberalism,” rather than as an interpretive framework for making sense of the past? And why was republicanism “received” as a potentially stimulating theory by legal scholars at the very moment, according to Rodgers, when its usefulness as an interpretive concept was being seriously called into question within the historical profession?

To these features of the episode I have added one not obviously extractable from Rodgers’s excerpt: what does the episode say about the current status of interdisciplinary scholarship in the legal academy, a status that is described by many commentators to be on the rise, perhaps even flourishing?⁴

Such are the purposes of this article. I first discuss the emergence of republicanism as a paradigm and then seek to explain its reception in the legal academy. The “lateness” of the republican revival, the characterization of legal scholars as “scavengers,” and the interaction of the “lateness” and “scavenging” themes with contemporary epistemological issues (particularly the issue of antifoundationalism), are central to my discussion. Ultimately, this article emerges as a series of reflections on how the republican episode manifests a deep and troubling predicament in which legal scholars currently find themselves, a predicament associated with the uncertain meaning of a “discipline” in contemporary academic life.

I. THE EMERGENCE OF REPUBLICANISM AS A PARADIGM

Since Thomas Kuhn’s *The Structure of Scientific Revolutions* first appeared in 1962, and especially after the appearance of the second edition of that work in 1970, the word “paradigm” has settled into the literature of a number of disciplines, and has arguably taken on a domesticated, accessible definition. Rodgers treats a paradigm as a “conceptual transformation, a reconfiguration of the largely known,”⁵ and in Rodgers’s hands, republicanism fits the treatment. In the terms of Rodgers’s essay, “progressive” historiography, with its emphasis on intergroup and interclass conflict as the working explanatory motif of American history, was the “normal science” of the three decades prior to the 1940s, whereas “liberal” historiography, with an alternative

4. Not all commentators consider the status of interdisciplinary scholarship to be on the rise. See, e.g., Charles Collier, *The Use and Abuse of Humanistic Theory in Law*, 41 DUKE L.J. 191 (1991).

5. Rodgers, *supra* note 2, at 11.

motif that de-emphasized conflict and emphasized consensual values and American exceptionalism, was the “normal science” of the period from the Second World War through the late 1960s. Finally, the emergence of republicanism as a reconfiguration of “largely known” historical events—the origins of the American Revolution, the founding of the Constitution—was a “paradigm shift” which eventually became a historiographical “revolution.”

Rodgers also shows how republicanist historiography can be seen as more than simply a critique of Hartzian liberalism that restored the terms and emphasis of Beardian progressivism. Republicanism, as a historiographic perspective, rejected both “conflict” and “consensus” as explanatory motifs. In its initial formulations, republicanism represented an effort to recapture the intellectual, transatlantic, and “classical” dimensions of the episodes of the Revolution and the framing of the Constitution. Rodgers demonstrates that republicanism widened its scope and explanatory power, and in the process developed its own complex, interacting set of theories about historical causation.

Rodgers does not attempt to identify the universal causal factors the historians writing within the republican paradigm associated with historical change. A search for the causal motif of republicanism, however, helps clarify its peculiar attractiveness as a scholarly perspective for those writing in the decades after 1970. Here I want to use Rodgers’s analysis as a point of departure for that search.

Rodgers points to some features of the republicanist perspective that could have rendered it a compellingly attractive reconfiguration for historians in the 1970s and 1980s. The insight driving republicanist historiography in its first phase, he suggests, was a recognition of how different the assumptions of those who participated in the American Revolution appeared from the conventional assumptions attributed to Americans by “liberal” historiography. Revolutionary-era actors were pictured as drawing their political and social theories from transatlantic sources, whereas “liberal” historians had emphasized the unique and indigenous dimensions of American thought and culture. Republicanists saw the world of the Revolution as emphasizing hierarchical social relations and deference politics; liberal historiography had emphasized the overwhelmingly “democratic” and antifeudal tenor of American society and politics. Those participating in the “republican” reconfiguration noticed archaic and “pre-capitalist” features in the early American economy, in contrast to those identified with the liberal reconfiguration, who had minimized those features.⁶

6. See, e.g., BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969); Bernard Bailyn, *The Central Themes of the*

Over time, the recognition of a “republican,” pre-“liberal” world was to evolve into the recognition of a republican alternative to the dominant liberal ideology of America.

Moreover, according to Rodgers, republicanism provided a conceptual apparatus that complemented the “structuralist turn”⁷ in the historiography of the 1970s. He discusses the “structuralist” turn alongside a discussion of the entrance into the historical profession of a group of scholars attracted to “neo-progressive” social history. The links between structuralism, the “new” social history, and republicanism deserve some attention, because the forging of such links was one of the factors that precipitated the expansion of republicanist historiography.

Before the advent of structuralist methodologies, intellectual history was in a defensive posture within the historical profession. The insights of structuralists who posited the existence of inherent contextual limitations—professional as well as social, economic, and temporal—on the content of ideas, helped intellectual history evade the charge that it was a myopically “idealist” perspective. After structuralism, ideas could be seen as ultimately rooted in power, status, or other materialist phenomena.⁸ The connection between structural intellectual history and the new social history was forged at this point. Structuralist work arguably complemented “materialist” social history instead of radically opposing it, allowing studies of “consciousness” to become part of the enterprise of the new social historians. Some of those engaged in the enterprise unearthed “pre-market” and “pre-capitalist” elements in the consciousness of those participating in the political economy of early America. These contributions were eventually integrated into a republicanist historiographical paradigm.⁹

The clearest example of the integration of structuralism, the new social history, and republicanist historiography can be seen in the

American Revolution: An Interpretation, in *ESSAYS ON THE AMERICAN REVOLUTION* (Stephen G. Kurtz & James H. Hutson eds., 1973); J.G.A. Pocock, *The Myth of John Locke and the Obsession with Liberalism*, in *JOHN LOCKE* (J.G.A. Pocock & Richard Ashcraft eds., 1980); J.G.A. Pocock, *To Market, to Market: Economic Thought in Early Modern England*, 10 *J. INTERDISCIPLINARY HIST.* 303 (1979); J.G.A. Pocock, *Virtue and Commerce in the Eighteenth Century*, 3 *J. INTERDISCIPLINARY HIST.* 119 (1972); Robert E. Shalhope, *Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography*, 29 *WM. & MARY Q.* 49 (1972). Cf. JOYCE APPLEBY, *CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790s* (1984); Joyce Appleby, *Commercial Farming and the 'Agrarian Myth' in the Early Republic*, 68 *J. AM. HIST.* 833 (1982); Joyce Appleby, *Republicanism and Ideology*, 37 *AM. Q.* 461 (1985). On deferential politics, see Ronald Formisano, *Deferential-Participant Politics: The Early Republic's Political Culture, 1789-1840*, 57 *AM. POL. SCI. REV.* 473 (1974).

7. By structuralism I mean a perspective emphasizing the inherently contextual (and contingent) character of ideas and ideologies, which are “structured” by time, place, and the established social and economic configurations of a culture.

8. Rodgers, *supra* note 2, at 14, 20-24.

9. The familiar citation here is SEAN WILENTZ, *CHANTS DEMOCRATIC* (1984).

altered causal position attributed to ideas as historical agents. The early historians Rodgers identifies with a republicanist perspective—notably Bernard Bailyn, Gordon Wood, and J.G.A. Pocock—had first identified republicanism with a set of pre-modern, pre-liberal ideas, such as the inevitability of corruption in governments, the cyclical theory of history, and the (untranslatable) concept of “virtue.” In early republicanist works, the presence of such ideas only suggested that early Americans took such ideas seriously enough to seek political independence on their behalf, and that the ideas were discernibly not those associated with liberalism. Soon, however, the very “pre-modern” quality of the ideas that the Revolutionary generations took seriously served as an implicit reminder of the strength and durability of even “alien” thought: a confirmation of the imprisoning features of thought itself. 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.” As Rodgers points out, the felicitous interaction of early republicanist historiography, “new” social history, and structuralism not only elevated the stakes of even the most casual “republican” utterance, it enabled historians to begin to expand republicanism from a pre-liberal ideology to one that competed with liberalism.¹⁰

Rodgers does not emphasize another interpretive development in 1970s scholarship that was accommodated by republicanist historiography. This was the linguistic turn. Whereas structuralist intellectual history indirectly reflected the contributions of “new” social historians and cultural anthropologists, linguistic analysis reflected a significant shift in literary criticism and the resurfacing, through Kuhn’s work on science, of the older approaches of American Studies scholars, with their emphasis on the “mythic,” “symbolic,” and “archetypal” dimensions of literature.¹¹ Conventional American Studies scholarship had often associated those dimensions with the exceptionalism of America or the consensual values of American civilization, but the new linguistics gave them a different spin. Scholars now saw them as ways in which contemporaries organized and ordered their experience, “interpreting” texts, as well as events, consistent with their ideological agendas. Linguistic analysis drew on “reader response” theory (in its early,

10. Rodgers, *supra* note 2, at 24-30.

11. In a discussion of Pocock, Rodgers stresses Pocock’s initial reading in American Studies literature and the enhanced meaning of that literature Pocock received from exposure to Kuhn’s theory of “paradigms.” From the two sets of sources, Rodgers argues, Pocock formulated his view that “language structured the means and vocabulary by which reality could be described.” *Id.* at 20-22. For an example of a contemporary blending of linguistic analysis with older American Studies approaches, see Patricia Nelson Limerick, *Making the Most of Words: Verbal Activity and Western America*, in *UNDER AN OPEN SKY: RETHINKING AMERICA’S WESTERN PAST* (William Cronon et. al. eds., 1992).

less radical versions) and a revived sense of language as an embodiment of cultural values to resurrect the significance of extracting ideological "readings of texts" as a historical exercise with stature.¹²

In the "linguistic" version of republicanist historiography, scholars turned to "archaic" texts. These scholars were informed both by an acquired familiarity with the cultural context of those texts, and a new appreciation of the extent to which language was the only medium in which actors situated in a culture could express their unique, time-bound, "place" in history and at the same time articulate their aspirations and fantasies. Everything, in short, was embedded in language.

The great value of republicanism as an aspirational "paradigm," then, was its ability to accommodate almost all practitioners in historical discourse after the 1970s, whether they were of a "structural" or "linguistic" frame of mind, were "new" social historians, or were even unreconstructed intellectual historians glad to have ideas taken seriously once more. Rodgers demonstrates, however, that the all-encompassing quality of republicanist historiography was a weakness as well as a strength. By the late 1980s, republicanism appeared to assume the character of "normal science" in its derivative phases.

One can glean a sense of the all-encompassing quality of republicanism in its "late" phases, and the extent to which that feature of the concept served to undermine its attractiveness, from a brief investigation of its central causal motif. Just as "conflict" was the causal motif of progressive historiography, and "consensus" the equivalent motif of liberal historiography, republicanism had a term that encapsulated its practitioners' sense of the primary locus of causal investigation in historical scholarship. That term was "culture." At first blush not a term apparently of the same order as "conflict" or "consensus," "culture" nonetheless signified a deliberate effort to complicate the view of historical causation embodied in those terms.¹³

The model of historical change erected by the Beardian progressives, and largely retained by the Hartzian liberals, was that of American history as a series of universally warring factions whose recurrent conflicts took place in an environment that possessed universal and

12. "Linguistic turn" and "reader response theory" are also terms that have lost their initially specialized meaning in frequent conversational use. Here I mean only the recognition that the language of cultural actors can function both as a window into the epistemological assumptions of the culture in which those actors are situated, and as a mechanism for "distancing" such actors from modern readers of the language.

13. Rodgers has argued, in commenting on an earlier draft of this article, that "culture" is not the thematic equivalent of "conflict" or "consensus" because the latter two terms signify theories of human behavior, capable of universalization. I agree that "culture" can become hopelessly vague and abstract as a universalist theme. That, however, is beside the point. "Culture" as a causal motif rests on an assumption that human behavior is necessarily and inevitably limited by time, space, and context. The vagueness or ubiquity of a concept does not necessarily disable it from being universalized. This point is developed more fully in the text that follows. See *infra* note 18 and accompanying text.

enduring physical and systemic features. For a Beardian, historical change in America was either brought about by the inevitabilities of interest-group or class conflict, which transcended environmental or governmental commonalities. For a Hartzian, historical change, in the form of truly divisive or revolutionary conflict, was inevitably circumscribed by the belief and the fact that America was a nonfeudal, nonmonarchical, nonradical, and self-proclaimed "exceptional" society. Whether one was a Beardian or a Hartzian, historical change in America was explicable in terms that transcended history.

If one considers the early scholarly contributions that came to be identified with a republicanist historiographical perspective, it is clear that the authors of those contributions—Bailyn, Wood, and Pocock can again serve as examples—were self-consciously distancing themselves from any ubiquitous causal metaphors in the course of their analyses. The decisive themes of their works—the existence of transatlantic, "classical," archaic political and social ideas in the thought of Americans of the Revolutionary and Founding generations; the transferring onto the American continent of themes of political strife associated with the earlier history of England or Renaissance Italy; and the tensions between "classical" politics and the setting of the American Republic—were themes that de-emphasized the universalistic character of historical change and emphasized the extent to which particularistic considerations of time and space contributed to the identity of the American Republic. That Republic, the early republicanist works suggested, was decisively not the product of a "conflict" or a "consensus" that could be replicated across time. It was a product of a specific "moment" in which archaic and modern currents and cross-currents came together in a distinctive, liberating mix.

What, then, was the root "cause" of historical change, as suggested by these early republicanist works? Bailyn, Wood, and Pocock were silent on issues of causation, at least in an explicit, historiographical sense. Other writers, however, quickly saw that their scholarship was an alternative to Hartzian liberalism, de-emphasizing the uniqueness and continuity of American ideas and institutions.¹⁴ Of less interest, apparently, to those enthusiastic about the promise of republicanism was that it was an alternative to Beardian progressivism as well, in the sense of restoring ideas to a position of independent causal significance, as distinguished from fodder for the machinations of elites and their antagonists. Gordon Wood described the idea of popular sovereignty as being shrewdly employed by Federalist supporters of the Constitution for their own ends, but he also stressed that by elevating the sovereignty of the people to a position of constitutional

14. See Ross, *supra* note 1.

supremacy, Federalist partisans imprisoned themselves in the ethos they had helped create.¹⁵

It was not immediately apparent, however, that republicanist historiography had a causal motif. Its early efforts seemed to be affirming a posture on causation something like "beyond consensus (and conflict too) to a focus on discrete, particularized, episodes in time." However, as republicanism became expansionist and imperialist in the late 1970s and 1980s, accommodating structuralism, "new" social history, and linguistics, moving its area of coverage from the founding period forward well into the nineteenth century, focusing on non-elites and the unlettered as well as the politically connected and educated, it became clear that its practitioners had adopted, consciously or unconsciously, their own causal motif. That motif emphasized the significance of implicit limits on the capacity of human actors, at any point in time, to transcend the boundaries of the conventional epistemology of their age. History was a series of largely "hidden" (to contemporaries), largely mysterious changes in conventional epistemology. To the extent that the origins of conventional epistemology could be discerned, and changes in epistemological assumptions identified, the "causes" of those phenomena, republicanist studies implicitly suggested, lay in "culture." Human actors in history were, first and foremost, the products of their respective cultures.

The term "culture" was not a new one in twentieth-century historiography: the American Studies works of the fifties and sixties had extensively employed it. But "culture" in the republicanist paradigm, as that paradigm expanded, came to be used in a more precise sense. Rodgers has detailed some of those associations.¹⁶ Republicanist literature incorporated the work of Clifford Geertz and other cultural anthropologists who had allegedly deepened the meaning of ideas to "ideologies," and had further deepened the meaning of ideology by defining it as a "cultural system." Thus the term "culture," as employed in republicanist historiography, signified that ideology was a metapolitical as well as a narrowly political concept. In a familiar example, "Federalists" and "Republicans" shared a republican ideology, being members of political cultures whose similarities, in the perspective of time, could be seen as far more significant, and limiting, than their differences.¹⁷

Moreover, the motif of "culture" incorporated the transformation, in literary theory, of the relationship between texts, interpretations, and readers. For those linguistic theorists who stressed the impor-

15. See WOOD, *supra* note 6, at 614-15.

16. In borrowing examples from Rodgers, I do not mean to suggest that he would endorse my arguments about the centrality of "culture" as a causal motif in republicanist historiography.

17. See, e.g., LINDA KERBER, *FEDERALISTS IN DISSENT* (1980).

tance of interpretive communities in determining the “meaning” of language, “context” overwhelmed “text.” Language was a cultural signifier, “meaning” a culturally derived phenomenon. The fact that texts were not universalistic documents, however, did not mean that language was entirely open-ended. Indeed, only some interpretations of texts were “possible” culturally, because only those interpretations were tacitly approved by the currently dominant interpretive community. Ideas were thus “structured” by communities, which were themselves the product of conventional epistemological assumptions. Where did those assumptions originate? To the extent that question was answerable, it was in the “culture” of the communities of readers who were responding to texts. “Culture” as a causal motif, then, stood for the significance of language and ideology as contextual emblems, and, more fundamentally, for the proposition that the ideas of historical actors, as expressed in their distinctive language, were inescapably embedded in time and place.

The evolution of “culture” as a primary causal motif for republican historiography provides a window into some of the normative assumptions of republicanism as a paradigm; in probing that assumption, the backdrop to the “Republican Revival” in legal scholarship is brought into clearer relief. As a causal motif, “culture,” despite its ubiquity,¹⁸ emphasizes the limitations on individual conduct as a generative force in history. Historical actors are imprisoned by culture: “boundaries” are tacitly imposed upon their capacity to contemplate an infinite variety of intellectual options or to be exposed to an infinite variety of experiences. The extent to which even extraordinarily talented and powerful individuals can effectuate lasting change is rendered problematic by a causal motif that emphasizes culture.

In sum, “culture” as a causal motif, and republicanism as a historiographic paradigm, particularly in its later, expansionist phases, are anti-individualist in their thrust.¹⁹ And as the “ideas” surveyed in republicanist literature came to take on the character of “ideologies”

18. One of the reasons why “culture” seems unlikely to enter the historiographical lexicon to the degree that “conflict” and “consensus” have is that the term, while signifying an attitude toward historical causation, posits a very broad definition of causal agencies in history. A historical actor’s “culture” is the total configuration of the actor’s experiences, ranging from the concrete and practical to the abstract and metaphysical. To say that an actor is the product of his or her “culture” is at one level to state the obvious and at another to state the unfathomable. Nonetheless, the motif of “culture” represents an important shift in the attitudes of historians toward the concept of causation itself, a de-emphasis on the kinds of universalistic causal factors entertained by the “conflict” and “consensus” motifs. The existence of an actor’s “culture” may be taken to be a universalistic phenomenon, but that culture is never the same over time. My thanks to Dan Rodgers for insisting that I specify the varying uses of “culture” as a causal motif in historiography.

19. “Anti-individualist” is meant here in two overlapping senses: as an (ostensibly) descriptive label for a perspective that emphasizes the limits on individual power and influence imposed by culture, and as a normative perspective, elevating the communal and collective dimensions of life to the status of desirable phenomena.

and “cultural systems,” the anti-individualism of republicanism came to be perceived as more obvious, and more important. In its most exalted phase, Rodgers points out, republicanism came to be seen as an ideology in perfect opposition to that most individualistic of American ideologies, liberalism. If, as Rodgers notes, in the early republican literature, republicanism and liberalism had been portrayed as “stacked vertically in time,”²⁰ by the later phases the two ideologies had come to be treated as close to parallel in their temporal relationship. Republicanism had become the mirror image of liberalism.

In this vein, it is not surprising that while samples of republicanist scholarship can be traced to the late 1960s, the emergence of republicanism as a ubiquitous organizing concept—a paradigm—came in the early 1980s, the same years in which the election of Ronald Reagan signaled the apparent collapse of the communitarian, “welfare state” orientation of national politics ushered in by the New Deal and extended throughout the next four decades. Rodgers quotes an introduction to a 1983 collection of essays on labor history describing “republican ideology” as “serv[ing] perhaps longer than any other dimension of American culture as a legitimation of working-class values . . . [and] a bulwark against the corrosive power of capitalism.”²¹ Although the thrust of the comment was to juxtapose “republican ideology” against “the corrosive power of capitalism,” one might also note that republicanism was described as an “ideology” and a “dimension of American culture.”

Thus 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. The “archaic” nature of republican thought had somehow metamorphosed into an ideology with distinctly contemporary implications. Not only could the republicanist paradigm accommodate those in search of energizing methodologies, it could apparently accommodate those in search of an energizing alternative politics.

II. THE RECEPTION OF REPUBLICANISM IN THE LEGAL ACADEMY

Enter the legal scholars, persons for whom the worlds of scholarship and contemporary politics are rarely very far apart, and who include among their pedagogic and scholarly goals the instruction of lawyers and aspiring lawyers in issues of contemporary policy. Unnoticed by many historians, legal scholarship had undergone a pervasive “revolution” in the 1970s, as the “normal science” of intraprofessional, doctri-

20. Letter from Daniel Rodgers to author (Oct. 13, 1993) (on file with author).

21. Rodgers, *supra* note 2, at 28 (quoting Michael H. Frisch & Daniel J. Walkowitz, *Introduction*, in *WORKING-CLASS AMERICA: ESSAYS ON LABOR, COMMUNITY, AND AMERICAN SOCIETY* (Michael H. Frisch & Daniel J. Walkowitz eds., 1983)).

nally oriented scholarship, equally accessible to practicing lawyers, judges, and scholars, began to decline in influence. Doctrinal legal scholarship was eventually overwhelmed by “revolutionary” scholarly perspectives, emphasizing interdisciplinary work and a research design approximating that of the arts and sciences. In the place of the dense, doctrinally oriented analyses and commentaries that had symbolized “approved” legal scholarship in the 1950s and sixties, there appeared longer, theory-laden articles and monographs.

The shifting research design for legal scholarship represented a set of intraprofessional concerns that penetrated the legal academy in the 1970s. The nub of those concerns was captured by Richard Posner, himself a “revolutionary” scholar, in a 1987 article entitled “The Decline of Law as an Autonomous Discipline: 1962-1987.”²² Posner claimed that in elevating interdisciplinary scholarship to a position of prominence, the legal academy was implicitly conceding that the “discipline” of law was no longer perceived by its academic practitioners as having a substantive or a methodological core, or even as being primarily a product of a unique professional subculture, mysterious and inaccessible to laypersons but coherent and comprehensible to the learned. As legal scholarship increasingly became concerned with “law and,” Posner suggested, the “autonomy” of the field of law dissipated.

Posner’s role as a “revolutionary” in the developments he sketched had been to participate in the emergence of Law and Economics as one of the interdisciplinary research programs that placed pressure on traditional doctrinal legal scholarship since the late 1960s. For a time it appeared as if the proponents of Law and Economics saw their program as only a shift in scholarly priorities, without normative contemporary implications,²³ but the continual participation of legal scholars in issues of contemporary politics served to negate any claim that the Law and Economics movement was dedicated to a neutral, “scientific” methodology, even if such methodologies existed. By the 1980s, much of Law and Economics scholarship was considered to have a distinctly “free market,” “capitalist” agenda, and many of its adherents were seen as sympathetic to the political thrust of the Reagan years.²⁴

22. 100 HARV. L. REV. 761 (1987).

23. See, e.g., Richard A. Posner, *Volume One of the Journal of Legal Studies—An Afterword*, 1 J. LEGAL STUD. 437 (1972).

24. See Morton J. Horowitz, *Law and Economics: Science or Politics*, 8 HOFSTRA L. REV. 905 (1981). There have been, of course, Law and Economics scholars who have self-consciously distanced themselves from orthodox 1980s politics. See, e.g., Ian Ayres, *Back to Basics: Regulating How Corporations Speak to the Market*, 77 VA. L. REV. 945 (1991); Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991); John J. Donohue III, *Opting for the British Rule, Or If Posner and Shavell Can't Remember the Coase Theorem, Who Will?* 104 HARV. L. REV. 1093 (1991); John J. Donohue III,

Meanwhile another “interdisciplinary” movement, Critical Legal Studies, had occupied space on the left side of the political continuum of legal scholarship in the 1970s and eighties. The interdisciplinary orientation of Critical Legal Studies was initially less apparent: its early practitioners devoted much of their energy to critiques of orthodox doctrinal analysis or of the structure of existing political and legal institutions.²⁵ By the mid-1970s, however, it was clear that to the extent legal scholarship was going to be responsive to the “structuralist turn,” members of the Critical Legal Studies movement would initiate that response. The methodology of structuralism itself became a subject for discussion in CLS scholarship; members of the CLS movement produced structuralist historical studies; the “subject/object dichotomy” became a familiar theme of critical theory.²⁶

The explicitly political agenda of Critical Legal Studies and the sharp controversy that agenda precipitated within the legal academy²⁷ tended to obscure the fact that interdisciplinary scholarship, by the 1970s, included not only economics, philosophy, and history, but also psychology, anthropology, and sociology. The legal academy witnessed its own linguistic turn with the emergence of the Law and Literature movement.²⁸ Thus a picture of the universe of legal scholarship as composed of the warring factions of Law and Economics and Critical Legal Studies in a contest for the hegemony vacated by the collapse of traditional doctrinal approaches would not only exclude many of the actors from the stage, it would miss much of the point of the activity. The central point was not which perspective triumphed—none did—but that an existing orthodoxy had collapsed, and the only apparent route to scholarly influence in the post-doctrinal world was through “law and” of one sort or another. In that sense the “revolu-

Prohibiting Sex Discrimination in the Workplace: An Economic Perspective, 56 U. CHI. L. REV. 1337 (1989); John J. Donohue III, *Law and Economics: The Road Not Taken*, 22 LAW & SOC'Y REV. 903 (1988); Ian Ayres & John J. Donohue III, *Economic Analysis of Law 3d ed.*, 39 STAN. L. REV. 791 (1987) (book review).

25. See ROBERTO M. UNGER, KNOWLEDGE AND POLITICS (1975); Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984); Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983); Duncan Kennedy, *How the Law School Fails: A Polemic*, 1 YALE REV. L. & SOC. ACTION 71 (1971).

26. See Thomas C. Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127 (1984), and sources cited therein; Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1152 (1985).

27. See Paul D. Carrington's attack, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984), and the subsequent controversy as captured in exchanges of correspondence between Paul Brest, Guido Calabresi, Paul D. Carrington, Owen M. Fiss, Robert W. Gordon, Phillip E. Johnson, Peter W. Martin, Louis B. Schwartz, and William W. Van Alstyne, published as “*Of Law and the River*,” and of *Nihilism and Academic Freedom*, 35 J. LEGAL EDUC. 1 (1984).

28. For two quite different symposia signifying the “arrival” of Law and Literature as a movement of stature, see *Symposium*, 60 TEX. L. REV. 373 (1982); *Symposium: Law and Literature*, 39 MERCER L. REV. 907 (1988).

tionary" agendas of Critical Legal Studies, Law and Economics, as well as those of the numerous other "law and" movements, were one and the same.

One could argue that legal scholars have tended to pay far less attention to the epistemological transformations that occur within their profession than to the short-run normative political implications of the current scholarly perspectives they are inclined to adopt. If so, the explicit political dimensions of a prospective "contest" between Law and Economics, perceived by many of its opponents as a perspective congenial to the intellectual orthodoxy of the "Reagan Revolution," and Critical Legal Studies, perceived by many of its opponents as a movement intent on "trashing" a liberal capitalist status quo and "transforming" American society and politics, were perhaps accorded more significance than, in the fullness of time, they will appear to have merited. Nonetheless, versions of the "contest" preoccupied many law faculties in the early- and mid-1980s.

By the latter years of the 1970s, one heard rumors of "purges" of CLS adherents among law school faculties and witnessed evidence of some CLS sympathizers failing to receive tenure at visible institutions. Shortly after these episodes came the "republican revival" in legal scholarship. The two events were hardly disconnected. Republicanist historiography was received within the legal academy at a moment which, given the scholarly and political issues then preoccupying legal scholars, particularly those on the left, was entirely propitious for its arrival.

Recall that by the mid-1980s interdisciplinary scholarship, with its emphasis on the application by legal scholars of theories and perspectives gleaned from other disciplines, had passed from a "revolutionary" orientation to something resembling an orthodoxy in elite law schools. This development had the effect, among other things, of legal scholars becoming more aware of the perspectives of other disciplines.²⁹ Recall, in addition, that republicanist historiography was in a late, expansionist phase at the same time. Recall, finally, that in its later phases the anti-individualist thrust of republicanism as an "ideology" had become captured by historians, who had for some time seen it as an alternative to Hartzian liberalism and were coming to see it, more pointedly, as a critique of liberal capitalism.

Additional developments occurring at the same time had special relevance to the community of legal academics and to the status of historical literature in that community. First, in the mid-1980s, the endorsement by Attorney General Edwin Meese of a jurisprudence of

29. For a confirmation of interdisciplinary scholarship as having displaced traditional doctrinal analysis as the "approved" research design at elite law schools, see *Symposium on Legal Scholarship*, 90 *YALE L.J.* 1017 (1981).

“original intent,” by which judges in interpreting the Constitution sought out, ascertained, and slavishly followed the intentions of those who framed provisions of the constitutional text, created consternation among many constitutional law scholars and, along with the forthcoming bicentennial of the Constitution, stimulated a renewed interest in the period of American history in which the ideology of republicanism had been most decisively and thoroughly located.³⁰ This expanded, for a time, the constituency of constitutional historians among legal scholars, a constituency that in its research encountered a well-established body of historical literature that was expanding to “paradigmatic” status.

Second, at the same time that more legal scholars came to investigate constitutional history and to encounter republicanism as an ideology, they increasingly questioned the place of Critical Legal Studies as a transformative political movement within law schools. As the “bite” of CLS politics became alternatively defanged or avoided as too threatening,³¹ another potential “alternative” to orthodox national politics surfaced: republicanism, in its most expansionist versions, as an anti-individualist critique of liberal capitalism.

The contrast between republicanism as a reconstructed contemporary ideology and Critical Legal Studies was instructive in what it revealed about the role of historical literature in the legal academy. History, tradition, and precedent have consistently been accorded authoritative status in the legal profession whose members, in most legal controversies, can expect that at least one side will argue for the preservation of the status quo. At the same time, lawyers are experienced in the artful manipulation of historical sources to serve adversarial positions in contemporary disputes. History thus serves lawyers both as a source for legitimating contemporary arguments and as fodder for those arguments.

The ideology of republicanism served legal academics in the late 1980s in both those capacities. Republicanism, in its expansive versions, was portrayed in the historical literature as an “anti-liberal” ideology with deep historical roots in American culture. Its pedigree could be traced to the great formative moments in the history of American law: the Declaration of Independence and the Constitution.³² At the same time, according to republicanist scholarship in its

30. See, e.g., H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

31. For a recent discussion of the currently problematic status of Critical Legal Studies from a sympathetic perspective, see Richard Michael Fischl, *The Question That Killed Critical Legal Studies*, 17 LAW & SOC. INQUIRY 779 (1992).

32. See BAILYN, WOOD, and POCOCK, *supra* note 6. Of these only Pocock specifically extends the influence of republicanism to the period of the Constitution, but subsequent work has amply demonstrated that influence. See, e.g., Ross, *supra* note 1.

later phases, republicanism was an ideology with a capacity to transcend its original, archaic contexts and persist well into the nineteenth century. Nonetheless, republicanism, even in its more expansive versions, obviously needed some updating to become an attractive political philosophy for contemporary legal policymakers. This updating, however, was not inconsistent with the expectation among members of the legal profession that historical evidence, regardless of its suggestiveness, was just evidence, capable of being reconstructed to fit the shape and thrust of contemporary legal arguments.

Republicanism thus constituted a body of interdisciplinary literature that seemed to fit all the criteria for application to law. Although the theoretical creation of historians, its direct relevance to a significant legal episode in American history was apparent; and that episode, the framing of the Constitution, was one that had obvious contemporary weight. In its late phases, republicanism had been reformulated as an ideology not confined to a particular time and place, but having enduring significance in the American polity. Moreover, it was, in its reformulated versions, discernibly anti-individualist—an alternative to liberalism. Finally, its ascribed communitarian, “anti-liberal” character appeared to underscore the “original” existence in America—at least to those who looked at republicanism with the present configurations of academic and national politics in mind—of clusters of values that seemed sadly absent from contemporary life.

At this point I want to consider, as an illustrative example, the ambiguous participation in the republican revival of one legal scholar with significant ties to the historical community. In his listing of “legal philosophers” prominently identified with republican revival, Rodgers included Morton Horwitz, whose work has been primarily in the field of legal history. Horwitz was an unusual sort of legal historian. He entered law teaching in the early 1970s, when the republicanist perspective first became influential among historians.³³ His doctoral degree was in political science, and his special area of interest was political theory. Horwitz’s first book, *The Transformation of American Law, 1780-1860*,³⁴ self-consciously explored the relationship between late-eighteenth- and early-nineteenth-century private law doctrines, and political and economic ideology. He was one of the founders of the Critical Legal Studies movement. Within the legal

33. Horwitz received his LL.B. from Harvard in 1967. He was a Charles Warren Fellow at Harvard Law School from 1968 to 1970, pursuing research in American legal history, and joined the Harvard Law School faculty full-time in 1970. Horwitz’s appointment at Harvard was the first of a series of appointments by elite law schools of persons interested in legal history scholarship. Prior to 1970 very few elite American law schools had legal historians teaching full time on their faculties; by 1976, most had.

34. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977).

academy, Horwitz's persona was very far removed from an earlier stereotype of law-based legal historians as otherworldly antiquarians.

Horwitz's intervention in the republican revival was thus that of a legal scholar with a keen interest in the relationship of history to contemporary politics. It was also that of a member of the Critical Legal Studies movement exploring the status of republicanism as an "alternative," anti-liberal ideology. At the same time, Horwitz's intervention was that of a scholar with both considerable standing in the community of professional historians, as well as a strong interest in making his work accessible to that community. His participation in the republican revival in legal scholarship can thus be seen as a particularly revealing exercise in the reception of historical scholarship by a member of the legal academy engaged in interdisciplinary work.

In a 1987 commentary on Horwitz's essay "Republicanism and Liberalism in American Constitutional Thought,"³⁵ I suggested that in his hands republicanism and liberalism had become "ideologies in almost perfect opposition," and described Horwitz's "model for distinguishing republicanism from liberalism." In Horwitz's model, I claimed,

Liberalism . . . is composed of four elements: a subjective theory of value, a conception of individual self-interest as the "only legitimate animating force in society," a theory of the public interest as inseparable from the aggregate of individual interests, and a "night-watchman" state. Republicanism is also composed of four elements, each an alternative to liberalism. "Republicans," for Horwitz, hold an objective theory of ideals of the good life, a belief in politics and political participation as fundamental animating forces, a theory of the public interest as autonomous and objective, and a belief in a positive state that is capable of promoting civic participation and the "virtue" that attends it.³⁶

Horwitz's reformulation, as Rodgers points out, reflected an exposure not only to the original republicanist literature but also to a series of critiques of liberalism by political theorists in the 1980s.³⁷ It was, in my view, an example of a scholar employing historical concepts with "studied ambiguity," both as historically placed ideologies and as contemporary political philosophies. Horwitz's message to his readers was that American history had been a continuous dialectic between "republican" and "liberal" ideologies, which purportedly symbolized starkly opposing clusters of values. Once again, the opposition cen-

35. Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57 (1987). Rodgers cites the Horwitz article among his examples of a "republican revival" in legal scholarship. Rodgers, *supra* note 2, at 33.

36. G. Edward White, *The Studied Ambiguity of Horwitz's Legal History*, 29 WM. & MARY L. REV. 101, 105 (1987). My extraction of Horwitz's characterization of republicanism and liberalism is based on *id.*, at 66-67.

37. Rodgers, *supra* note 2, at 33.

tered on values associated with individualism. Liberalism's values emphasized subjectivity, self-interest, politics as contests among "interest groups," and even an individualistic symbol for the state, a "night watchman." The values of republicanism were, in contrast, communal, civic, and public-regarding—republicans were committed to an intersubjective conception of the general "good." One of Horwitz's thematic purposes in formulating his model of republicanism and liberalism, I had suggested in my 1987 comment, was "to 'recover' republicanism, an oppositionist ideology that 'lost' over the course of time, was suppressed by mainstream liberal thought, and now offers the possibility of resurgence."³⁸

Horwitz's participation in the "republican revival" is of particular interest for my purposes because he, in contrast to nearly all of the other legal scholars identified with republicanism in legal commentary in the 1980s, had announced as one of his aspirational goals that of communicating with "general" historians, a professional community outside the legal academy.³⁹ Horwitz was well aware of one of the central issues within the historical community in the 1980s: the extent to which "objectivity" toward the past was possible for scholars writing in the present.⁴⁰ In his "Republicanism and Liberalism," he stopped short of openly discarding the "objective" role of the historian, but at the same time he spoke of "bridg[ing] the chasm between legal theory and legal history"⁴¹ and made it clear that his versions of "republicanism" and "liberalism" were "ideal types," presented, as Rodgers put it, as "sweeping through the past in timeless opposition."⁴² One could say, in fact, that Horwitz's ideologies did more than "sweep through the past"; they injected themselves into contemporary politics.

Horwitz's early involvement in the "republican revival," taken on one level, underscores a final element that contributed to the attractiveness of the concept of republicanism for legal scholars. In borrowing an ideology from one period and seeking to "revive" it in another, legal scholars were "using" the past in a characteristic fashion, as a

38. White, *supra* note 36, at 106.

39. See Horwitz's first sentence in the introduction to *THE TRANSFORMATION OF AMERICAN LAW*, *supra* note 34, at xi: "My first aspiration in this book is to make the history of technical and obscure areas of American law accessible to professional historians and to other nonlegally trained scholars."

40. In the preface to Horwitz's most recent book he refers to "the massive challenge to traditional ideas of historical explanation that have invaded both the worlds of theory and historical practice since [1977, when his first *Transformation* book] was written." He goes on to cite PETER NOVICK, *THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION* (1988), which appeared after he wrote *Republicanism and Liberalism*. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* vii-viii (1992).

41. Horwitz, *supra* note 35, at 74.

42. Rodgers, *supra* note 2, at 34.

source of presentist arguments.⁴³ The legal profession's enlistment of historical evidence for present-minded, adversarial goals has, of course, been a staple of conventional wisdom for some time.⁴⁴ Horwitz's arguably "presentist" use of republicanism, however, was more intriguing, given his self-identification with a community of historians who continue to hold, notwithstanding current debates about the intelligibility of an "objective" stance in historical scholarship, strong misgivings about presentism.

Why would a scholar whose "ardent desire" had been "to reach the general historian" write an essay ten years later in which he appeared to be self-consciously extracting his subject matter from history? And why would Horwitz then, in a 1991 essay, warn against "the dangers of a certain kind of lawyer's history, which involves roaming through history looking for one's friends," and note that "the republican revival" had many "dangers"?⁴⁵ Or why would he conclude, in the preface to his 1992 book, that "efforts at mutually exclusive categorical formulations have come to seem less and less satisfying,"⁴⁶ when only five years earlier he had undertaken such an effort in his essay on republicanism and liberalism?

Two answers suggest themselves, and both help illuminate the intellectual atmosphere in which republicanism was first recognized by legal academics. First, Horwitz may have implicitly felt comfortable injecting presentist political concerns into his historical "ideal types" because he sensed that historians were themselves confronting, in the 1980s, the problematic nature of the canons of objectivity and distancing in historical scholarship. He may have concluded that such canons were illusory precisely because presentism could not fairly be read out of the most determinedly "objective" treatment of the past. If so, the historian was freed to be a more active "user" of the past for present purposes. Thus Horwitz may have felt more comfortable participating in a "revival" of republicanism that arguably de-emphasized the time-bound and contextual elements of that ideology because he believed that recovering those elements by a scholar situated in the present would inevitably reflect that scholar's current concerns.

Second, Horwitz's own political orientation within the legal academy may have made the exercise in "recovering" republicanism as a timeless, "alternative" ideology too tempting to resist. In Horwitz's formulation republicanism not only functioned as an alternative to lib-

43. By "presentist" I mean the overt presentation of evidence from the past as if it were evidence from the present, without attention to the different ways such evidence might have been perceived by contemporaries in the time period from which it is extracted.

44. See CHARLES A. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* (1969).

45. Morton Horwitz, *Republican Origins of Constitutionalism*, in *TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS* 148-49 (Paul Finkelman & Stephan Gottlieb eds., 1991).

46. HORWITZ, *supra* note 40, at viii.

eralism but as a critique of orthodox, “free market,” “utility-maximizing,” “public choice,” deregulatory politics. Moreover, it held up an alternative, positive ideal: a civic-minded, public-regarding community dedicated to the pursuit of an altruistic general good, signified by the republican ideal of “virtue.” Seen in these terms, republicanism was an ideology that could enlist a variety of legal academics, dissatisfied with existing political orthodoxy, in a positive, communal enterprise. Beyond the polarized world in which Critical Legal Studies had surfaced lay the prospect of a genuinely revitalized “republican” polity, uniting all those for whom free market liberal orthodoxy had become corrosive.

From its origins, then, the “republican revival” was responding to the implicit question critics of CLS asked of its adherents: What would one put in the place of corrosive liberalism? A newly constituted republican community. As one commentator in a 1989 symposium on republicanism put it, “the answer” most legal scholars emerged with, after exploring republicanist literature, was “that by constructing a political pedigree that is exclusively liberal, we have neglected our republican heritage,” and that “a reaffirmation of our republican past could provide a new source of strength to a nation suffering from the malaise and anomie that characterize modern liberal society.”⁴⁷

By now the commentary that came to be identified with the “republican revival” has been regularly cited in law journals. The commentators—Bruce Ackerman, Sanford Levinson, Frank Michelman, Suzanna Sherry, Cass Sunstein, and Mark Tushnet, in addition to Horwitz—are familiar figures. The vocabulary of the “revival,” encompassed in terms such as “the common good,” “dialogue,” and “public-regarding” activity, has been injected into the discourse of the legal academy.⁴⁸ It would be a comparatively simple matter to trace communitarian themes in the familiar revival scholarship.⁴⁹ It would also

47. Suzette Hemberger, *Dead Stepfathers*, 84 Nw. U. L. REV. 220 (1989).

48. For a confirmation of the “familiar” status of the republican revival among legal scholars, see Stephen M. Feldman, *Republican Revival/Interpretive Turn*, 1992 WIS. L. REV. 679.

49. MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988); Bruce A. Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989); Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984); Feldman, *supra* note 48; Frank I. Michelman, *Bringing the Law to Life: A Plea for Disenchantment*, 74 CORNELL L. REV. 256 (1989); Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Frank I. Michelman, *Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Suzanna Sherry, *The Intellectual Origins of the Constitution*, 5 CONST. COMMENTARY 323 (1988); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); Cass R. Sunstein, *Preferences and Politics*, 20 PHIL. & PUB. AFF. 3 (1991); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988); Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984); and Symposium, *The Republican Civic Tradition*, *supra* note 3.

not be startling, to most legal scholars, to conclude that there was a close affinity between the normative goals articulated by participants in the revival—goals emphasizing deliberation, dialogue, and collective decisionmaking—and the disaffection critics of orthodox national politics in the 1980s felt toward the federal judiciary, personified by the Supreme Court of the United States. Republicanism and locally oriented, legislative decisionmaking seemed to complement one another, and seemed to some participants in the revival the best hope for communitarian policies in the face of what appeared to be a determined phalanx of Reaganesque judges.⁵⁰ Other participants retained a hope that properly instructed judges would restore “republican” values⁵¹ or even that the “people” would, if sufficiently encouraged to participate in civic dialogue, insist on legal institutions conforming to the “common good.”⁵²

I will thus not belabor the details of the revival’s anti-individualist orientation, nor elaborate upon its discernible status as an oppositionist ideology in the world of national politics in the 1980s. I am interested, rather, in two consequences of the revival that seem not to have been fully anticipated by the revivalists. One is that in reviving republicanism as a contemporary ideology, the participants have been engaging in a distinctive version of the interdisciplinary exercise colloquially rendered as “law and,”⁵³ an exercise widely attributed to legal scholars engaged in interdisciplinary research but often misunderstood in its particular methodological emphasis. The “and” in the case of republican revivalists is history, extracted and universalized in the form of political ideology. Yet none of the revivalists, with the exception of Horwitz, emphasizes the “dangers” of “roaming through history looking for one’s friends”; none seems to regard the presentist use of historical concepts as a violation of the professional standards of historians.

A second unanticipated consequence of the revival is that despite the variety of forces, detailed earlier, combining to suggest that republicanism, in its revived version, was an idea whose time had surely come within the legal academy, the participants in the “republican revival” have not seen their ideological perspective elevated to a position of influence. On the contrary, they have been subjected to severe criticism, have had difficulty articulating their common goals, and currently seem, on the whole, to be occupying a precarious position, at least with respect to contemporary influence among legal scholars.

50. Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

51. See Michelman, *Law's Republic*, *supra* note 49, at 1524-32.

52. See generally BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

53. For an early recognition of the exercise of doing “law and” in the legal academy, see Arthur Leff, *Law And . . .*, 87 YALE L.J. 989 (1978).

These unanticipated consequences of the republican revival take us directly to the questions with which this article began, and to a consideration of the predicament in which interdisciplinary legal scholarship currently finds itself.

III. THE RECEPTION OF REPUBLICANISM AND THE CURRENT STATE OF INTERDISCIPLINARY LEGAL SCHOLARSHIP

We are now in a position to examine, in more detail, the series of observations that Rodgers makes about legal scholars in his brief description of the "republican revival" episode. His initial two observations, related to one another, are that legal scholars, "natural scavengers," had been "slow to sense what was transpiring" with respect to the status of republicanist literature within the community of historians. If one accepts the descriptions of the evolution of republicanism as a paradigm and of the republican revival among legal scholars advanced in this article, however, neither of these observations precisely captures the response of the legal academy to republicanism.

In previous sections of this article, the gradual collapse of a revived "autonomy" for the discipline of law in the years after 1960 has been singled out as complementing the emergence of a wave of interest in the work of other disciplines among legal scholars.⁵⁴ But the "slow" response on the part of legal scholars to republicanist literature, those sections have suggested, was not a function of some inherent intellectual lag within the legal academy. Nor can it be seen as a result of "scavenging" tendencies on the part of law professors, at least in the conventional sense of that term.

The republican revival was primarily an outgrowth of the implicit but constant assumption within the legal academy, held at least since the 1930s, that legal scholarship should be directed toward contemporary policy issues. Whether twentieth-century legal scholars have primarily focused their attention on developments in the social sciences and other disciplines, or whether they have primarily been concerned with reaching audiences within the legal profession, such as practition-

54. It is sometimes assumed that enthusiasm for interdisciplinary scholarship is a "new" phenomenon within the legal academy. The history of legal education suggests a more complicated relationship between legal scholars and works generated within other disciplines. If one restricts the time frame to a period after the modern academic disciplines had been launched, primarily the twentieth century, there were at least two periods—the period prior to World War I and the period between the late 1920s and the Second World War—during which legal scholars at elite institutions exhibited a strong interest in the work of social scientists, and in which faculty members with training in other disciplines joined law faculties. Between the Second World War and the late 1960s, by contrast, legal scholarship turned decisively inward: it was this turn that precipitated the most recent revival of interdisciplinary work, beginning in the early 1970s. See LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960*, at 67-97, 109-26, 136-38, 150-54, 176-94, 205-28 (1986); ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA* 134-41, 270-72 (1983); G. EDWARD WHITE, *PATTERNS OF AMERICAN LEGAL THOUGHT* 97-163 (1978).

ers and judges, they have persistently assumed that their work has an immediate relevance to contemporary public policy debates. The republican revival episode was no exception. Discussions of the ideological orientation of elite Americans in the early Republic were perceived as outside the concerns of legal scholars until those discussions, for the variety of reasons discussed above, came to be perceived as having contemporary relevance in the 1980s.

The "republican revival" was "late" to surface in legal scholarship, then, only if one took legal scholarship about republicanism to be the equivalent of historical scholarship about that topic. But "law and" in the legal academy has never been the equivalent of "and law." The other disciplines that legal scholars have arguably "scavenged" have typically been presented as not only having distinctly normative implications for contemporary policy, but as being in the service of the scholars' normative assumptions. The metaphor of "scavenging," as noted, suggests that legal scholars employ the theories of contributors from other disciplines as if they were the discarded portions of a feast after others have eaten their fill of the prime ingredients. The metaphor does not quite capture the interdisciplinary interaction of "law and." The perspectives of Law and Economics or Law and Literature, to take just two examples, do not merely apply another discipline's techniques or insights to law: they are not rendered as "economics and law" or "literature and law." Instead the perspectives start from the assumption that "legal" scholarship of any kind is ultimately relevant to the discussion of contemporary policy issues that concern the legal profession. They then ask what light other disciplines can shed on those issues.

The "republican revival" in legal scholarship was thus a product of an "interdisciplinary" orientation within the legal academy, but this orientation has been misunderstood. To be sure, legal scholarship has been in a period in which the autonomy of law as a field has been de-emphasized, and scholars have investigated the perspectives and techniques of other disciplines. Nonetheless, those perspectives and techniques, when adopted by legal scholars, have not served to displace the essential thrust of legal scholarship toward issues perceived as having immediate policy ramifications for persons who have a special familiarity with the doctrines and institutions of the law. In reviving republicanism those participating in the revival were joining the community of historians only in a limited and particularistic sense. They were exploring issues in the subfield of "law and republican ideology."⁵⁵

55. I do not want to be misunderstood here as saying that legal scholars currently engaged in interdisciplinary work are indistinguishable from those who produced the cruder versions of "law office history" or "law office economic theory" that have been caricatured by numerous

Moreover, the republican revival was unlike other “law and” exercises that have recently surfaced within the legal academy. Although the revivalists made use of the literature of another discipline, their extraction of the contributions of that discipline did not take the same form that one could see taking place in Law and Economics or Law and Literature. In those “law and” movements a disciplinary methodology—welfare economics, public choice theory, reader response theory, narrative voice theory—had been extracted and applied to contemporary legal issues, not only so that a “fresh” theoretical perspective could be brought to bear on those issues, but so that particular normative implications could be said to follow from the methodological exercise.

With the possible exception of Horwitz, the participants in the “republican revival” did not use the contributions of republicanist historical literature in the same manner. They did not ponder over the implicit shift in theories of historical causation that the emergence of republicanism as a paradigm portended; they did not ruminate on the implications of “culture” as a limiting force on the conduct of historical actors. On the contrary, they simply took the association of republican ideology with important “formative” periods in the legal history of America as a given, assumed that such an association strengthened the contemporary stature of republicanism as a political ideal, and refashioned republican ideology to make it appear less archaic and thereby more palatable as a perspective on contemporary policy issues.⁵⁶ One could argue that the “history” that they extracted in the exercise was substantively unrecognizable in its original form, and that the methodological process that had spawned such enthusiasm for the concept of republicanism within the historical community was not part of their concerns in undertaking the exercise. One could even argue, as did the revivalists’ critics, that they were treating history the way the legal profession traditionally treated the discipline: as a legitimating source for contemporary arguments designed to secure discrete policy objectives. Republicanist literature furnished the source; the objectives were those anticipated by a neo-republican political agenda.

The “republican revival” appears as a fortuitous interaction of the expansionist, openly ideological character of the paradigm of republi-

contemporary scholars. I am only suggesting that the starting place for “law and” work, however sophisticated, is necessarily a different starting place from that of “and law” work, because law remains, to an important degree, a distinct, “policy-oriented,” discipline. To say that law is distinctive, however, is not to say that its scholarly practitioners agree on its disciplinary identity. But that problem is not unique to the discipline of law.

56. Notably by adding “liberal” ingredients to the normative mix. See, e.g., Ackerman, *Constitutional Politics*, *supra* note 49, at 480-86; Michelman, *Law’s Republic*, *supra* note 49, at 1505-15; Sunstein, *Beyond the Republican Revival*, *supra* note 49, at 1541-42, 1566-71.

canism as it evolved within the community of historians, and the sudden relevance of both the early Republican period of American history and the anti-individualist normative thrust of republicanism in the 1980s. In this scenario, the republican revival among legal scholars was not “late” but especially timely, and those participating in the revival functioned not so much as derivative “scavengers” but as purposive practitioners of “law and.”

Moreover, when one probes the sources of the republican revival within the historical as distinguished from the legal profession, a dimension of the “law and” version of interdisciplinary scholarship is thrown into stark relief. If the “law and” version of interdisciplinary scholarship, as contrasted with the “and law” version, principally subsumes the perspectives of other disciplines in the distinctive, policy-oriented perspective shared by most contemporary legal scholars, one might think that an obvious problem might be created. How can the legal scholar avoid distortion of the perspectives of the other discipline purportedly being used as a source of insights if that discipline is used only in the service of contemporary legal doctrine and policy? In the example being addressed by this article, how can legal scholars learn anything from republicanist literature, whose subject matter is the distant past, if in the process of referring to that literature they are changing its subject matter from the past to the present and converting it from history to contemporary policymaking? Rodgers seems aware of this problem, and offers a response. He refers to the participants in the republican revival as “legal philosophers” rather than legal historians. In effect he reads them out of the community of historiographical professionals.

There is, however, another interpretation of the revival, which suggests another way of characterizing interdisciplinary scholarship in the legal academy. That interpretation follows from my earlier treatment of Horwitz’s essay on republicanism and liberalism. Although Horwitz was well aware that by reframing the concepts as universalistic, oppositionist ideologies he was offending the canons of presentism and objectivity in the historical profession, he first openly engaged in the exercise, and then had some second thoughts. In the course of discussing that essay, I advanced two explanations for Horwitz’s stance.⁵⁷ I now want to convert those explanations to general propositions.

Between his 1987 essay and his 1992 book on American legal thought after 1870, Horwitz, while acknowledging the collapse of the ideal of objectivity as a stance for the professional historian, continued to express concerns about “dangers” he associated with the republican

57. See *supra* text accompanying notes 45-47.

revival, the dangers of “roaming through the past” seeking support for one’s positions in the present. One could develop the theme of ambivalence further and suggest that even though Horwitz admitted in 1992 to a loss of faith in the capacity of “mutually exclusive categorical formulations” to serve as clarifying historiographical devices, he had adopted such a formulation in his 1987 essay on republicanism and liberalism because he had, at that time, concluded that objectivity in the historian was an illusion, and presentist, “ideological” historical scholarship inevitable.

If a historian abandons the canon of objectivity and its associated strictures against presentism and in support of time-boundedness, context-boundedness, and detachment, then what “discipline” has been embraced? As Horwitz put it in the preface to his 1992 book, is historical writing “just my story, with all the connotations of skepticism and subjectivity that the word ‘story’ implies?” He answered “[n]o” to that question, and spoke of “aspir[ing] to give the best possible explanation” of his historical subjects,⁵⁸ an explanation that would purportedly do more than roam through the past finding friends and enemies. But he never specified any criteria for evaluating “best.”

It is therefore possible to see the expansionist phase of the paradigm of republicanism within the historical profession, with its increasing emphasis on the normative dimensions of republican ideology, as fueled by growing concerns about the ideal of objectivity and its associated constraints on the scholarly persona of the historian. It is possible, in fact, to expand the analysis far more widely. The message of Kuhn’s *The Structure of Scientific Revolutions* had been that research designs, even in fields committed to inductive, empirically based methodologies such as the physical sciences, were contingent on, and subject to, the pressures of history, culture, and ideology. But throughout the twentieth century, as the concept of discrete academic departments and disciplines has become accepted as endemic to the structure of academic life, professional physicists or astronomers or biologists have been distinguished from other specialists or from laypersons by their “disciplined” approach to their subjects—their internalization of a body of research techniques and professional standards designed to ensure that they would not unduly distort the specialized data with which they worked.

What, however, if the logic of Kuhn’s approach is extended and applied to the concept of a discipline itself? What if the disciplinary analogies to the canon of objectivity in history—pick whatever field and canon you choose—turn out, on close analysis, to be ideologically and culturally contingent illusions as genuine constraints on human

58. HORWITZ, *supra* note 40, at viii.

idiosyncrasy and willfulness in the pursuit of scholarship? Suppose the same “crisis” allegedly accompanying the collapse of the canon of objectivity in historical scholarship is revealed as happening in all fields, as research designs more and more reveal themselves to be the provisional products of “communities” occupying particular places in time and academic space. What then does it mean to do “interdisciplinary” scholarship? How are scholars truly “disciplined” in the first place?

The “republican revival” in legal scholarship was responsive to this last set of questions. In seizing on the ideological and presentist dimensions of a concept that, given the traditional canons of the historical profession, should have been, as a historiographical perspective, neither overtly ideological nor baldly presentist, the revivalists were unwittingly exposing the apparent difficulty late-twentieth-century historians were having defining the core of their discipline. Indeed the revivalists could be seen as advancing a kind of “solution” to that difficulty. Since objective historical writing was an illusion, when historiographical concepts such as republicanism were tacitly granted the status of “best possible explanations” for historical events, that status was a function of their appeal to current scholarly communities—their ideological resonance. Given the belief that concepts such as republicanism function in this manner, why not drop the pretense of objectivity and openly employ them as vehicles for contemporary policymaking? That, of course, was precisely what the revivalists had done.

Writ large, this argument suggested that all scholarly fields, not just law, were “up for grabs.” The Kuhnian dilemma, that no discipline could achieve a truly objective, universalistic research design for its practitioners and therefore assure that its scholars would be properly “disciplined,” could be said to exist everywhere in academic life. “Economics,” “literature,” “history,” and other scholarly fields had no transcendent body of data and research techniques that superseded the ideological leanings of scholars.

What, then, were the governing assumptions of “law and” scholarship? Practitioners of “law and” did not set out to supplant the traditional scholarly orientations of the legal professorate, since the extralegal disciplines they drew upon were enlisted in the service of those orientations, contemporary doctrine and policy. Instead, those practitioners seemed to be making an implicit concession that the traditional scholarly orientations of the legal academy, if conducted exclusively within an intraprofessional framework, produced unstimulating work, the kind of work associated with a paradigmatic research design in its decaying stages before a “revolution” occurs. “Interdisciplinary” scholarship allegedly reinvigorated the research design of the

legal academy by bringing in fresh, extraprofessional perspectives, the perspectives of other “disciplines.” But in the process, as noted, the intelligibility of a disciplinary perspective, indeed of the concept of an academic discipline, became elusive.

Thus the infiltration into legal scholarship of “law and” work complicated rather than clarified the meaning of interdisciplinary scholarship in the legal academy. Here again the republican episode serves as an example.

Contemporaneous with the “republican revival” came severe attacks on republicanism as a contemporary ideology. The attacks illustrated the double-edged quality of “law and” scholarship. Those participating in the revival, as noted, argued that the anti-individualist orientation of republican theory, with its emphasis on civic participation, intersubjective concepts of the “public interest” and the “public good,” and the “community” as the ultimate source of a virtuous public policy, was highly relevant for America in the late 1980s. Their critics were far less sanguine about some of the ideological baggage of republicanism. Participants in the revival were criticized for advancing an ideology that was relentlessly elitist, being grounded on very limited definitions of the pool of citizens that could achieve virtue. Minorities, women, and the unpropertied “masses” were not expected to participate in the republican polity; definitions of the “public good” were to be formulated by property-holding white males. Although neo-republicans advanced far broader definitions of “community,”⁵⁹ skeptics suspected that they continued to hold elitist conceptions of the public interest.

More fundamentally, critics of the “republican revival” found the dominant philosophical assumptions of the Revolutionary and Founding years difficult to square with the revivalists’ enthusiasm for republicanism as a democratic, participatory, communitarian ideology. They noted that the founders of American independence and the Framers of the Constitution held a view of humans as inevitably self-interested and susceptible to corruption and tyranny. The idea of a republican form of government, in their minds, was associated with checks on these human tendencies. “Virtue,” in its late-eighteenth-century context, was associated with social responsibility, duty, and self-abnegation, codes that reflected the subordination of an individual’s selfish tendencies, not a sense of the inherent perfectibility of humankind.

59. See, e.g., Abrams, *supra* note 3; Derrick Bell & Preeta Bansal, *The Republican Revival and Racial Politics*, 97 YALE L.J. 1609 (1988); Paul Brest, *Further Beyond the Republican Revival: Toward a Radical Republicanism*, 97 YALE L.J. 1623 (1988); Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713 (1988).

Nor was late-eighteenth-century republicanism consistent with participatory democracy. Its adherents did not believe in the capacity of all persons to govern themselves, or to make enlightened decisions on public issues. On the contrary, they believed that a "virtuous" class of elite citizens should govern on behalf of the masses. Republicanism was only a "democratic" or "participatory" ideology in comparison with monarchism or despotism. It was fundamentally an ideology that rested on hierarchies and constraints. As such, it did not seem to be a particularly promising foundation from which to erect contemporary programs designed to install a broadly based, widely participatory "community" as the agent of governance. On the contrary, it seemed congenial with government by a limited class of self-perpetuating, albeit "virtuous," elites. Republicanism only seemed "communitarian" in contrast to liberalism, and it was a large step to equate eighteenth-century conceptions of virtue with twentieth-century conceptions of a communitarian "public good."⁶⁰

The criticism of the republican revival by contemporaries illustrates the dilemma faced by proponents of "law and" in a post-Kuhnian academic universe. By advocating neo-republicanism as a political ideology, the legal scholars who participated in the revival were doing, as noted, a particularistic version of "law and"—extracting the contributions of another discipline and converting them to policy imperatives. In performing this version of "law and" they seemed to have exposed themselves to an apparent difficulty. Either neo-republicanism bore no substantive relationship to original republicanism, or neo-republicanism and original republicanism were substantively connected, in which case those who advocated a revival of republican ideology needed to be held accountable for the implications of that ideology as it was originally formulated.⁶¹ It seems fair to conclude that a "law and" scholar who simultaneously claims that the "and" is a source of fresh insights, and then backs away from those insights if on reflection they prove politically uncomfortable, is experiencing a version of cognitive dissonance.

Yet that seems to be the position that some of the revivalists are finding themselves in. Under the pressure of criticism, some revivalists, such as Horwitz, have begun to see "dangers" in the revival;

60. See, e.g., Richard H. Fallon, Jr., *What is Republicanism and Is It Worth Reviving?* 102 HARV. L. REV. 1695 (1989); Michael A. Fitts, *Look Before You Leap: Some Cautionary Notes on Civic Republicanism*, 97 YALE L.J. 1651 (1988); Linda K. Kerber, *Making Republicanism Useful*, 97 YALE L.J. 1663 (1988); Jonathan R. Macey, *The Missing Element in the Republican Revival*, 97 YALE L.J. 1673 (1988).

61. Some revivalists seemed aware of this difficulty and proposed a third interpretive stance, the use of republicanism as a received "tradition" of intellectual discourse in American culture. See, e.g., TUSHNET, *supra* note 49. Critics who addressed this stance suggested that it was presentism in disguise. See, e.g., Hendrik Hartog, *Imposing Constitutional Traditions*, 29 WM. & MARY L. REV. 75 (1987).

others have become attracted again to the idea of law as an autonomous discipline.⁶² The latter move is particularly interesting, since it suggests that as legal scholars come to recognize that other disciplines are just as susceptible as law to the Kuhnian virus—the difficulty of formulating a transcendent body of research techniques and scholarly attitudes that truly constrains the normative agendas of scholars within a discipline—they may undertake a renewed search for those methodological and substantive orientations that can fairly be said to distinguish one field from another. This search, paradoxically, appears to be a search for disciplinary coherence in an “antifoundationalist”⁶³ academic universe.

IV. CONCLUSION: INTERDISCIPLINARY LEGAL SCHOLARSHIP IN AN ANTIFOUNDATIONALIST ACADEMY

If one were to look beyond the disciplines of history and law, on which this article has focused, to the other current disciplinary entities in universities, I would suspect one could note developments paralleling the collapse of the canon of objectivity in history and the downgrading of traditional intraprofessional analytics in law. I would suspect that in a variety of fields, transcendent research designs have been subjected to criticism that seeks to rob them of their external, nonideological, universalistic premises. I would suspect that the emergence of “culture” as an important causal motif in historiography might parallel comparable theories that emphasize the contingent and time-bound quality of work in a number of disciplines. I would suggest, in fact, that the motif of “culture” as an explanatory device for locating human conduct harmonizes rather well with the current epistemology of “antifoundationalism.” I would venture to say that the traditional organization of academic life is currently encountering a powerful antifoundationalist critique.

Such a critique can be profoundly disquieting to persons who have hitherto taken for granted the traditional twentieth-century epistemology on which disciplinary boundaries have been erected. As the republican revival episode illustrates, when one discipline’s practitioners borrow the insights of another’s, the latter insights can become unrecognizable or perhaps even unintelligible as a meaningful “core”

62. Cass Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993).

63. “Antifoundationalism” is another one of those ubiquitous “buzzwords.” I am using it here in the same sense as it is used in RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* (1989)—as an epistemological perspective that denies the coherence of universalistic “foundational” principles, whether theologically based or otherwise. I am not suggesting that any political stance necessarily follows from perceiving the world of ideas as “antifoundationalist”; still less am I claiming that antifoundationalism is the only epistemology a sensible person can endorse in today’s world. The audience reaction to my use of the term in an earlier oral version of this essay indicates that the term is perceived by some contemporary academics as carrying a great deal of normative baggage.

of disciplinary knowledge, thereby calling into question the coherence or integrity of *both* disciplines.⁶⁴ As the implications of such episodes are considered in light of the antifoundationalist critique, extremist responses can surface. Three such responses can be observed within the current legal academy. One is a crude type of interdisciplinary imperialism, in which practitioners of a “law and” movement implicitly demand that others join their ranks or face the loss of scholarly stature. Another is an equally crude version of “fin-de-siècle resignation,” in which one asserts that in an antifoundationalist world all scholarship is ephemeral, and one ought to turn to consulting. In the third response an assumption is made that since no transcendent research design exists, it follows that no meaningful standards can be formulated for evaluating legal scholarship. Hence “legal scholarship” becomes whatever the scholar wants to make it, including highly personal narratives of the scholar’s life.

I do not, however, read the republican revival episode despairingly, as evidence of the inexorability of the antifoundationalist critique. Nor do I believe that the above three responses exhaust the options for those scholars who have become persuaded that an antifoundationalist epistemological perspective is all one can credibly hold in contemporary academic life. To be sure, the revival episode has had a number of disquieting features. The historical community, in its enthusiasm for the concept of republicanism, pressed it beyond its temporal and cultural contexts, thereby distorting it to the point that it could be further distorted by nonhistorians. A group of legal scholars, in seeking to demonstrate the promise of republicanism as a contemporary political ideology, has further distorted the original concept, spawning criticism and producing, in some instances, “backing and filling” from the revivalists. More significantly, the revival episode reveals that both the community of historians and the community of legal scholars are having grave difficulties defining, let alone agreeing upon, the precise content of their scholarly missions.

But at another level the episode widened the common ground among lawyers and historians. It introduced the perspectives of archaic republicans as well as neo-republicans into constitutional law casebooks, thereby bringing historical documents and ideas into the mainstream consciousness of legal scholars and law students. It stimulated a great many scholarly works, by both historians and legal scholars. Those works, notwithstanding the fact that they can now be located on a continuum of influential historiographic concepts in the

64. The “republican revival” episode is a particularly vivid illustration of this problem, because one could argue that the legal scholars who “revived” republicanism as a normative political theory were abetted in that task by the expansionist phase of republicanist historiography, which was almost exclusively illustrated by works written by historians.

twentieth century, have vastly increased the current historical community's understanding of the framing of the Constitution, and the legal history of the early Republican period, as well as the current legal community's understanding of the ideological currents in that time frame. The consequence of the revival episode, and the scholarly developments that helped precipitate it, was that both the legal and historical professions were made aware that there can be times in which their intellectual interests and concerns, not to mention their contemporary political concerns, will overlap. In this sense the republican revival was an example of disciplinary boundaries being broken down to the stimulation and edification of many persons who had previously conducted their working lives within those boundaries.

The challenge of the republican revival episode is to treat it as an opportunity to renew one's commitment to scholarship that breaks down, at least temporarily, scholarly barriers and expands the community of academics with shared intellectual pursuits, rather than as an invitation to engage in disciplinary imperialism, "free play," or polemics. Whether or not one defines one's work in terms of departmental boundaries or perspectival canons, it seems that one has to find some common ground with others to achieve more than limited influence. At one level, the republican revival episode was an effort to find that common ground: to look beyond law to history in order to discover a concept that could excite practitioners in both disciplines, and thereby expand both sets of practitioners' intellectual and personal horizons.

An initial paradox of the revival episode, however, was that interdisciplinary communication was actually enhanced by the fact that disciplinary coherence broke down within the legal and historical communities. As republicanism evolved from a set of archaic ideas to an "ideology," the traditional canon of objectivity weakened, and historians became more aware of the inescapably normative dimensions of scholarship. The concept of republicanism became less limited by its temporal context and therefore more attractive to contemporary-minded legal scholars. Meanwhile those persons had come to question their profession's traditional canons of scholarship, and had begun looking beyond conventional legal sources and methodologies. The republican revival was as much a product of enthusiasm for "law and" within the community of legal scholars as it was a response to ideological challenges posed by the orthodox politics of the 1980s. At one level enthusiasm for "law and" was precipitated by a disquiet about the core meaning of "law" as a discipline.

The implicit disquietude about disciplinary coherence that can be located in both the historical and legal communities at the time of the revival, when taken along with the degeneration of the republicanist

paradigm and the critique launched at the revivalists, unearths a second, deeper paradox of the revival episode.

Rodgers suggests that the republicanist paradigm began to decline in influence as its participants so widened the explanatory scope of the concept that it lost its temporal and contextual moorings. The critics of the revivalists have made their most telling points when they have exposed the dissonance between republicanism as a late-eighteenth-century ideology and the republicanism the revivalists were championing. Both incidents suggest that a group of scholars can lose credibility when they deviate “too far” from an implicit disciplinary standard of scholarly performance. The more aggressive and expansionist republicanist scholars seemed to have ignored an implicit requirement that explanatory concepts in history be firmly rooted in the time frame in which they surfaced. The revivalists seemed to have ignored an implicit requirement that legal scholars, in the course of advancing frameworks to provide guidance for contemporary policy, ground those frameworks in the concrete “realities” of current politics. At the time of the revival episode, in short, both sets of participants appeared open to the charge of being “undisciplined” with respect to the ordinary expectations of their disciplines. And this vulnerability was apparent even though the revival episode can be seen as something of a crisis in the meaning of disciplinary coherence among historians and legal scholars.

The most intriguing paradox of the revival episode is that it simultaneously demonstrates, at a time when interdisciplinary scholarship continues to flourish within the legal academy, the decline of widely shared beliefs in disciplinary coherence and the continued presence of an inarticulate conviction that “undisciplined” scholarship lacks stature and influence. Thus the episode challenges scholars to continue to produce “disciplined” scholarly work—work that treats evidence and offers interpretations in a fashion that distinguishes it, for its readers, from “free play” or polemics—in an academic universe in which the concept of disciplinary coherence seems as fragile and ephemeral as it has in this century.

I would go further and assert the belief that there is a close relationship between “disciplined” scholarship and the capacity of scholarly work to endure over time. I assume, in developing my own scholarly agenda, that “disciplined” and enduring work transcends contemporary politics, even if it cannot fully avoid being shaped by the contemporary context in which it is written. But the exposition of that belief has not been the primary purpose of this article. That purpose has been to characterize the republican revival episode as an instructive example of the current predicament faced by those in the legal acad-

emy who believe that their future lies with interdisciplinary scholarship.

In proposing that a way out of the predicament may lie in restoring a conception of “disciplined” work, notwithstanding the difficulties in articulating disciplinary coherence, I am assuming that the original conception of an academic discipline—a collective commitment to specialized training as a means of channeling idiosyncrasy and constraining polemics—continues to have some meaning. This assumption, like my hopeful reading of the revival episode, may be overly sanguine. But however one chooses to read the episode, and whether or not one finds my conceptions of “disciplined” or enduring work coherent, the republican revival cannot be seen simply as an example of one set of legal scholars receiving one set of historiographical messages in the late 1980s. All of us doing scholarship in the contemporary legal academy are implicated in it, whether we like it or not.

