

Law “In” and “As” History: The Common Law in the American Polity, 1790–1900

Kunal M. Parker*

Introduction: Law “In” and “As” History.....	587
The Common Law in the American Polity: 1790–1900.....	594
Conclusion.....	607

INTRODUCTION: LAW “IN” AND “AS” HISTORY

The call to situate law in history itself has a lengthy history. As such, it raises a few questions worth exploring. What is the specific understanding of history invoked when we are asked to situate law in history? What are the specific imagined effects of situating law in history? What has been represented as coming in the way of situating law in history?

In approaching such questions here, I choose a particular and concrete point of departure, namely Robert W. Gordon’s perceptive article from the mid-1970s, “J. Willard Hurst and the Common Law Tradition in American Legal Historiography.” Like so much of his other work, Gordon’s article captures a certain mood, even as it points American legal history in precisely the direction it has ended up taking. In its broad outlines, I submit, the article continues to represent much mainstream thinking within American legal history.¹

Gordon begins his article by distinguishing between what he calls “internal legal history” and “external legal history.” This is how he defines the difference:

The internal legal historian stays as much as possible within the box of distinctive-appearing legal things; his sources are legal, and so are the basic matters he wants to describe or explain, such as changes in pleading rules, in the jurisdiction of a court, the texts assigned to beginning law students, or the doctrine of contributory negligence. The external

* Professor of Law and Dean’s Distinguished Scholar, University of Miami School of Law. The author would like to thank Clayton Koppes, Christopher Tomlins, and the audience at the University of California, Irvine School of Law symposium “Law As . . . : Theory and Method in Legal History” (April 16–17, 2010) for comments on drafts of this paper. Justin Wales helped with citations.

1. Robert W. Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 LAW & SOC’Y REV. 9 (1975).

historian writes about the interaction between the boxful of legal things and the wider society of which they are a part, in particular to explore the social context of law and its social effects, and he is usually looking for conclusions about those effects.

According to Gordon, much American legal history before the appearance of the work of J. Willard Hurst was “internal,” offering the reader nothing more than chains through which legal phenomena were made sense of in terms of other legal phenomena, such that any particular legal phenomenon to be historicized could be traced backward and forward in time. Thanks to the impact of Hurst and others, Gordon suggests, American legal historians began adopting more “external” perspectives on law. Giving American law “historicity” means, for Gordon, “localizing it to specific times and places” and then abstracting those times and places into social contexts. Gordon concludes the article on a relatively sanguine note, commenting on “how busily the traffic has been humming across the drawbridge between law and history.” Already in the mid-1970s, in other words, Gordon is able to read the future: the triumph of “external legal history.”²

Toward the end of this introduction, I shall suggest what “external legal history,” to use Gordon’s phrase, might have become and how that might be related to this Symposium’s call for us to think “law as . . .” But for now, I would like to address (a) what Gordon takes to be the origins of “external legal history” and (b) what he takes to be the principal obstacle to the development of “external legal history” for so many decades after thinkers allegedly first hit upon “external legal history” as an idea.

Gordon very explicitly traces the origins of “external legal history” to American legal pragmatism, to the writings of legal thinkers such as Oliver Wendell Holmes Jr., Roscoe Pound, and John Dewey. He also is quite clear about what he blames for impeding the development of “external legal history”: the common law tradition and its enduring grip on the American legal professoriate. As he puts it toward the end of the article: “This essay has advanced the argument that the actualization of pragmatic legal theory in historical writing was stunted and sometimes choked off by the reluctance of legal scholars to shake off their old roles of interpreters of the common law tradition.”³ It is the common law tradition, in other words, that stood in opposition to the “external legal history” supposedly inaugurated by American legal pragmatism. I want to explore both these points in greater detail.

There is no doubt that American legal pragmatism entailed a specific historical consciousness and that this historical consciousness was deployed to critical ends. This is clear from a cursory examination of the late nineteenth-century writings of the individual typically credited with being its “founder,”

2. *Id.* at 11, 27, 55.

3. *Id.* at 45.

Oliver Wendell Holmes Jr. History was crucial in Holmes’s thinking about law in general, and the common law in particular.⁴

In a series of celebrated writings, Holmes accused the common law tradition of being impervious to history. First, at the opening of his now little-read classic, *The Common Law*, Holmes makes a statement that has since become a cliché of pragmatist legal thought:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.⁵

Holmes was arguing that common law thinkers had begun to believe that the common law could be understood as a matter of ahistorical logic, such that legal results could be imagined to follow syllogistically from initial premises. But the common law, Holmes suggested, was irreducible to logic. It could not thus be systematized. Like all law, the common law had to be seen, instead, as the product of nothing but history, as something without ahistorical foundations, as something that had arisen in time.

Second, even as he insisted that the common law was not logic but instead the product of nothing but history, Holmes argued that the common law was overly committed to repeating the past. In an essay entitled “The Path of the Law,” Holmes declared that the mere passage of time, or brute antiquity, was an insufficient basis for endowing a rule with legal weight. He put it thus:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.⁶

Antiquity, something that had long served as a ground of the common law’s legitimacy, was no foundation for law. A mere “blind imitation of the past” would not do. If we are to repeat the past, Holmes tells us, it must only be if we choose to do so now and with utter self-consciousness.

Superficially regarded, Holmes’s twin critiques of the common law appear inconsistent. How could the common law simultaneously be accused of being excessively wedded to an ahistorical logic and excessively wedded to repeating the

4. I have written specifically about Holmes’s historical sensibilities in Kunal M. Parker, *The History of Experience: On the Historical Imagination of Oliver Wendell Holmes, Jr.*, 26 POLAR 60 (2003).

5. O.W. HOLMES JR., *THE COMMON LAW* 1 (Boston: Little, Brown & Co. 1881).

6. OLIVER WENDELL HOLMES, *The Path of the Law*, in 3 THE COLLECTED WORKS OF JUSTICE HOLMES 391, 399 (Sheldon Novick ed., Univ. Chi. Press 1995) (1897).

past blindly? Holmes was, in fact, pointing to different aspects of the common law tradition as he understood them. The logic-oriented tradition was the product of a scientific orientation to the common law of relatively recent vintage. It had been developing around the newly reorganized Harvard Law School at the time Holmes came of age intellectually. The precedent-oriented tradition, according to which the legitimacy of the common law rested upon repeating the past, went back centuries. It had been articulated authoritatively in the early seventeenth century by thinkers such as Coke and Hale and had been repeatedly reaffirmed.

What reconciles Holmes's twin critiques of the common law is his antifoundational conception of history. For Holmes, history is the largely negative practice of revealing the merely temporal origins of phenomena in order to dismantle the foundations upon which such phenomena rest, whether those foundations be the logic allegedly underlying law or the accumulated weight of law's past that authorizes its own repetition. Once the temporal origins of phenomena have been revealed and their foundations taken apart, no underlying order becomes visible. History possesses no necessary or coherent direction or meaning, no directing arc of movement. It simply sweeps away foundations, clears ground, and invites self-reflection. Law's foundations may be dismantled in the name of history; but we are given no substitute foundations. Instead, we are told—as members of a democratic society—to think collectively about what we might want law to be.

It is this antifoundational conception of history that Gordon has in mind when he places Holmes at the origin of what he calls “external legal history.” When Gordon talks about the importance of “localizing [law] to specific times and places,” and of placing it in social-historical context, I submit, it is not because Gordon is operating with a rigorous theoretical notion of the “social,” but because specifying temporal, spatial, and social context is a way of demolishing law's pretended atemporal foundations, its pretended claim to autonomy, its insistence on its imperviousness to its outside.

As for Holmes, for Gordon, history serves a negative function and it serves that function against a well-defined enemy: law's claim to self-sufficiency, exemplified for Gordon by common law ideology. Put in terms familiar to legal scholars, history for Gordon is ultimately a means of eroding the famed law-politics distinction. In undermining law's autonomy, history reveals law to be a kind of politics, such that law might be remade in accordance with society's desires, might be a product of democratic will. This is clear from Gordon's approving description of the historical consciousness of Holmes and Pound: “The role of history [for Holmes and Pound] was the important but auxiliary one of clearing away the rubbish of pointless old law.”⁷

Albeit in a different vocabulary, other prominent American legal historians

7. Gordon, *supra* note 1, at 30.

have endorsed Gordon’s account of the origins of “external legal history” by placing Holmes at the origin point of the “discovery” that law could be collapsed into politics. At the end of a brilliant and detailed discussion of Holmes, for example, Morton Horwitz puts it thus:

[H]olmes pushed American legal thought into the twentieth century. It is the moment at which advanced legal thinkers renounced the belief in a conception of legal thought independent of politics and separate from social reality. From this moment on, the late nineteenth century ideal of an internally self-consistent and autonomous system of legal ideals, free from the corrupting influence of politics, was brought constantly under attack.⁸

“External legal history”—which we might allegedly trace back to Holmes and other legal pragmatists—is, then, nothing other than the practice of revealing law to be nonautonomous, hence political, by situating it in context. The actual context matters less, I would argue, than the effect of the contextualization (robbing law of much of its autonomy, showing law to be politics, hence showing it to be changeable, so that it can be opened up to democratic fashioning).

Let me turn now to Gordon’s second observation, namely that legal scholars schooled in the common law tradition came in the way of the full flowering of “external legal history.” Gordon is undoubtedly correct that various twentieth-century legal scholars, such as Roscoe Pound and Karl Llewellyn, even as they began with a commitment to thinking historically and to placing law outside of itself, made a certain “conservative turn” toward the end of their careers and ended up reverting to the common law tradition. He is also correct, indeed highly acute, when he argues that various legal figures commonly praised for fighting legal formalism—Oliver Wendell Holmes Jr., John Chipman Gray, Roscoe Pound, Jerome Frank, and Karl Llewellyn—all contributed, because of the extreme law-centeredness of their writings and their excessive emphasis on case law, to reinforcing law’s “internal” sensibilities, and to reinforcing the common law tradition’s sense of autonomy, continuity, and antiquity. I would extend that charge further than Gordon does, to encompass a great deal of what passed for Critical Legal Studies around the Harvard Law School in the last third of the twentieth century. In the work of scholars from Duncan Kennedy to Morton Horwitz, much history is made to turn on miniscule shifts in legal doctrine. A change in a theory of legal causation or negligence stands in for massive historical transformations of enormous import.

Despite this apparent thwarting of the promise of “external legal history” by the common law tradition, Gordon would undoubtedly approve of certain developments commonly attributed to the Holmesian erosion of the law-politics

8. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 142 (1992).

distinction in the name of antifoundational history. Gordon would likely not disagree that the Holmesian erosion of the law-politics distinction played a critical role in the increase in democratic control over the law and in the decline of the relative prestige of the common law as a mode of governance and public discourse. Following in Holmes's footsteps, Progressive-era thinkers railed against the common law's late nineteenth-century formalist orientation. For example, in his celebrated *An Economic Interpretation of the Constitution of the United States*, the historian Charles A. Beard criticized "[t]he devotion to deductions from 'principles[.]' ... which is such a distinguishing sign of American legal thinking...."⁹ Progressive-era thinkers also followed Holmes in assailing the common law's traditional backward orientation, its commitment to repeating the past. Law was increasingly thought of as something that had to be made in the present, with full awareness of its contingency, provisionality, and revisability. This present-focused law had to rely, furthermore, on the latest expert knowledge of nonlawyers. As John Dewey put it in a brief 1941 essay, law required that "intelligence, employing the best scientific methods and materials available, be used, to investigate, in terms of the context of actual situations, the consequences of legal rules and of proposed legal decisions and acts of legislation."¹⁰ Various early twentieth-century schools of legal thought—Sociological Jurisprudence, Legal Realism, and so on—flourished at least in important part on the foundations of Holmesian insights. In a series of developments related to these early twentieth-century intellectual trends, the conservative, common law-centered, antiredistributive constitutional jurisprudence of the U.S. Supreme Court, exemplified by cases such as *Lochner v. New York*, gave way by the 1930s to the capitulation of the Court to the forces of the New Deal. Law in the United States would increasingly be a matter of state-generated law: codes, administrative agencies, bureaucratic actors, and so on. The reduction of law to politics had the effect, in other words, of allowing democratically elected authorities (i.e., those properly invested with the task of doing politics) to exercise greater control over law. To be sure, this triumph of democracy over the forces of the common law, as Gordon and others have accurately observed, was not complete. This has not stopped the proliferation of a triumphalist narrative, celebrated by progressive legal scholars and taught to law students across the United States as part of the history of American democracy and its relationship to law.¹¹

Gordon might find something to celebrate as well in another development, one that he predicted as the wave of the future in the mid-1970s and that he

9. CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* 9 (1913).

10. John Dewey, *My Philosophy of Law*, in *MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS* 71, 84 (photo. reprint 1987) (1941).

11. *Lochner v. New York*, 198 U.S. 45 (1905); HORWITZ, *supra* note 8, offers a good discussion of the developments discussed in this paragraph.

himself has played such a prominent role in bringing to pass: the growing presence of legal historians, often with training in professional history, on law faculties. “External legal history” of the kind Gordon called for is fully present now on law faculties. Gordon’s 1997 *Stanford Law Review* introductory essay, entitled “The Arrival of Critical Historicism,” testifies to his recognition of this triumph.¹² Even if “external legal history”—despite having “arrived”—is far from dominant on law faculties, furthermore, most legal academics are fully aware of the possibility of eroding the law-politics distinction in the name of antifoundationalism and of diminishing law’s autonomy in the name of history. “We are all Realists now,” the cliché goes. Any attempt to restore the law-politics distinction must take place, as it were, *after* Holmes, after the possibility of looking at law from the outside.

However, if there is much to celebrate when it comes to a certain triumph of “external legal history”—which I have, through a reading of Gordon, traced to the antifoundational historical thought of Holmes—there might also be cause for a measure of hesitancy. And it is this that brings me to the subject of this Symposium.

When Gordon wrote in the mid-1970s, he wrote as someone situated in the law school context, fully aware of the power of “internal legal history” in his immediate professional surroundings and convinced of the exciting intellectual possibilities of “external legal history.” It was not just law that had to be related to something outside of itself, one imagines, but the law professor as well. A quarter century after the appearance of Gordon’s article, particularly from the perspective of legal scholars trained in the humanities and social sciences who have acquired a berth on law faculties, the call to contextualize law, to place it “in” history as a way of diminishing its autonomy and of showing it to be a species of politics—or social context read as politics—seems entirely familiar. For historians engaged with the discipline of history, situating law in its social-historical context to achieve a variety of effects—to demonstrate its contingency, to reveal its politics, to underscore its imbrication in power relations, to hint at the possibility of its being remade, and so on and so forth—has been thoroughly normalized. As scholarship relentlessly historicizing law pours out, offering us endlessly complex pictures of law’s past and pointing to the plurality of missed opportunities in the past (all of which are supposed to mirror the open possibilities of the future), one cannot help but experience a sense of intellectual exhaustion.¹³ The theme of this symposium—to think of “law as . . .” rather than “law and” (which is another

12. Robert W. Gordon, *Foreword: The Arrival of Critical Historicism*, 49 STAN. L. REV. 1023 (1997)(emphasis added).

13. Out of a similar sense of exhaustion with the cultural study of law, Annelise Riles has called for a turn to legal technicalities. Annelise Riles, *A New Agenda for the Cultural Study of Law: Taking on the Technicalities*, 53 BUFF. L. REV. 973 (2005). I have written of the relentless “complexity” of contemporary historical scholarship in Kunal M. Parker, *Context in Law and History: The Late Nineteenth-Century American Jurisprudence of Custom*, 24 LAW & HIST. REV. 473 (2006).

name for “law in,” or what Gordon might call “external legal history)—stems from a deep sense of intellectual fatigue, of a sense that it might be important to begin looking elsewhere, to rejuvenate our thinking, to explore other possibilities not offered by our current dominant modes of contextualization.

I am not certain that I can point a way out of our current intellectual stasis (and it is important to observe that not everyone agrees that this is a time of intellectual stasis). However, in what follows, I hope to question some of Gordon’s distinctions: “internal legal history” versus “external legal history”; a historical/democratic/political sensibility versus the common law tradition; and ultimately (something raised by the conference that gave rise to this Symposium) “law and” versus “law as.” I do so by offering a brief account of the relationships between democracy, history, and the common law tradition from the end of the American Revolution to about 1900, when the antifoundational historical thinking inaugurated by Holmes—the source of what Gordon calls “external legal history”—began to acquire steam. As I shall make clear, the version of “law as” I present here is a rather specific one.

This account I present is a summary of an argument I explore at considerable length in my book *Common Law, History, and Democracy in America, 1790–1900: Legal Thought Before Modernism*.¹⁴ Accordingly, I avoid extensive citations here and direct the reader to the book for a fuller and better substantiated version of what is presented below. In the most orthodox historical tradition, I show that the past—in this case, the past before Holmesian antifoundational historical thinking—was different. In the conclusion to this paper, I will offer some speculations as to what might inhere in showing that the past was different.

II. THE COMMON LAW IN THE AMERICAN POLITY: 1790–1900

From the American Revolution until the very end of the nineteenth century, the common law was an integral mode of governance and public discourse in America. The vital presence of the common law might seem puzzling in a country premised in so many ways on breaking with its European past and on assuming political control of its own destiny. After all, the common law had originated in, and remained closely identified with, England. It was ideologically committed to upholding precedent and to repeating the past, claiming as it did so to embody the “immemorial” customs of the English, customs so old that their origin supposedly lay beyond “the memory of man.” It consisted of judicial, rather than legislative, articulation of legal principles. For all these reasons, one might expect Americans, who were intensely proud of their fledgling republican experiment, to have rejected the common law.

14. KUNAL M. PARKER, *COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790–1900: LEGAL THOUGHT BEFORE MODERNISM* (2011).

Instead, in contrast to the concerted effort to uproot all traces of the past that took place in revolutionary France, from the Revolution until the very end of the nineteenth century, the common law was widely—although never universally—claimed and celebrated. To advance just one example, in 1826, in the first volume of his celebrated *Commentaries on American Law*, the “American Blackstone,” James Kent, delivered the following breathless paean to the common law that captures how many nineteenth-century American lawyers thought about it:

[The common law] fills up every interstice, and occupies every wide space which the statute law cannot occupy. . . . [W]e live in the midst of the common law, we inhale it at every breath, imbibe it at every pore; we meet with it when we wake, and when we lie down to sleep, when we travel and when we stay at home; and it is interwoven with the very idiom that we speak; and we cannot learn another system of laws, without learning, at the same time, another language.¹⁵

We might account for the longevity and resilience of the common law tradition in nineteenth-century America by advancing at least two reasons, both very well known in the historiography. First, the common law came with heavy ideological freight. It was associated with the very heart of Anglo-American freedom. Since the early seventeenth century, English common lawyers had resisted the encroachments of would-be absolute Stuart monarchs in the name of England’s “ancient constitution,” itself an agglomeration of immemorial, endlessly repeated, common law freedoms. Americans had thoroughly absorbed this learning. As John Phillip Reid has argued at considerable length, the American revolutionary struggle was fought in important part to vindicate what colonists considered their common law rights and freedoms.¹⁶ As a result, many prominent American legal thinkers from the late eighteenth century on considered the written U.S. Constitution to be informed by, and indeed to be incomprehensible without reference to, the common law. U.S. Supreme Court Associate Justice David Brewer, who served on the Court from 1889 to 1910, is just one among many lawyers and judges who expressed this view. When “interpreting the Constitution,” Brewer observed, “we must have recourse to the common law.”¹⁷ The common law, Brewer argued in his landmark opinion in *Kansas v. Colorado*,

15. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 342–43 (E.B. Clayton, 4th ed. 1840). It is noteworthy that Kent makes an argument that many contemporary socio-legal thinkers would recognize, namely, that law is utterly constitutive of our lives, down to their most mundane, routine, habitual aspects. For contemporary legal scholars, the authoritative work on the constitutive nature of law is that of Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984).

16. See JOHN PHILLIP REID, THE ANCIENT CONSTITUTION AND THE ORIGINS OF ANGLO-AMERICAN LIBERTY (2005); see also Reid’s multivolume *Constitutional History of the American Revolution*. 1–4 JOHN PHILLIP REID, THE CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION (1986–2003).

17. *South Carolina v. United States*, 199 U.S. 437, 449 (1905)

“does not rest on any statute or other written declaration of the sovereign”; its “principles” were “in force generally throughout the United States.”¹⁸

Second, throughout the nineteenth century, the American state—whether at the federal, state, or local levels—did not play nearly as significant a role in economy and society as it would in the twentieth century. This is true notwithstanding recent scholarship that has emphasized the ubiquity of extensive regulation in nineteenth-century America.¹⁹ The vacuum left by the state was filled by common lawyers, who played a correspondingly larger part in articulating law for America’s vibrant, dynamic and multiplying polities and economies. Even as they were accused of political bias, nineteenth-century American common lawyers took this role as guardians of America’s economies and societies extremely seriously. Over a quarter century ago, Morton Horwitz detailed the considerable creativity of American common lawyers as they reshaped English doctrines of tort, contract, and property to suit the needs of the nineteenth-century American economy. Scholars such as Howard Schweber have made much the same point more recently.²⁰

But there was also more. Throughout the nineteenth century, the common law, history, and democracy were imagined as coexisting in ways very different from the way we are now wont to imagine them. These nineteenth-century ways of imagining the relationships among the common law, history, and democracy explain a great deal about why the common law tradition survived for as long as it did as such a vital part of American governance and public discourse. They show us different conceptions of how law, history, and democracy related to one another; different modes of historicizing law; and different ways of thinking about history itself. They suggest—and this is the core of my argument—that the law-politics problem as we imagine it today (i.e., as intimately related to an antifoundational Holmesian historical consciousness) was not a problem for many nineteenth-century Americans.

The ideational world of the nineteenth century was a world in which the notion of *given* constraints was very real indeed. In other words, this was not a world in which the subject—whether an individual, a group, or a society—ordinarily deemed itself free to act entirely as it pleased, to reimagine the world in a thoroughgoing way. This is true even of the radical democratic voices to be heard from the American Revolution going forwards. One valid explanation for the persistence of a sense of the givenness of constraints is that, even though Americans had long ceased to enact Biblical strictures as law by the time of the

18. *Kansas v. Colorado*, 206 U.S. 46, 96 (1907).

19. WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996).

20. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* (1977); HORWITZ, *supra* note 8; HOWARD SCHWEBER, *THE CREATION OF AMERICAN COMMON LAW, 1850–1880* (2004).

Revolution, this was a society that remained overwhelmingly religious.²¹ However, the presence of religion in nineteenth-century American thought, if offered up as a definitive and all-encompassing explanation for the givenness of constraints, risks becoming monolithic and reductionist. Even though it can always be identified as a presence, it often fails to capture the changing, proliferating, and complex ways in which nineteenth-century Americans went about constructing their worlds and naming its limits and constraints.

For our purposes, what is important is how nineteenth-century Americans imagined the scope of political democracy, the formal sphere of the political. This sphere, which would be called upon to do so much work in twentieth-century America, was often imagined as constrained. But it is the kinds of limits that were imagined, and the ways in which those limits were made to interact with each other, that are ultimately of interest to me.²²

When it comes to nineteenth-century understandings and representations of political democracy, it is important to keep in mind a cardinal fact, one that we tend too often to ignore. From the American Revolution into the twentieth century, throughout the Western world, political democracy, even as it was an aspiration for millions, was new and exceptional and not necessarily viewed as a prerequisite to national prosperity, achievement, or prominence. The explosive eruptions and vicissitudinous careers of various revolutions—the late eighteenth-century American, French, and Haitian Revolutions; the Latin American struggles; the revolutions of 1848; various slave insurrections; and the Paris Commune, to name just a few in the West—underscored political democracy's instability, unpredictability, violence, and dangerousness.

It should not be at all surprising, then, that political democracy was the object of deep, sustained suspicion. As is very well known, this suspicion lay at the heart of the republican tradition that gave rise to the elaborate structure of checks and balances in the U.S. Constitution. But it continued into the nineteenth century long after the preoccupation with republicanism began to fade. Thinkers strove mightily to ponder political democracy's limits, to conjure up truths that the democratic subject, in his arrogant assertion that he could remake his world through self-conscious political activity, would be unable to tamper with. The mid-century Scottish Romantic conservative historical thinker Thomas Carlyle offered the catchiest formulation, one that enjoyed considerable currency

21. For a recent article on the issue that adopts a comparative perspective and introduces the reader to much of the relevant literature, see Richard J. Ross, *Puritan Godly Discipline in Comparative Perspective: Legal Pluralism and the Sources of "Intensity,"* 113 *AM. HIST. REV.* 975 (2008). A good starting place is GEORGE L. HASKINS, *LAW AND AUTHORITY IN EARLY MASSACHUSETTS* (1960).

22. I am not talking about constraints on political democracy in the narrow sense of Lockean natural rights, but about a broader set of constraints that operated, at a philosophical level, as given. Indeed, my argument about the givenness of constraints supports, rather than contradicts, William Novak's discussion of nineteenth-century America as a "well-regulated society." See NOVAK, *supra* note 19.

throughout the English-speaking world. Carlyle analogized the nation to a ship that had to round Cape Horn. Was the establishment of political democracy among the crew of the ship sufficient to negotiate this confrontation with an inexorable, limiting, and *given* nature? Carlyle's answer was unequivocal:

Your ship cannot double Cape Horn by its excellent plans of voting. The ship may vote this and that, above decks and below, in the most harmonious exquisitely constitutional manner: the ship, to get round Cape Horn, will find a set of conditions already voted for, and fixed with adamantine rigour, by the ancient Elemental Powers, who are entirely careless how you vote. . . . *Ships accordingly do not use the ballot-box at all; . . . one wishes much some other Entities,—since all entities lie under the same rigorous set of laws,—could be brought to show as much wisdom, and sense at least of self-preservation, the first command of Nature. . . . [Democracy is] a very extraordinary method of navigating, whether in the Straits of Magellan or the undiscovered Sea of Time.*²³

“Nature” or “ancient Elemental Powers,” in Carlyle’s formulation, consisted of “a set of conditions *already* voted for, and fixed with adamantine rigor” that operated as an absolute limit on political democracy.

But one should not imagine that the world of the nineteenth century was one in which limits to political democracy were necessarily self-consciously conjured up only by those ideologically opposed to it. What we might take to be a limiting or cabining of political democracy was in fact often merely taken to be an actually existing feature of political democracy, nothing other than the order of things itself. Throughout the nineteenth century, American political and legal thinkers (indeed, thinkers all over the West) were acutely aware of political democracy’s manifest—and to many, necessary or inevitable—incompleteness, even in those very few countries, such as the United States, that claimed to be democracies. They were fully aware, for example, that large segments of the American population—a changing group that included women, minors, African Americans, Native Americans, propertyless white males—were not full participants in the polity but *were nevertheless subject to its laws*. They were also aware that only limited numbers of even those Americans entitled to vote actually voted in elections. They were also conscious of how much of the rest of the world was non-self-governing.

While some saw this incompleteness as the basis for demanding an extension or deepening of political democracy, others did not think this incompleteness made American political democracy less democratic, but instead that it underscored the fundamentally or essentially nondemocratic—or, better put, non-self-chosen—nature of law. This in turn fed the sense of constraints on political democracy, a Burkean sense of the inevitability of subjection to a governing order that one had

23. THOMAS CARLYLE, *The Present Time*, in LATTER-DAY PAMPHLETS 20–21 (Chapman and Hall 1870) (1850) (emphasis added).

not arrived at through a self-conscious process of working through abstract principles. This is precisely the kind of argument Joseph Story made in his celebrated *Commentaries on the Constitution of the United States*, a work written to defend the “implied powers” jurisprudence of the Marshall Court and to oppose the “compact theory” that was increasingly popular in Jacksonian America. “Implied powers,” of course, were those powers that had not been expressly delegated to the government by the people. The “compact theory,” by contrast, rested on the idea that power originally belonged to the people or the states, and that government possessed only such powers as had been expressly delegated. The theory one adhered to had a great deal to do with whether or not one believed law to be self-given.

According to Joseph Story, no contemporary American state had in fact been founded upon the assent of a majority of its population. In other words, governmental power had not been created through voluntary contract or contemporaneous consent (grounds of the compact theory), but was ubiquitous, always already there. This was evident if one looked around and saw how subjection to power actually worked. Individuals generally did not assent to the societies they were part of; they were born into such societies already subject to their rules. Story put it thus, “The assent of minors, of women, and of unqualified voters has never been asked or allowed; *yet these embrace a majority of the whole population in every organized society, and are governed by its existing institutions.*”²⁴ The demonstrable imperfection of consent and contract as grounds of political power was true not only of the states, but also of the national government:

In respect to the American Revolution itself, it is notorious that it was brought about against the wishes and resistance of a formidable minority of the people; and that the declaration of independence never had the universal assent of the inhabitants of the country. So, that this great and glorious change in the organization of our government owes its whole authority to the efforts of a triumphant majority. And the dissent on the part of the minority was deemed in many cases a crime²⁵

In Joseph Story we have, then, perhaps the most prominent and erudite American legal thinker of his day insisting upon the fundamentally non-self-given nature of law, based upon his apprehension that the vast majority of Americans—in a philosophical register, he would very likely even have included himself—were largely voiceless when it came to matters of politics and law. Why, in such a situation, should powers not be implied on behalf of government?

This received sense that the world lay, in crucial ways, beyond the power of the democratic subject to remake, that it was subject to laws not of his making,

24. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 236 (Melville M. Bigelow ed., William S. Hein & Co. 5th ed., photo. reprint 1994) (1891) (emphasis added).

25. *Id.* at 298.

imbues nineteenth-century American political and legal discourses. It allowed political democracy to coexist, as a result, with various kinds of constraints or limits, most of which we would today reject for their illegitimate foundations. A large number of these imagined constraints on the politico-legal sphere were temporal, constraints of the past and of the future. The politico-legal sphere was crowded with times ahistorical and historical, times with mysterious origins, times with a given logic and direction and meaning that democracy was declared unable to subvert. For our purposes, two different kinds of given times that enjoyed considerable currency as limits to the sphere of political democracy were the nonhistorical premodern times of the common law, on the one hand, and the changing teleological and foundational times of nineteenth-century history, on the other.

Let me begin first with the nonhistorical time of the common law. From the seventeenth century on, the English common law tradition had claimed for itself the self-consciously nonhistorical time of “immemoriality.” The origins of the common law were said to reach back to a time “beyond the memory of man.” The “memory of man” was formally stated to extend no further back than 1189 C.E., but this precise chronology belies the uses to which the formula was typically put. The time of “immemoriality” was self-consciously deployed to set the common law beyond historical specification or determination. It was precisely a resistance to history that common lawyers relied upon to claim legitimacy for the common law. Freed from the strictures of a law that could be pinned down in chronological, historical time, common lawyers could claim a diffuse, imprecise, and mysterious antiquity on behalf of an “immemorial” common law. This special and mysterious antiquity allowed them to claim superiority vis-à-vis law-giving acts that could be located in mere chronological time, such as acts of monarchs or, later, legislatures. Such temporally delimited acts of monarchs and legislatures, common lawyers argued, could never possess the wisdom of a law that embodied the diffuse and collective wisdom of multiple generations going back into the mists of time. In the various ways in which the time of “immemoriality” was deployed against monarchs and legislatures, one sees the precise import, albeit twisted around, of Gordon’s call to localize law to specific times and places. In the seventeenth century, when thinkers such as Coke and Hale articulated the temporality of “immemoriality,” to have made law the creature of a specific time and place was to have implied that it could be remade. This argument, so readily claimed by modern legal thinkers seeking to break down the wall between law and politics, was the argument of royalists seeking to give monarchs the power to remake law. The nonhistorical temporality of the common law was a gesture of resistance.²⁶

26. The authoritative discussion of seventeenth-century common law thought, with a discussion of “immemoriality” and its relationship to history, remains J.G.A. POCKOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE*

The “immemoriality” of the common law did not mean that, in the hands of common lawyers, the common law was immune to change. Even as they maintained that the common law was “immemorial” and possessed of a diffuse and imprecise antiquity that lay beyond historical specification, seventeenth-century common lawyers hailed the common law’s ability to respond to changing circumstances through recourse to the time of “insensibility.” The common law changed so “insensibly,” it was maintained, that it could never be seen to change. In his *History of the Common Law of England*, Sir Matthew Hale put it thus:

From the Nature of Laws themselves in general, which being to be accommodated to the Conditions, Exigencies and Conveniencies of the People, for or by whom they are appointed, as those Exigencies and Conveniencies do *insensibly* grow upon the People, so many Times there grows *insensibly* a Variation of the Laws, especially in a long Tract of Time; and hence it is, that tho’ for the Purpose of in some particular Part of the Common Law of England, we may easily say, That the Common Law, as it is now taken, is otherwise than it was in that particular Part or Point in the Time of Hen. 2. when Glanville wrote, or than it was in the time of Hen. 3. when Bracton wrote, yet it is not possible to assign the certain Time when the Change began²⁷

For Hale, the common law’s “insensible” changing was not so much the consequence of a lack of supporting records, but instead an assertion about how the common law changed in general, in short, a claim about its method. It was the gradual and partial nature of its changes, a step-by-step process in which identity and difference were collapsed, that made it meaningful to describe the changeability of the common law as “insensible.” Thus, Hale continued in a famous passage:

But tho’ those particular Variations and Accessions have happened in the Laws, yet *they being only partial and successive*, we may with just Reason say, They are the same English Laws now, that they were 600 Years since in the general. As the Argonauts Ship was the same when it returned home, as it was when it went out, tho’ in that long Voyage it had successive Amendments, and scarce came back with any of its former Materials; and as Titius is the same Man he was 40 Years since, tho’ Physicians tells us, That in a Tract of seven Years, the Body has scarce any of the same Material Substance it had before.²⁸

“Insensibility” did the critical work, then, of recognizing difference and change and yet insisting on identity and continuity. This was, in other words, also a time impervious to chronological or historical specification or determination. The precise moment of the common law’s changing could never be located in

SEVENTEENTH CENTURY (1959).

27. MATTHEW HALE, *HISTORY OF THE COMMON LAW* 39–40 (Charles M. Gray ed., Univ. Chi. Press 1971) (1739).

28. *Id.* at 58–59.

chronological time; change could only be inferred by comparing origin and end points. And once again, common lawyers used this time as proof of the common law's superiority. Because it was "insensible," whatever change the common law brought about was less abrupt, less disruptive, and less violent, they argued, than the sudden and ill-conceived changes introduced by monarchs and legislatures.

It was precisely the indistinctness and imprecision of these times of "immemoriality" and "insensibility" that American lawyers would claim, albeit in complicated ways, throughout the nineteenth century. It was precisely these times that gave the common law its authority. To nineteenth-century American common law thinkers, the Benthamite charge that common law judges made law as they pleased was simply an illegitimate aspersion. To them, the common law was an inherited body of "immemorial" doctrine that commanded a measure of fidelity because of its antiquity and its association with Anglo-American freedoms. But this was never a blind or unthinking fidelity. Above all, the common law was a method—indeed, the best, most scientific, and least despotic method—of "insensible," step-by-step lawmaking. At a time when legislatures were partial and nonrepresentative affairs, the common law judge was uniquely privileged, far more so than any elected legislature, to "read" the community that presented itself to him in his courtroom. When the common law judge spoke, in other words, the common law corresponded perfectly to the actually existing state of the community. This was a view that had emerged in seventeenth-century England and that was held by prominent American common law thinkers throughout the nineteenth century, from Joseph Story to Thomas Cooley to the younger Oliver Wendell Holmes Jr. Furthermore, the common law judge decided case by case, unwilling to turn his back on the past or to plunge headlong into the future. As such, the common law judge was committed to a careful calibration of the competing claims of the past, the present, and the future, of maintaining the identity of society over time even as he was committed to change. This was also a view repeated by nineteenth-century common law thinkers, from Francis Lieber in Jacksonian America to James Coolidge Carter at the very end of the nineteenth century. When these features of the common law method were combined, it was democratically elected legislatures, rather than common law judges, that appeared "unscientific" in their lawmaking. Nineteenth-century American political democracy shared space, as it were, with a law that began but could not be seen to have begun, that changed but that could not be caught in the act of changing, that always embodied the current needs of the people even as it reflected the wisdom of an illimitable past. In other words, political decision making, which took place in historical time, was constrained by a law that unfolded outside historical time. To many, this was not the contradiction that it appears to be to us.

The second kind of time that limited the scope of nineteenth-century American political democracy was the time—or rather multiple and changing times—of teleological and foundational history. Through much of the nineteenth

century, history was not self-consciously antifoundational as it would become with Oliver Wendell Holmes and his modernist, pragmatist champions. When one contemplated the historical world, one did not see it, as many historians are now (apparently) accustomed to seeing it, as the product of nothing but history, as one historically locatable phenomenon giving way to another. One saw it instead in terms of the logic of a number of "firsts" that underlay the passage of time and that gave it meaning: God, "spirit," "laws," "life," and so on. There has been a powerful tradition in American intellectual history that has charged American historical thought with inadequacy or insufficiency or weakness. Eighteenth- and nineteenth-century Americans were too mired in a sense of their own exceptionalism, we have been told, to understand their historical world as genuinely historical (i.e., as devoid of foreordained directionality).²⁹ This sense that eighteenth- and nineteenth-century Americans were committed to teleological and foundational conceptions of history is largely correct, although they were hardly unique in such commitments. But to say this does not capture the richness of nineteenth-century historical discourses. Regardless of the overwhelmingly foundational and teleological nature of nineteenth-century history, discussions about history, and about America's place in history, were vigorous. They were also decidedly not provincial: they employed vocabularies and structures that were in use in Europe as well. Furthermore, even though nineteenth-century Americans organized the historical world in terms of firsts and foundations, they did not necessarily agree with one another about what constituted the logic of history. There were many different accounts of what history was about, of where it was headed.

Teleological and foundational ideas of history were applied to American democracy from the American Revolution going forward. Even as many in the nineteenth century saw democracy as furnishing the logic of history, to the extent that history was imagined to possess an underlying logic and meaning and direction, it could equally serve as a check on democracy. If history was going somewhere, in other words, it was possible to judge the activities of a democratically elected legislature in terms of that logic. Thus judged, a legislature could be "wrong" in the sense that it was guilty of flouting the logic of history. Let us take the example of slavery. Proslavery thinkers in the mid-nineteenth century believed that slavery instantiated the natural "law" of subordination of blacks to whites. History proved this natural law. One could look at the subordination of blacks to whites across temporal and geographic contexts and conclude this. But it also implied that American democracy could *not* violate this natural law. Antislavery legislation was thus represented as an exception to this law, as something that went against the logic of history itself. Antislavery thinkers

29. See J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (1975). The authoritative work for the nineteenth century is Dorothy Ross, *The Origins of American Social Science* (1991).

employed the same logic, but to the opposite end. Proslavery legislation and the recognition of slavery in the U.S. Constitution violated the natural “law” of equality.³⁰ On both sides of the slavery debate, in other words, the space of democratic activity was cabined or limited by the logic imagined to imbue history. One could multiply examples of how teleological and foundational ideas of history were used to limit the space of political democracy. History could be the shift from the feudal to the commercial; the movement of the “spirit of the age”; the transition from “status” to “contract”; or the trajectory of Darwinian-Spencerian “life.” Each, in different ways, acted as a constraint on what political democracy could do.

Thus far, I have been arguing, political democracy in nineteenth-century America coexisted with two sets of constraining or limiting times, those of the common law and those of foundational and teleological history. It is in the intersection of these times that we see how common lawyers made out the case for the centrality of the common law as an important mode of governance in America and why they were not troubled by our law-politics problem. It is in the intersection of these two times, as well, that we see how what Gordon would call “internal legal history” and “external legal history” were combined and separated.

Nineteenth-century American common lawyers—following in the wake of their seventeenth- and eighteenth-century English and Scottish counterparts—were fully historical thinkers. From their own perspective, they were not engaged in a surreptitious or unthinking “political” reshaping of common law doctrine (to be sure, this is something their opponents accused them of from time to time and something that we—with *our* historically informed law-politics problem—see them as doing). Instead, they were openly, articulately, vigorously, and self-consciously trying to fit the common law to the imperatives of history as they and their contemporaries saw them, imperatives that were imagined to constrain American democracy itself. This common lawyerly turn to history was not just a defensive strategy against the common law’s many critics (although it was also that), but a deeply felt position. Where legislatures seemed unable or unwilling to guide America along history’s imagined path, or simply seemed to lack the expertise to do so, common lawyers would do the needful.³¹

Nineteenth-century American common lawyers’ turn to history reveals possible relationships between history and law that are occluded by the Holmesian antifoundational turn to history to which we are heirs. In order to see this, let us

30. For a discussion of such uses of history, see PARKER, *supra* note 14, at 168–219.

31. Certain scholars have discussed nineteenth-century lawyers turn to history. A major early work in this vein is PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR* (1965). More recent work, albeit with orientations different from mine, includes David Rabban, *The Historiography of Late Nineteenth-Century American Legal History*, 4 *THEORETICAL INQUIRY* L. 541, 568 (2003); Stephen A. Siegel, *Historism in Late Nineteenth-Century Constitutional Thought*, 1990 *WIS. L. REV.* 1431 (1990); and Steven Wilf, *The Invention of Legal Primitivism*, 10 *THEORETICAL INQUIRY* L. 485 (2009).

turn to the mechanics of how nineteenth-century American lawyers combined common law and historical sensibilities.

Armed with the diffuse nonhistorical common law times of "immemoriality" and "insensibility," convinced of the superiority of the common law method over that of legislatively generated law, nineteenth-century American legal thinkers turned to the common law tradition to make sense of pressing issues ranging from labor to crime, commerce to slavery, marriage to local government, contract to tort. Even as they turned to the common law tradition, however, nineteenth-century common lawyers turned to the varying times and logics of history. And it is here that the conjoining of common law and history reveals something interesting.

In the first instance, the bringing together of the times of the common law and the times of history served to subject the common law *to* history. This was, to use Gordon's term, "external legal history" to the extent that nineteenth-century common lawyers relied upon ideas of history *outside* of the common law itself to make sense of the common law: law was fitted into time and place, understood in terms of the imperatives of history, such that it could be subjected to reform. From the eighteenth century on, English and Scottish political and legal thinkers, from Bolingbroke to Kames to Blackstone, were acutely aware that the common law that had come down to them had developed in a land-based feudal society and that it was inconsistent with the needs of eighteenth-century Britain's commercial society. History was thus imagined as a move from the feudal to the commercial, as something that provided a perspective on the existing common law.

In the late eighteenth and early nineteenth centuries, American political and legal thinkers continued this trend of subjecting the common law to the imperatives of history imagined as a move from feudal to commercial, often transposed onto the shift from monarchy to democracy, from Europe to America. As the nineteenth century wore on, the imperatives of history changed. By the mid-nineteenth century, American political and legal thinkers were no longer preoccupied with plotting a relationship between a prerevolutionary, feudal past and a postrevolutionary, commercial present and future. The specter of British influence, so prominent in Jeffersonian and Jacksonian America, waned. At the same time, as the slavery crisis began to dominate public life, political democracy, once seen as at least potentially able to allow the laws of nature and society to flourish, came increasingly to be seen as itself a potentially serious obstacle to the flourishing of natural and social laws. First the slavery crisis, and then the centralizing impulses of federal and state regulation, brought about new, but equally constraining, languages of history, whether Comtean languages of underlying invariable natural and social laws or Darwinian-Spencerian ones that plotted history as a slowly but constantly evolving "life." These new historical languages would also, as had been the case in earlier decades, be used to make sense of the common law. From the time of the American Revolution going

forwards, then, American common lawyers judged the common law rigorously in terms of various prevailing vocabularies and logics of history. Thus judged, parts of the common law were declared obsolete and excised, others systematized, yet others reformed or revived. The doing of “external legal history” was ubiquitous, entirely normal.

Even as they engaged in “external legal history,” however, nineteenth-century common law thinkers would argue that the common law, occasionally as doctrine but more often as method, itself realized and embodied the logic, meaning, and direction of foundational and teleological history. In other words, something akin to what Gordon would call “internal legal history” was represented as effectuating the movement of “external legal history.” Alternatively, to borrow the terminology that drove the conference that has led to this Symposium, nineteenth-century lawyers were doing “law and history” and “law as history,” where the former stands for a historical contextualization of law and the latter stands for a legal contextualization of history. One could offer various examples of this phenomenon, and I discuss them at considerable length in the book. Where history was plotted as a shift from feudal to commercial in the late eighteenth and early nineteenth centuries, the common law was represented as having worked out that shift; where history was plotted as the progressive realization of natural “laws” of equality or slavery in the mid-nineteenth century, the common law was represented as embodying those natural laws; and where history was plotted as the movement of Darwinian-Spencerian “life” in the late nineteenth century (often represented as the emergence of an autonomous and self-regulating private sphere), the common law was represented as capturing “life” itself. This is curious. It requires a bit of spelling out.

Nineteenth-century common law thinkers were not using history negatively to pull down law’s foundations generally in the manner of Holmes. As such, the point of doing “external legal history” was not to dissolve the common law into history, to rob it of its autonomy, and to reduce it to a species of politics. The common law was to be subjected to remaking in the name of foundational and teleological history, but the point of doing so was never to surrender the making of law to democracy, because democracy was itself constrained by foundational and teleological history. Put differently, common lawyers’ commitment to the common law’s autonomy did not mean that they did not simultaneously think historically about the common law. It is this fusion of opposites that is hard for us to inhabit. The times of the common law and the times of history brushed up against each other, informed each other, constituted each other, without destroying each other. History was a method of acting upon the common law; the common law was a method of realizing history. History produced an external perspective on the nonhistorical common law, but at the same time, the nonhistorical common law produced an external perspective on history. Nineteenth-century American common law thinkers reveal themselves, in other

words, to have been able simultaneously to inhabit two different types of time, the nonmodern and nonhistorical times of the common law (“internal legal history” or “law as history”) and the varying times of nineteenth-century foundational and teleological history (“external legal history” or “law and history”). Holding on to two utterly different kinds of time, setting them in relationship to one another, required considerable intellectual labor. How to maintain simultaneous affiliations to a legal tradition that had emerged in the seventeenth century and collapsed continuity and change, identity and difference, on the one hand, and the historical imperatives of the nineteenth century, on the other hand?

One is tempted to work out—theoretically—the precise meaning of that impossible space between “internal legal history” and “external legal history,” between the nonmodern and nonhistorical times of the common law and the foundational and teleological times of nineteenth-century history, between “law as history” and “law and history.” Antifoundationalism, I am tempted to say, brings about the need for naming *aporias*. But I will refrain from advancing any facile “philosophical” explanation for why nineteenth-century common lawyers did not experience as problems what we experience as problems. Suffice it to say that *our* problems were not *theirs*, at least in this rendering of the story. This does not mean, of course, that the historical record could not be read to find earlier iterations of our problems: but that would be a different project from the one I have embarked upon.

CONCLUSION

What does it mean to have historicized the law-politics problem, or the “internal legal history” versus “external legal history” problem, as I have done?

In drawing attention to the ways in which the common law, history, and democracy worked together before roughly 1900, I have argued that the law-politics problem as we know it did not emerge until history began to perform an antifoundational task, which it did in writings of Oliver Wendell Holmes Jr., and those who claimed him and followed in his wake. A historical sensibility that undermined law’s foundations, to say nothing of history’s own foundations, was important for the law-politics distinction to present itself in the ways in which we recognize it. Once we stop believing that history has a foundation and a teleology, it becomes easier to see law as nothing other than a species of illegitimate politics. The emergence of this particular law-politics problem growing out of antifoundational historical thinking transcends the American politico-legal context, going more generally to philosophical concerns about the status of foundational thinking after modernism. Philosophers of history have recognized that, since the late nineteenth century, we have been living in a world “after” metaphysics, where the world is nothing but history and seems “ever-provisional.”³² Recognizing what

32. Benjamin Barber, quoted in DAVID ROBERTS, NOTHING BUT HISTORY:

Holmes recognized a century ago when he sought to tear down the foundations of law in the name of history, Benjamin Barber has written, “[P]olitics is what men do when metaphysics fails.”³³ Democracy, David Roberts writes, “is the form of interaction for people who cannot agree on moral absolutes.”³⁴ This is the background of our law-politics problem.

It might be hard to transcend this condition and, as I indicated in the Introduction, I certainly have no easy answers. Gordon and I share, it must be recognized, a similar understanding of history and a similar sense of its uses. In his 1975–76 essay, Gordon used it to great effect to undermine a sense of law’s autonomy, whereas I have used it to undermine a sense of the autonomy of the understanding of history that we both share and to show how law, history, and democracy interacted before our way of thinking about history became authoritative. And yet, as David Roberts has written, there is no easy return to the world of teleologies and foundations. In other words, it might be no rejuvenation of our historical practices to describe sympathetically, as I have attempted here to do, the world that preceded them. Only Borges, David Roberts has written wryly, could write as if it is *still* 1748.³⁵ That may not be entirely correct (even if it is correct for Borges). There are examples of foundational and teleological thinking—imbued with an “as if” character and without—all over the world today.³⁶ And not all appear particularly desirable.

But I want to end on a positive, explicitly historical and political, note. The mystery is that many who claimed to follow in Holmes’s wake did not share his rigorous antifoundationalism even as they claimed his legacy in breaking down the law-politics distinction. Foundational and teleological histories of a liberal stripe are rife in the American legal academy, even as we are engulfed in historical accounts that give us more and more “complexity.” At certain times, such foundational and teleological histories frustrate; at other times, they do not.

For example, Akhil Amar approvingly quoted John Hart Ely’s *Democracy and Distrust*: “There have also existed throughout our history limits on the extent of the franchise and thus on government by majority. But the constitutional development [] *has been continuously, even relentlessly, away from that state of affairs.*” “As it turns out,” Amar assures his readers, “the amenders [of the U.S. Constitution] have, in general, been liberal democratic reformers in their eras just as the Founders were in theirs.”³⁷ If the writings of Amar suggest anything, it is that

RECONSTRUCTION AND EXTREMITY AFTER METAPHYSICS, at xvii–xix (2007).

33. *Id.* at xviii–xix.

34. *Id.*

35. As Roberts puts it, “If I try to be true to the situation of 1748, I find myself in the world of Jorge Luis Borges.” *Id.* at xv.

36. I am referring to HANS VAHINGER, *THE PHILOSOPHY OF “AS IF”*: A SYSTEM OF THE THEORETICAL, PRACTICAL AND RELIGIOUS FICTIONS OF MANKIND (C.K. Ogden trans., Barnes & Noble 2d ed. 1952) (1924).

37. Akhil Reed Amar, *America’s Constitution and the Yale School of Constitutional Interpretation*, 115

American democracy continues to be subjected to foundational and teleological historical faiths. American constitutionalism—mired in its countermajoritarian difficulties—continues to marshal a history of ever-expanding circles of rights, freedoms, and equalities. I myself find it difficult to resist the lure of such foundational historical thinking, even as I chide myself for giving in to it. Let us take the question of same-sex marriage. Do developments in Western Europe, Latin America, and a few progressive American jurisdictions not suggest that same-sex marriage is something that *will* happen in the future, that it is something mandated by the logic of history itself? Does American democracy itself not seem to be “wrong” to many because of its failure to fall in line with what so clearly appears to be a historical trend? And is it not law—“internal legal history” or “law as . . .,” linking same-sex marriage with America’s history of overcoming racial and gender discrimination—that appears better positioned to realize this historical movement than American democratic majorities currently do? In combining “external legal history” and “internal legal history,” “law and history” and “law as history,” we might not, after all, be so different from our nineteenth-century forebears.