Whether Or Not Special Expertise Is Needed: Anti-Intellectualism, the Supreme Court, and the Legitimacy of Law

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"WHETHER OR NOT SPECIAL EXPERTISE IS NEEDED": ANTI-INTELLECTUALISM, THE SUPREME COURT, AND THE LEGITIMACY OF LAW

SEAN M. KAMMER

I. INTRODUCTION

In 2015, a dozen Democratic voters from Wisconsin sued the state for its drawing of legislative districts following the most recent census in 2010.1 They specifically alleged the map discriminated against Democratic voters and candidates based on their political beliefs in violation of the Equal Protection and Due Process clauses of the Fourteenth Amendment.2 This is just one of several similar lawsuits across the country confronting the widespread practice of so-called “partisan gerrymandering,” whereby parties which control their state legislatures draw district lines to benefit their own parties.3 In a trial before a three-judge panel, the plaintiffs provided ample evidence that the Wisconsin Government Accountability (WGA) Board drew the maps with an intent to benefit Republican politicians.4 They also showed, using a metric called the “efficiency gap,” that the Board’s attempts at benefitting Republicans were highly successful.5 Developed by Nicholas Stephanopoulos, a law professor, and Eric McGhee, a

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2. Id.; U.S. CONST. amend. XIV.
4. Id.
5. Id.
political scientist, the efficiency gap seeks to measure the number of votes each party “wastes” in a given election cycle, meaning the number of votes received beyond those needed to win a given race, divided by the total votes cast. In their own analysis of elections over a forty-year period, Stephanopoulos and McGhee showed that districting plans had “exhibited steadily larger and more pro-Republican gaps,” with the plans in effect as of their writing in 2015 representing “the most extreme gerrymanders in modern history.” For its part, Wisconsin’s challenged districting plan was found to have produced efficiency gaps far exceeding the national average, specifically in creating “pro-Republican efficiency gaps of 13 percent in 2012 and 10 percent in 2014—meaning that Republicans won 13 percent and 10 percent more seats, respectively, than they would have under a neutral map.”

Rather than disputing the plaintiffs’ allegations of discriminatory intent, officials on the WGA Board insisted that partisan intent in districting is lawful. On this point, defendants found support in case law, including from the nation’s highest court. While the Supreme Court of the United States declared in 1986 that partisan gerrymandering claims were justiciable as potential violations of the Fourteenth Amendment, the Court has yet to strike down a state’s districting plan on such a basis. In a pair of cases challenging plans implemented after the 2000 census, the Court held the gerrymandering claims non-justiciable due to the purported lack of a “judicially discernible and manageable standard.” As the deciding vote in upholding the lower courts’ dismissal of the claims, Justice Anthony Kennedy agreed no standard yet existed, but he explicitly left the door open for such a standard to present itself in the future. Indeed, Stephanopoulos and McGhee developed their “efficiency gap” model, in part, to answer Kennedy’s call.

Lawyers for the State of Wisconsin, including Solicitor General Misha Tseytlin, argued against the “efficiency gap” being used to potentially strike down partisan gerrymandering. In so doing, they did not challenge the test based upon its legitimacy as a political science model or its accuracy in assessing and predicting how certain district maps favor or disfavor one political party over

7. Id. at 831.
9. Id.
10. Id.
11. Id. See also Davis v. Bandemer, 478 U.S. 109, 143 (1986) (holding that political gerrymandering cases are justiciable under the Equal Protection Clause of the Fourteenth Amendment).
15. Petry, supra note 1.
others. Rather, they misconstrued plaintiffs’ case as requesting that the Supreme Court “instruct district courts to evaluate the effects of alleged partisan gerrymanders by applying an unbounded variety of metrics,” a quandary lower courts would have to “figure [out] on their own, “presumably only after having subscribed to Political Research Quarterly, American Political Science Review and other essential journals.” However, the plaintiffs in this case simply asked the Supreme Court to apply a single metric, one whose application would be as simple as setting a number that district maps could not exceed and then striking down plans that exceed that number. It would be one thing to argue that the “efficiency gap” is scientifically unsound and does not accurately measure the discriminatory effects of districting plans, or even to argue that partisan gerrymandering is inherently non-justiciable, regardless of the evidence showing discriminatory intent and effect. However, it is quite another to suggest it is beyond the judiciary’s abilities to understand basic scientific or mathematical concepts.

During oral arguments, Chief Justice John G. Roberts seemingly accepted Solicitor General Tseytlin’s argument in his questioning of plaintiffs’ attorney, Erin E. Murphy. During that questioning, he lectured Murphy that “you’re taking these issues away from democracy and you’re throwing them into the courts pursuant to, and it may be simply my educational background, but I can only describe as sociological gobbledygook.” He presented a hypothetical:

[i]f you’re the intelligent man on the street and the court issues a decision, and let’s say, okay, the Democrats win, and that person will say: “well, why did the Democrats win?” And the answer is going to be because EG was greater than 7 percent, where EG is the sigma of party X wasted votes minus the sigma of party Y wasted votes over the sigma of party X votes plus party Y votes. And the intelligent man on the street is going to say that’s a bunch of baloney. It must be because the Supreme Court preferred the Democrats over the Republicans. And that’s going to come out one case after another as these cases are brought in every state. And that is going to cause very serious harm to the status and integrity of the decisions of this court in the eyes of the country.

Now, Roberts was surely right to be concerned about the Supreme Court appearing to be partisan. However, his questioning primarily revealed not a concern for whether the Court might be perceived as taking political sides, as he intended. After all, such a concern is easily rebutted. The answer to the question of “why

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17. Id.
20. Id.
21. Id. at 32:46.
did the Democrats win” in Roberts’ hypothetical is simply that the Democrats received more votes. Roberts’ questioning exhibits a rejection of sociological expertise as a basis for producing useful knowledge regarding social institutions.

Many have expressed concern for Roberts’ line of questioning. Most prominently, Eduardo Bonilla-Silva, president of the American Sociological Association, wrote a letter to Roberts on behalf of sociologists.22 “In an era when facts are often dismissed as ‘fake news,’” Bonilla-Silva wrote, “we are particularly concerned about a person of your stature suggesting to the public that scientific measurement is not valid or reliable and that expertise should not be trusted.”23 What Roberts called “gobbledygook,” Bonilla-Silva implored, was actually “rigorous and empirical.”24

Bonilla-Silva rightly connected Roberts’ comments to a broader “anti-expertise” or “anti-intellectual” strand of American political thought.25 In his seminal work, Anti-Intellectualism in American Life, Richard Hofstadter defined anti-intellectualism as a “resentment and suspicion of the life of the mind and of those who are considered to represent it; and a disposition constantly to minimize the value of that life.”26 By the “life of the mind,” Hofstadter meant “the critical, creative, and contemplative side of mind,” one he distinguished from the broader concept of intelligence.27 Indeed, one important element of anti-intellectualism, according to Hofstadter, is the belief that “[t]he plain sense of the common man, especially if tested by success in some demanding line of practical work, is an altogether adequate substitute for, if not actually much superior to, formal knowledge and expertise acquired in the schools.”28 In other words, it is an

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22. Letter from President of the American Sociological Association Eduardo Bonilla-Silva to Chief Justice of the United States Supreme Court John Roberts (Oct. 9, 2017) (on file with the University of South Dakota School of Law library).
23. Id. (emphasis added).
24. Id.
25. Id.
27. Id. at 25. “Whereas intelligence seeks to grasp, manipulate, re-order, adjust,” he explained, “intellect examines, ponders, wonders, theorizes, criticizes, imagines.” Id. Whereas “[i]ntelligence will seize the immediate meaning in a situation and evaluate it . . . [i]ntellect evaluates evaluations, and looks for the meanings of situations as a whole.” Id. All animals are capable of intelligence, while intellect, according to Hofstadter, is a uniquely human trait, one alternatively “praised and assailed.” Id. One author has noted the similarities between Hofstadter’s distinction between intelligence and intellect and Max Weber’s distinction between “men who live off politics and men who live for politics,” in that “[i]ntellectuals,” according to Hofstadter, “live for rather than off ideas.” LEWIS A. COSER, MEN OF IDEAS xvi (1997).
28. HOFSTADTER, supra note 26, at 19. See E.D. HIRSCH, JR., THE SCHOOLS WE NEED: AND WHY WE DON’T HAVE THEM 106-07 (2010) (discussing Hofstadter’s conception of anti-intellectualism in the context of education). Hirsch wrote this about anti-intellectualism: [i]t is a convenient term, but I wonder whether Hofstadter’s definition of it does adequate justice to its attractions for a wide spectrum of Americans. Hofstadter defines anti-intellectualism as a concept for ‘knowledge of its own sake.’ This definition perhaps misses something essential, namely, that the knowledge most often scorned by Americans tends to be academic knowledge connected with scientific lore and past traditions—the kind taught in lecture halls and recorded mostly in books. Disinterested curiosity is not in-itself scorned by Americans—only disinterested curiosity about the contents of lectures and books.
embrace of “street smarts” to the exclusion of “book smarts.” Importantly, “anti-intellectualism” refers not just to a dislike of people who call themselves “intellectuals” (let’s be honest; we can be an annoying bunch), but a rejection of their expertise and a dismissal of the knowledge they produce.

Anti-intellectualism is far different from mere ignorance. Whereas ignorance might be defined as an absence of knowledge, to be anti-intellectual is to be against acquiring knowledge itself. It is to be against those who possess knowledge. As psychologist and educational reformer John Dewey once observed, anti-intellectualism is far more dangerous to a society than mere ignorance.29 “Genuine ignorance,” as he explained it, is “profitable because it is likely to be accompanied by humility, curiosity, and open-mindedness, while ability to repeat catch phrases, cant terms, familiar propositions gives the conceit of learning and coats the mind with a varnish waterproof to new ideas.”30 Novelist Gene Wolfe once described this phenomenon as a “new illiteracy”:

[...] this, then, is the new illiteracy, the illiteracy of those who can read but don’t. [...] This new illiteracy is more pernicious than the old, because unlike the old illiteracy it does not debar its victims from power and influence, although like the old it disqualifies them for it. Those long-dead men and women who learned to read so that they might read the Bible and John Bunyan would tell us that pride is the greatest of all sins, the father of sin. And the victims of the new illiteracy are proud of it. If you don’t believe me, talk to them and see with what pride they trumpet their utter ignorance of any book you care to name.31

Id. See also ELLEN CONDLIFFE LAGEMANN, AN ELUSIVE SCIENCE: THE TROUBLING HISTORY OF EDUCATION RESEARCH xii (2002) (“If, as Richard Hofstadter pointed out brilliantly almost forty years ago, anti-intellectualism has been a central theme in American life, the related phenomenon of antieducationism has also been important. Antieducationism is a compound of all the qualities Hofstadter saw in anti-intellectualism—especially a skepticism toward intellect and a preference for instrumental knowledge, know-how, over less purposive reflection, speculation, or pondering.”); FRANK DONOGHUE, THE LAST PROFESSORS: THE CORPORATE UNIVERSITY AND THE FATE OF THE HUMANITIES 9-10 (2008) (”[Hofstadter] argues that the opposition to higher education modulated as America’s corporations came to depend on college graduates and had undergone a ‘conspicuous change’ by the turn of the century. That is, as corporate entities became so large and complex that they required engineers, accountants, and lawyers in order to run smoothly, corporate executives were less likely to attack the universities that produced these professionals.”); ALAN RYAN, JOHN DEWEY AND THE HIGH TIDE OF AMERICAN LIBERALISM 348 (1995) (”As Hofstadter observed, the terms of the argument between Harris and his opponents were the same a century ago as they were in 1962. Nor has much changed since 1962. On the one hand stood those who thought the aim of education was to get the child to master an intellectual discipline; on the other, those who thought of the ‘needs’ of the child. Hofstadter’s enthusiasm for what came to be called life adjustment as an educational goal can be gauged from his quip ‘Life adjustment educators would do anything in the name of science except encourage children to study it.’”); PHILLIP C. SCHLECHTY, INVENTING BETTER SCHOOLS: AN ACTION PLAN FOR EDUCATIONAL REFORM 2 (1997) (“As Richard Hofstadter has observed, the history of school reform is a ‘history of complaint.’ Each generation discovers what the generation before it discovered: something is wrong with America’s schools and someone ought to do something about it. And each time reformers try to bring about change, the reforms fail to deliver what has been promised.”).

30. Id.
However, while Wolfe was correct in his description of anti-intellectualism, he was arguably wrong to call it "new." His fellow science fiction writer Isaac Asimov, for instance, once criticized what he called "a cult of ignorance" in the United States, one he contended had always existed.\footnote{32} As he explained, "the strain of anti-intellectualism has been a constant thread winding its way through our political and cultural life, nurtured by the false notion that democracy means that 'my ignorance is just as good as your knowledge.'"\footnote{33}

Asimov was far from the first to find the roots of anti-knowledge in democracy. In his famous early nineteenth-century account of American society, for example, French historian and political scientist Alexis de Tocqueville observed he knew of "no country in which there is so little true independence of mind and freedom of discussion as in America," a feature he attributed to "the majority [having] raise[d] very formidable barriers to the liberty of opinion."\footnote{34}

More recently, Hofstadter agreed, concluding that this way of thinking "first got its strong grip... because it was fostered by an evangelical religion that also purveyed many humane and democratic sentiments," and that "[i]t made its way into our politics because it became associated with our passion for equality."\footnote{35}

Ironically, just as democratic ideals may have contributed to the prominence of anti-intellectual viewpoints in America, so too do they threaten to undermine democracy itself. Many prominent political theorists have long questioned the long-term viability of democracies for precisely this reason: that people lack the knowledge or intellect required for governance. An early skeptic of democracy, Plato developed a useful analogy:

> [i]magine then a fleet or a ship in which there is a captain who is taller and stronger than any of the crew, but he is a little deaf and has a similar infirmity in sight, and his knowledge of navigation is not much better. The sailors are quarreling with one another about the steering—every one is of opinion that he has a right to steer, though he has never learned the art of navigation.\footnote{36}

If the government is a ship, a democratic one is unlikely to get where it is going. This is what John Adams was referencing when he observed that...

\begin{footnotes}
\footnote{32}{Isaac Asimov, \textit{A Cult of Ignorance}, NEWSWEEK, Jan. 21, 1980, at 19.}
\footnote{33}{\textit{Id.}}
\footnote{34}{ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 267-68 (Henry Reeve trans. 1839).}
\footnote{35}{HOFSTADTER, supra note 26, at 22-23. Marilyn French, author of \textit{The War against Women}, had this to say about Hofstadter's conclusions about the role of religion in fostering anti-intellectualism: [f]undamentalists are militant about the Bible, doctrine, and daily behavior; they forbid smoking, drinking, dancing, card playing, immodest dress, and any sexual behavior outside marriage. Richard Hofstadter finds them anti-intellectual, paranoid, militant, and oppositionalist, yet devoted to populist democracy. Hofstadter's fundamentalists cannot tolerate ambiguity and are phobic about sexuality: they bar sexual behavior outside marriage, and even any verbal reference to sexuality, and would like to extend the taboo to the entire society. MARILYN FRENCH, \textit{THE WAR AGAINST WOMEN} 53 (1993)}
\footnote{36}{1 PLATO, THE DIALOGUES OF PLATO 749 (B. Jowett trans. 1937).}
\end{footnotes}
“democracy never lasts long” but rather “soon wastes, exhausts, and murders itself.”

It is also ironic that a judiciary that has for so long represented an intellectual check on the most irrational of the American people’s impulses has now so thoroughly given into anti-intellectualism. The American Constitution was premised on the idea that sovereignty is derived from—and hence can be limited by—the people, and that the Constitution embodied a limited, revocable grant of sovereignty to a central, national government. Although American notions of “constitutionalism”—a term referring to the broad principle that government is limited by some “higher law”—have evolved since 1787, the one constant has been reliance upon a group of educated, supposedly disinterested persons to protect the republic and its peoples from the most dangerous whims of democracy. At the time of the Constitution’s ratification, most political leaders thought this role could be served by elected representatives themselves. In fairly short order, however, that thinking proved to be wishful, and the concept of judicial review emerged as a principal, if not supreme, means of preserving the constitutional order. As judicial review became an established component of American governance, lawyers solidified their elite status within American society primarily through professionalizing what it meant to be a lawyer. It meant, above all else, to be an intellectual.

There has deservedly been much consternation regarding the politicization of the judiciary. There has been much less regarding members of the nation’s


38. For definitions of “constitutionalism,” see, e.g., David Fellman, Constitutionalism, in 1 DICTIONARY OF THE HISTORY OF IDEAS: STUDIES OF SELECTED PIVOTAL IDEAS 485, 492 (Philip P. Wiener, ed. 1973) (“Constitutionalism as a theory and in practice stands for the principle that there are—in a properly governed state—limitations upon those who exercise the powers of government, and that these limitations are spelled out in a body of higher law which is enforceable in a variety of ways, political and judicial.”); Frank Michelman, Brennan and Democracy, 86 CALIF. L. REV. 399, 400 (1998) (defining “constitutionalism” as “‘a law of lawmaking’”). It is worth noting that, in its broadest sense, “constitutionalism” does not require the existence of a “state.” See generally D. Chalmers, Post-nationalism and the Quest for Constitutional Substitutes, 27 J. OF L. & SOC. 178 (2000); Anne Peters, The Merits of Global Constitutionalism, 16 INDIANA J. OF GLOBAL LEG. STUDIES 397 (2009); Gunther Teubner, Societal Constitutionalism: Alternatives to State-centered Constitutional Theory, in CONSTITUTIONALISM & TRANSNATIONAL GOVERNANCE (Christian Joerges et al., eds. 2004).

39. See infra Part III.A (discussing the evolution of judicial review in the United States).

40. See infra Part III.A (discussing the evolution of judicial review in the United States).

41. See infra Part III.B (discussing the prominent role of lawyers in the United States and the rationales for it).

42. See infra Part III.B (discussing the prominent role of lawyers in the United States and the rationales for it).

43. During Neil Gorsuch’s confirmation hearings, for example, Chief Justice Roberts said the following:

[j]it is a real danger that the partisan hostility that people see in the political branches will affect the nonpartisan activity of the judicial branch . . . [i]t is very difficult, I think, for a member of the public to look at what goes on in confirmation hearings these days, which is a very sharp conflict in political terms between Democrats and Republicans, and not think that the person who comes out of that process must similarly share that partisan view of public issues and public life.
highest court having embraced the same anti-intellectualism that has ensnared American political discourse. It is not just in the technical fields, such as sociology or political science, where judges have shown an antipathy to expertise, but even in areas judges should be able (and certainly willing) to navigate, including history.

This article builds upon scholarship regarding the propensity of lawyers and judges to produce simplistic, selective, and ends-oriented histories in which they dismiss or misconstrue the work of professional historians and eschew the historiographic methods they employ. It does so by examining two opinions, District of Columbia v. Heller and New York Times Co. v. Sullivan, that rely heavily upon historical analysis. Although these two opinions represent radically different judicial (and political) philosophies, they both also exemplify poor attempts at “doing history.” They thus show that the problem of “law office history,” as it has come to be known, is not unique to a particular judicial philosophy but rather has come to be a feature of judicial lawmaking more generally.

This article then examines two oft-studied facets of American legal history: one being the emergence of judicial review and judicial supremacy, the other the professionalization of the bar. The legitimacy of the practice of judicial review and the status of lawyers in American society both rely upon the intellectual demands of judging and lawyering and, in turn, the intellectual expertise of those who have taken it upon themselves to meet those demands. Seen within this historical context, for lawyers and judges to engage in what they should know to be flawed historical analysis or otherwise to embrace anti-intellectualism, as Chief Justice Roberts did, presents a real threat to the legitimacy of law itself.

II. THE SUPREME COURT’S EMBRACE OF “LAW OFFICE HISTORY”

Legal scholars have long criticized the tendency of lawyers and judges, including those serving on the nation’s highest court, of engaging in law office history. This form of history is “a stark, crabbed, oversimplified picture of the past, developed largely to plead a case,” a narrative that sharply contrasts with the

Linda Greenhouse, Will Politics Tarnish the Supreme Court’s Legitimacy, N.Y. TIMES (Oct. 26, 2017), https://www.nytimes.com/2017/10/26/opinion/politics-supreme-court-legitimacy.html. Indeed, some experts have explained Roberts having broken with the conservative wing of the Court to uphold the Affordable Care Act as a decision rooted in a concern for the court’s legitimacy. As one legal expert explained after the ruling, “[o]ne more high-profile partisan ruling, and the Court’s reputation could have been damaged beyond repair.” John Dean, Why Chief Justice Roberts Dared Not Overturn President Obama’s Healthcare Plan, JUSTIA (June 29, 2012), https://verdict.justia.com/2012/06/29/why-chief-justice-roberts-dared-not-overturn-president-obamas-healthcare-plan. Legal scholar Richard H. Fallon recently wrote that the Supreme Court may be more vulnerable “in the long run” than even the Congress and the president, primarily because Justices “have no renewable democratic mandate stemming from periodic elections” and “[a]ll but the most uninformed or naïve among us accept that the Justices’ moral or political views influence their votes in some cases” in which “huge political consequences hinge.” RICHARD H. FALLON, LAW & LEGITIMACY IN THE SUPREME COURT x-xi, 1 (2018).

44. 554 U.S. 570 (2008).
complex, contingent past that comprises professional histories.\textsuperscript{46} As historian Saul Cornell described it, it is “a results oriented methodology in which evidence is selectively gathered and interpreted to produce a preordained conclusion.”\textsuperscript{47} Whereas professional historians may find truths that are useful to folks in the present (or future), that is not their primary aim in doing history. It is rather to find the truth—or, more accurately, a truth—and as constitutional historian Alfred H. Kelly once succinctly put it, “the truth of history does not flow from its usefulness.”\textsuperscript{48} Law office histories capture the truth only inasmuch as the truth serves the desired ends.

Although law office history does not itself demonstrate an explicitly anti-intellectual perspective of those engaged in it, it does implicitly diminish the work done by professional historians and thus undermines the value of professional expertise itself. This Part explores two examples of law office history, one from a “conservative” justice, Justice Antonin Scalia, the other from a “liberal” justice, Justice William J. Brennan. In both, the Justices utilized their own flawed historical analyses to support constitutional interpretations that greatly expanded the scope of constitutional protections; in the case of Scalia, the right to keep and bear arms; in the case of Brennan, the freedom of expression and of the press.\textsuperscript{49} This shows that a lack of proper respect for “experts” (in these cases experts in the art and science of history) is not unique to the adherents of any one judicial philosophy or political ideology but rather an issue whose causes (and effects) run deeper.

A. A “LAW OFFICE HISTORY” OF ORIGINAL CONSTITUTIONAL MEANING

Those who seek to fix the meanings of constitutional provisions—and the Constitution as a whole—to the date of their promulgation are generally referred

\textsuperscript{46} John Phillip Reid, \textit{Law and History}, 27 LOY. L.A. L. REV. 193, 197 (1993) (quoting Samuel Krislov, \textit{The Amicus Brief: From Friendship to Advocacy}, in \textit{ESSAYS ON THE AMERICAN CONSTITUTION} 77, 80 (Gottfried Dietze ed. 1964)). Notably, “law office history” is not limited to practitioners and judges but rather has also infiltrated legal scholarship. As Martin S. Flaherty summarized the problem, legal scholars, in what in its worst form is dubbed ‘law office history,’ notoriously pick and choose facts and incidents ripped out of context that serve their purposes. In a phrase, persuasive historical procedure dictates genuine concern for facts, sources, and context. Abiding by just these standards is hard and time-consuming work, often too hard and time-consuming to meet the imperatives of legal scholarship.


\textsuperscript{47} Saul Cornell, \textit{Heller, New Originalism, and Law Office History: “Meet the New Boss, Same as the Old Boss,”} 56 UCLA L. REV. 1095, 1098 (2009) [hereinafter Cornell, \textit{Heller, New Originalism, and Law Office History}]. See also Eric Foner, \textit{The Supreme Court and the History of Reconstruction—And Vice-Versa}, 112 COLUM. L. REV. 1585, 1604 (2012) (arguing that Supreme Court justices, rather than basing their decisions on a reading of history, most likely “approach history instrumentally, reaching decisions on other grounds and then turning to history for justification”).


\textsuperscript{49} See infra Part II.A (discussing Scalia’s flawed historical analysis in \textit{Heller}, an opinion recognizing an individual right to bear arms); infra Part II.B (discussing Brennan’s flawed historical analysis in \textit{New York Times Co.}, an opinion recognizing a first amendment right against being held liable for libel).
to as "originalists." Although there are many variations of "originalism," Justice Antonin Scalia, through his decades on the Supreme Court, came to personify perhaps its most common incarnation today: original meaning theory. This theory holds that the text of a legal instrument—including the Constitution—should be interpreted based on how reasonable or ordinary persons would have understood the text at the time of its enactment. As Scalia himself explained in a 1996 speech, he did not "care if the framers of the Constitution had some secret meaning in mind when they adopted its words" but rather simply sought to take "the words as they were promulgated to the people of the United States, and what is the fairly understood meaning of those words." The case of District of Columbia v. Heller demonstrates that finding a "fairly understood meaning" is not always so simple a matter.

In that case, a police officer had challenged a Washington D.C. law that, among other things, required citizens "to keep lawfully owned firearms unloaded and disassembled or bound by a trigger lock or similar device." In resolving the constitutionality of D.C.'s gun control law, Scalia claimed, as he did in all cases, to have sought the "normal and ordinary" meaning of the Second Amendment, as it was understood by the voters. Interestingly, he did not cite to a single

51. Id.
53. Joe Carter, Justice Scalia's Two Most Essential Speeches, THE ETHICS & RELIGIOUS LIBERTY COMM'N OF THE S. BAPTIST CONVENTION (Feb. 18, 2016), https://erlc.com/resource-library/articles/justice-scalias-two-most-essential-speeches. See also André LeDuc, The Anti-Foundational Challenge to the Philosophical Premises of the Debate Over Originalism, 199 PENN ST. L. REV. 131, 131 (2014) (describing Scalia's originalism as wrongly "assum[ing] that language represents the world, that the Constitution is something that has an ontologically independent existence, and that propositions of constitutional law are true if they accurately represent the objective Constitution"); PERRY, supra note 50, at 56 (clarifying that the question for originalists is "not what the Framers or Ratifiers meant or understood subjectively, but what their words would have meant objectively—how they would have been understood by an ordinary, reasonably well-informed user of the language, in context, at the time, within the relevant political community that adopted them") (citations omitted) (quotations omitted). André LeDuc also wrote,

perhaps the hottest front in the half-century-old debate over originalism turns on the introduction of semantics, pragmatics, and other techniques from the philosophy of language and linguistic theory. While in some ways these arguments simply build on the now familiar distinction between interpretation and construction defended by the New Originalism, the newest of the New Originalists purport to break new ground in the debate. The originalists argue that they have rehabilitated originalism so as to avoid the criticisms that had been leveled against earlier versions, including those leveled against earlier versions of New Originalism. The newest critics argue that the sophisticated tools of linguistic philosophy, when properly applied in their hands, offer new and decisive challenges to originalism, including the newest of the New Originalisms.


56. Id. at 576-77.
professional historian in his attempt at deciphering how voters would have understood the Second Amendment in the late-eighteenth century. He instead selectively quoted texts entirely divorced from their respective contexts to tell the story that fit his desired result, namely that the Second Amendment protects an individual right to possess firearms for the sake of self-defense.

After a curious argument regarding the relationship between the prefatory clause ("[a] well regulated Militia, being necessary for the security of a free State") and the operative clause ("the right of the people to keep and bear Arms, shall not be infringed"), Scalia began his inquiry into the meaning of "the right of the people." Here, he did so without even attempting to consider the relevant history. Rather, he cited to two other instances in the Bill of Rights where the phrase was used, as well as to another where what he called "similar terminology" was used, before simply concluding that "all three of these instances unambiguously refer to individual rights, not 'collective' rights, or rights that may be exercised only through participation in some corporate body." To Scalia's credit, he did acknowledge that other uses of "the people" in the Constitution "arguably refer" to "the people" as a collective entity. However, he dismissed their relevance simply by insisting those provisions all dealt with the "exercise or reservation of powers, not rights," as if the meaning he apparently attached to that distinction should be self-evident. Scalia also acknowledged that some state constitutions used the term "the people" to refer to the people collectively and used the term "citizen" when defining individual rights. However, he countered these facts simply by proclaiming, again without any historical analysis, that "it was clearly not the terminology used in the Federal Constitution." Scalia thus concluded he should undertake the rest of his analysis with a "strong presumption that the Second Amendment right is exercised individually and belongs to all Americans." 

Scalia then moved on to the question of what ordinary people understood the phrase "keep and bear arms" to mean. Citing to several eighteenth century sources, Scalia first found the "natural meaning" of the phrase to be the possession

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57. In an opinion a decade earlier, one in which Scalia hinted that the Supreme Court might soon consider the meaning of the Second Amendment, Scalia cited to a number of works which, according to him, "marshaled an impressive array of historical evidence" to show "that the 'right to keep and bear arms' is, as the Amendment's text suggests, a personal right." Printz v. United States, 521 U.S. 898, 938 (1997). Notably, only one of those works was authored by a professional historian. Id. That work was Robert J. Cottrol & Raymond T. Diamond, The Second Amendment: Toward an Afro-Americanist Reconsideration, 80 GEO. L. J. 309 (1991). In that article, the authors contended that "the individual rights theory comports better with the history of the right to bear arms in England and Colonial and post-Revolutionary America." Id. at 319.

58. See generally Heller, 554 U.S. 570.
59. Id. at 576-79.
60. Id. at 579.
61. Id.
62. Id. at 579-80.
63. Id. at 580 n.6.
64. Id.
65. Id. at 581.
66. Id.
and carrying of weapons, potentially limited to where the purposes are "offensive or defensive" in nature, but not limited to the specific context of military service.\(^{67}\) Scalia recognized an idiomatic meaning to "bear Arms" that was "significantly different from its natural meaning," namely "to serve as a soldier, do military service, fight or to wage war."\(^{68}\) He then dismissed that definition's applicability to the Second Amendment, however, by stating it would be absurd for the protected right "to consist of the right to be a soldier or to wage war," a deduction that only makes sense if one were to assume the protected right was an individual one, as Scalia did.\(^{69}\) Circularities abound.

As to the meaning of "arms," Scalia seemingly defined the term differently—and even contradictorily—in different portions of the opinion. Initially, he quoted to two revolutionary era dictionaries to conclude "arms" meant "weapons of offence" or "armour of defence."\(^{70}\) Scalia emphasized that the term was applied not just to weapons used in the context of military service, but also to "weapons that were not specifically designed for military use and were not employed in a military capacity," though he did acknowledge, but ultimately dismiss, one thesaurus from the time defining "arms" as "instruments of offence generally made use of in war."\(^{71}\) Scalia’s first definition was thus quite broad, and it most definitely included those firearms commonly used in military combat at the time. Later in the opinion, however, Scalia recognized that the right never protected the right to keep or carry "dangerous and unusual weapons," a term Scalia held would apply to those weapons generally used in military service today, namely "M-16 rifles and the like."\(^{72}\) Scalia thus went from defining "arms" as a broad category including, but not limited to, weapons typically used in military combat, to defining it as a category capable of entirely excluding weapons generally used in the military. He failed to address the discrepancy.\(^{73}\)

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67. Id. at 582-86.
68. Id. at 586 (citations omitted) (quotations omitted).
69. Id. "Worse still," according to Scalia, such an interpretation would render the operative clause of the Second Amendment "incoherent." Id. at 586-87. Scalia claimed "[t]he word 'Arms' would have two different meanings at once: 'weapons' (as the object of 'keep') and (as the object of 'bear') one-half of an idiom. It would be rather like saying 'He filled and kicked the bucket' to mean 'He filled the bucket and died.' Grotesque." Id. at 587.
70. Id. at 581-82.
71. Id.
72. Id. at 627.
73. The only possible objection he addressed was what his new definition might do to the legal significance of the prefatory clause:

[It may be objected that if weapons that are most useful in military service—M-16 rifles and the like—may be banned, then the Second Amendment right is completely detached from the prefatory clause. But as we have said, the conception of the militia at the time of the Second Amendment’s ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.]

Id. at 627-28.
Only at this point did Scalia fully consider the question of whether the Second Amendment protected an individual right to possess and carry weapons for purposes of self-defense as against duly-enacted regulations, after having previously announced a “strong presumption” in favor of that proposition. In doing so, he rightly first proclaimed that the Second Amendment, rather than establishing a new right, merely recognized an already-existing right. He thus looked to sources predating the Constitution to decipher the nature of that right. In particular, he cited to the English Declaration of Rights and its proclamation “that the Subjects which are Protestants, may have Arms for their Defence suitable to their Conditions, and as allowed by Law,” a statement Scalia took to be “the predecessor” to the Second Amendment. Scalia then, without any analysis, concluded the right protected by the Declaration of Rights “was clearly an individual right, having nothing whatever to do with service in a militia.” He recognized it was a right held only against the Crown and not Parliament, but he insisted still it “was secured to them as individuals, according to libertarian political principles.”

According to Scalia, the individual right evolved in the following century to “become fundamental for English subjects,” implicitly including those Americans who drafted and ratified the Second Amendment. On this point, he relied upon the works of William Blackstone, which Scalia characterized as “the preeminent authority on English law for the founding generation.” Blackstone’s description of the right, according to Scalia, “cannot possibly be thought to tie it to militia or military service.” In support of that proposition, one contrary to the consensus historical view, Scalia merely quoted to two passages from Blackstone’s Commentaries, one describing the right to bear arms as “the natural right of resistance and self-preservation,” the other describing it as “the right of having and using arms for self-preservation and defence.”

Scalia then directly linked the English experience to that of Americans in the decades leading up to the Declaration of Independence. As Scalia wrote, “[i]n the tumultuous decades of the 1760’s and 1770’s, the Crown began to disarm the inhabitants of the most rebellious areas,” a move that “provoked polemical
reactions by Americans invoking their rights as Englishmen to keep arms." 83 In support, he quoted to a newspaper article from 1769 stating that "[i]t is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defence." 84 An early American edition of Blackstone’s Commentaries interpreted Blackstone’s work as recognizing the rights of certain citizens to "repe[l] force by force," given that "the intervention of society in his behalf, may be too late to prevent an injury." 85 To Scalia, these quotations were not only probative of the nature of the Second Amendment right, but in fact dispositive. It was meant to protect an individual right to arms for the purposes of self-defense.

Professional historians have not been kind to Scalia’s historical analysis in Heller. These criticisms surely could not have caught Scalia by surprise. Indeed, several prominent historians, including Jack N. Rakove, Saul Cornell, David T. Konig, William J. Novak, and Lois G. Schwoerer, filed an amicus brief in Heller advising the justices, including Scalia, as to the relevant history. 86 In that brief, the historians cautioned the Justices against merely “snatching a line from Blackstone’s Commentaries or Madison’s 46th Federalist” or other contemporary texts. 87 Rather, they said the Justices needed to explain “how a popular right to keep and bear arms figured in the ratification debates of 1787-1788; how that debate was in turn shaped by the Militia Clause of Art. I, § 8; and why that clause appeared to threaten key Anglo-American political ideas dating to the Glorious Revolution of 1688-1689,” while also placing these debates within the broader context of similar provisions used in the English Bill of Rights of 1689 and in state constitutions. 88

While Scalia arguably did some of these things, he did so without ever considering the larger whole. He did so ahistorically. Just as the amicus brief cautioned against, he “snatched” each text out of its proper context as if the meaning of each were self-evident—objective. As to the English Bill of Rights, on which Scalia relied for defining the preexisting individual right to possess and carry arms, for instance, these historians noted that “the right stated . . . was vested not in individuals but in Parliament, which remained free to determine ‘by law’ which Protestant subjects could own which weapons and how they could be used.” 89 While Scalia acknowledged the right being limited to Protestants and it being enforceable only as against the King, not Parliament, he failed to consider the ramifications of that fact, namely that the right, while exercised individually, could be modified or even abrogated based on the interests of the community as a

83. Id.
84. Id. (citation omitted).
85. Id. at 595 (quoting 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES 145-46 n.42 (1803)).
87. Id. at 2.
88. Id.
89. Id. at 2-3.
whole, as represented in Parliament. It was, in short, a collective political right for the community (or polity) to determine the scope and meaning of the right to arms rather than an unelected monarch.

This is not the only portion of the opinion where Scalia seemed to confuse what historians mean when they talk about “collective rights” or “civic rights” as understood by those who drafted or ratified the Constitution or Bill of Rights. Throughout his opinion in Heller, Scalia seemingly failed to grasp what a right would even look like if not fitting his own individualist (and ahistorical) notions. In his discussion of the prefatory clause, for example, Scalia acknowledged there were three principal reasons why Americans of the late eighteenth century deemed the militia “necessary to the security of a free State.”

First, he noted, “it is useful in repelling invasions and suppressing insurrections.”

Second, “it renders large standing armies unnecessary.”

And third, a “well-regulated militia” is “better able to resist tyranny.”

He failed to even consider how each of these reasons points to a collective or civic right rather than an individual one. They in fact point to the necessity of a community having the means to defend itself and its republican government against both internal and external threats. These threats included a potentially unresponsive despotic president as well as a citizen who might use arms in a way contrary to the common good of the community, which even Scalia recognized is what was meant by the term “the free State.”

The story of the Constitution’s ratification as the historians told it in their amicus brief was also far different from Scalia’s version. The chief concern of Anti-Federalists, including those Scalia quoted, was not simply that a government might infringe upon their rights as individuals. Rather, it was that the Constitution threatened significant changes in how militias might be governed, particularly in potentially giving Congress authority over an area theretofore subject only to state control. Anti-Federalists feared Congress might use (or rather abuse) its constitutional powers to undermine state militias, an institution citizens had long considered one of liberty’s “greatest bulwarks.” Still, “[n]othing in the ratification debates,” these historians insisted, “indicated that the exercise of this right required limiting the customary police powers of state and local government.”

91. Id. at 597.
92. Id. at 597-98.
93. Id. at 598.
94. Id. at 597. Scalia’s confusion is perhaps best demonstrated by a passage in an opinion over a decade before Heller, in which Scalia wondered aloud whether, “at some future date,” he and his colleagues would “have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms “has justly been considered, as the palladium of the liberties of a republic.” Printz v. United States, 521 U.S. 898, 939 (1997) (emphasis added). Given that Printz involved individuals challenging a duly-enacted law restricting access to firearms, Scalia obviously took that quote to reference an individual, rather than a collective, right, a presumption that is perplexing given that Story explicitly referenced “the liberties of a republic” rather than its individual members. Id.
95. Historians’ Amicus Brief, supra note 86, at 3.
96. Id.
As for the Federalists, who dominated the first Congress and generally favored more power being vested in a centralized, national government, they sought a compromise with the Anti-Federalists. According to the historians' brief in *Heller*, "they simultaneously sought to assuage the expressed Anti-Federalist concern about the maintenance of the militia while preserving congressional authority over its organization, arming, and discipline."97 This is why, the historians explained, the Federalists rejected a qualifying provision that would have defined the militia as being "composed of the body of the people," as that definition would have unacceptably—to them—"impair[ed] congressional authority to determine how extensive membership in the militia should be."98

The historians also emphasized how little discussion there was regarding an alleged right to the private, individual ownership of firearms, which they also noted were "subject to extensive legal regulation" throughout the eighteenth century.99 They contrasted this with other supposedly "fundamental" rights. "Americans were hardly shy," they argued, "about identifying and discussing such fundamental rights as representation, trial by jury, or freedom of conscience, or the natural rights to life, liberty, and property."100 This suggests to the historians that the question of the scope or nature of any individual legal right to firearms was a minor question at most, in contrast not just to other fundamental rights, but also to issues regarding the proper role of militias in the emerging constitutional order. The role of the militia, the historians noted, was "the subject that was patently in dispute in 1787-1789," a fact they cited to conclude that the prefatory clause to the Second Amendment reveals the true original meaning of the right to keep and bear arms.101

Alas, Scalia completely ignored the historians' insights, preferring his own version of history instead. As Joshua Stein told it, "[historians] tried to tell the Court what they thought the Founders thought the Second Amendment meant," but "[t]heir version of the past lost out to an account that was, unsurprisingly, able to give the Court's majority the past it needed to rule the way it wanted to."102 Also not surprising is the fact historians and legal scholars have cited to Scalia's opinion in *Heller* as a prime example of law office history. As historian Saul Cornell characterized the opinion, "it seems clear that it is not the triumph of a new methodology, but really just the latest incarnation of the old law office history."103 In criticizing *Heller*, prominent jurist Richard Posner explained the process by which law office histories like it are created:

97. *Id.*
98. *Id.* at 3-4.
99. *Id.* at 4.
100. *Id.*
101. *Id.*
[1]awyers are advocates for their clients, and judges are advocates for whichever side of the case they have decided to vote for. The judge sends his law clerks scurrying to the library and to the Web for bits and pieces of historical documentation. When the clerks are the numerous and able clerks of Supreme Court Justices, enjoying the assistance of the capable staffs of the Supreme Court library and the Library of Congress, and when dozens and sometimes hundreds of amicus curiae briefs have been filed, many bulked out with the fruits of their authors' own law-office historiography, it is a simple matter, especially for a skillful rhetorician such as Scalia, to write a plausible historical defense of his position.104

Posner then noted that the matter was "not so simple in Heller," causing Scalia and his clerks to "labor[] mightily to produce a long opinion . . . that would convince, or perhaps just overwhelm, the doubters. The range of historical references in the majority opinion is breathtaking, but it is not evidence of disinterested historical inquiry. It is evidence of the ability of well-staffed courts to produce snow jobs."105 Prominent legal historian Paul Finkelman was more succinct in his condemnation of Heller when he said it was "horrible on the history."106

Because of the tendency of lawyers to produce poor history, some historians have gone further to argue against originalism as a theory of legal or constitutional interpretation. Professional historians indeed find the entire enterprise of finding the one true "original meaning," "original intent," or "original understanding" of any text for the purposes of defining legal rights and duties in the future to be inherently problematic. This is because history is not about developing an unquestioned meta-narrative of the past but rather about uncovering the full complexity of the human condition and the worlds humans have inhabited. As Gordon Wood once explained, "[t]he past in the hands of expert historians becomes a different world, a complicated world that requires considerable historical imagination to recover with any degree of accuracy. The complexity . . . comes with the realization that the participants were limited by forces that they did not understand or were even aware of . . . "107 Finkelman doubted he knew of "any serious historians that believe you can do original-intent analysis for most cases. It doesn't work well if you take history seriously. [The past] is much too complicated. Courts don't like complicated. They want history to prove something, and history doesn't do that."108 Harvard historian Jill Lepore compared originalism to "historical fundamentalism, which is to history what

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105. Id.
106. Stein, supra note 102, at 370.
108. Stein, supra note 102, at 364.
astrology is to astronomy, what alchemy is to chemistry, what creationism is to evolution." All of this is why legal historian Peter Hoffer was able to conclude confidently that "[n]o working historian (that is, historian teaching in a history department) credits any of the various versions of originalism, because we know how difficult it is to do the history that would substantiate such a version of interpretation." However, it is not just judges of an "originalist" bent that appeal to history in rendering constitutional interpretations.

B. A "LAW OFFICE HISTORY" OF A "LIVING CONSTITUTION"

The alternative to the "originalist" position is one positing that interpretations of constitutional provisions should incorporate some consideration of how society and its norms have changed since the provision’s enactment. Because these views generally envision a constitution that can grow and evolve over time, much as living organisms do, they are collectively referred to as the "living Constitution" theory. As one of the first to speak of the Constitution as though it were a living thing, Woodrow Wilson once articulated, “[t]he Constitution must, of the necessity of the case, be a vehicle of life. As the life of the nation changes so must the interpretation of the document which contains its change, by a nice adjustment, determined, not by the original intention of those who drew the paper, but by the exigencies and the new aspects of life itself.” Many adhere to such a view based at least in part on the impracticality or even impossibility of finding a one true historical meaning to dictate particular legal results years, decades, or even centuries later. Justice Brennan, for one, contended in a 1963 case concerning the religious clauses of the First Amendment that "a too literal quest for the advice of the Founding Fathers upon the issues of these cases seems to me futile and misdirected," in substantial part because “the historical record is, at best, ambiguous, and statements can readily be found to support either side of the proposition.”

109. Id. at 363.
110. Id. at 364.
111. This is not to suggest there are only two judicial philosophies or even that this is the only way one can categorize these many philosophies.
113. School Dist. of Abington Township v. Schempp, 374 U.S. 203, 237 (1963) (Brennan, J., concurring). Later, in 1985, he attacked the doctrine of originalism by declaring that “it is arrogant to pretend that from our vantage point we can gauge accurately the intent of the Framers on application of principle to specific contemporary questions.” Arlin M. Adams, Justice Brennan and the Religion Clauses: The Concept of a “Living Constitution,” 139 U. PA. L. REV. 1319, 1319 (1991). Similarly, Paul Brest, in 1980, considered strict originalism an untenable approach to constitutional interpretation due to the impossibility of understanding the past in its own terms. Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U.L. REV. 204, 218-22 (1980). Characterizing the strict-originalist approach as "questing after a chimera," Brest argued that any understanding of original understanding "may be so indeterminate as to undermine the rationale for originalism." Id. at 222. Brennan’s criticism insinuated that originalists are concerned with finding the subjective intent or collective understanding of the Framers, even as some originalists claim not to be concerned with what was actually in anyone’s mind. For a summary of Brennan’s judicial philosophy, see Adams, supra note 113, at 1319.
Justice Brennan’s seminal 1964 opinion in *New York Times Co. v. Sullivan*, however, shows that a “living Constitution” sometimes requires historical analysis in interpreting it and is thus prone to producing law office history. In that case, *The New York Times* was found guilty of libel for accusing the Montgomery police of conspiring with others to undermine Martin Luther King’s civil rights efforts.\(^{114}\) Under Alabama law, L.B. Sullivan, the police commissioner, was not required to prove that he had been actually harmed, and the defense of truth was unavailable to the *Times* because the advertisement contained factual errors.\(^{115}\) The jury found in favor of Sullivan and against the *Times*, awarding the plaintiff $500,000 in damages.\(^{116}\) Once the decision was upheld by the highest court in Alabama, the Supreme Court agreed to review the decision and was, thus, faced with the question of whether Alabama’s libel law unconstitutionally infringed on the *Times’* First Amendment rights.\(^ {117}\)

Writing for the Court, Justice Brennan looked to history to ascertain what he called the “central meaning” of the First Amendment. In doing so, he found several quotes from James Madison, often regarded as one of the principal architects of the Constitution and Bill of Rights, including Madison’s assertion in the House of Representatives that “the censorial power is in the people over the Government, and not in the Government over the people” and his conclusion, from the Virginia Resolutions of 1798, was that the Sedition Act passed that year—a law which allowed for the prosecution of those who said or printed anything deemed malicious to the president or the government of the United States—was unconstitutional.\(^{118}\) Madison’s reasoning was that the Sedition Act was “levelled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right.”\(^{119}\) These quotations, according to Justice Brennan, revealed Madison’s understanding that “the right of free public discussion of the stewardship of public officials was . . . a fundamental principle of the American form of government.”\(^{120}\)

Justice Brennan argued that Madison’s views were important not because they revealed some “original understanding” or “original intent,” but because they contributed to a “national awareness” of the amendment’s core meaning and ultimately “carried the day in the court of history.”\(^{121}\) In support he cited the facts that Thomas Jefferson, as president, pardoned those convicted under the Act; that John Calhoun found, in 1836, the Act’s unconstitutionality to be a matter “which no one now doubts”; that Congress, in 1840, repaid any fines levied pursuant to the Act; and that justices of the Supreme Court have also “assumed” the Act’s

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115. *Id.* at 258-64.
116. *Id.* at 256.
117. *Id.* at 264-65.
118. *Id.* at 273-76.
119. *Id.* at 274.
120. *Id.* at 275.
121. *Id.* at 276.
invalidity.122 In support of this final point, Justice Brennan cited to the dissents of Justices Oliver Wendell Holmes and Louis Brandeis in Abrams v. United States, Justice Robert A. Jackson’s dissent in Beauharnais v. Illinois, and Justice William O. Douglas’ scholarly work, The Right of the People.123 The views expressed by these politicians and justices, according to Justice Brennan, “reflect a broad consensus that the Sedition Act of 1798, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.”124

Justice Brennan’s historical argument regarding the “court of history” was deeply flawed. His formulation of a “broad consensus” reflected by politicians and jurists failed to account for the many historical facts that contradict there having been such a consensus. Regarding the views of political leaders, Justice Brennan cited Calhoun’s testimony and Congress’ repayment of Sedition Act fines, but ignored the federal government’s criminalization of seditious libel decades later during World War I. With the Espionage Act of 1917 and the Sedition Act of 1918, suppression of speech during World War I was perhaps just as widespread as it had been at the end of the eighteenth century.125 As for the views of prominent jurists, David Rabban showed, in his 1997 work, Free Speech in Its Forgotten Years, that the only consensus that could be said to have been formed prior to World War I was one of “hostility to virtually all free speech claims.”126 Indeed, prior to World War I, courts normally applied the English common law “bad tendency” doctrine to uphold government restrictions of speech.127 This doctrine allowed the state to punish speech that had any tendency, no matter how slight, of leading to violations of law.

Justice Brennan’s reliance upon Justice Holmes’ dissenting opinion in Abrams v. United States as a reflection of a longstanding judicial consensus is especially troubling. Even Justice Holmes had to recognize his dissenting opinion in Abrams as a break from well-established judicial precedent. First, his opinion was merely a dissenting opinion that carried only one other vote. In Abrams, the majority upheld the convictions of Russian immigrants for their roles in publishing and distributing leaflets which criticized President Woodrow Wilson’s sending of

122. Id.
123. Id.
124. Id.
125. DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 248-98 (1997). See also Zechariah Chafee, Jr., Freedom of Speech in War Time, 32 HARV. L. REV. 932, 936 (1919) (noting that “scores of citizens [had been] imprisoned . . . only for their disapproval of the war as irreligious, unwise, or unjust”).
126. RABBAN, supra note 125, at 2.
127. See generally id. In addition to politicians and jurists, prominent scholars writing around the time that Chafee published his post-World War I works on free speech also considered the Sedition Act of 1798 to have been constitutional, thus providing further evidence against Brennan’s “court of history” argument. Harry Kalven, Jr., The New York Times Case: A Note on “The Central Meaning of the First Amendment,” 1964 SUP. CT. REV. 191, 206 (1964) (citing Thomas F. Carroll, Freedom of Speech and of the Press in the Federalist Period: The Sedition Act, 18 MICH. L. REV. 615 (1920); Edward S. Corwin, Freedom of Speech and Press under the First Amendment: A Resume, 30 YALE L.J. 48 (1920); James P. Hall, Free Speech in War Time, 21 COLUM. L. REV. 526 (1921)).
troops into Russia and which called for a general workers’ strike in protest. If any of the holdings in Abrams represented a consensus view, it would be those signed onto by seven of the nine justices, not those contained in Justice Holmes’ dissent. Moreover, Justice Holmes himself apparently adopted the views represented in his Abrams dissent only shortly before the Court decided that case. In March of that year, he wrote three opinions, each for a unanimous Court, in which he upheld convictions of anti-war socialists under the Espionage and Sedition Acts. Accepting most of the positions of the government, he approved punishing speech based only on its “indirect tendencies” of causing harm, gave substantial deference to jury determinations, and allowed for greater restrictions on speech in times of war. While it may be possible to blame these restrictive and deferential rulings on the exigencies of war, they were, in fact, completely in line with Justice Holmes’ pre-war opinions. Writing for the Court in 1907, for instance, he declared unequivocally that the First Amendment, its central purpose being “to prevent all such previous restraints upon publications as had been practiced by other governments,” does not “prevent the subsequent punishment of such as may be deemed contrary to the public welfare.” Moreover, according to Justice Holmes, the subsequent punishment of speech, whether for criminal libel, contempt, or other offense, “may extend as well to the true as to the false.”

It was just a few years before Brennan’s opinion in New York Times Co. v. Sullivan that one historian, in a book titled Legacy of Suppression, challenged established orthodoxy regarding the history of the First Amendment on which Brennan relied. This historian, Leonard Levy, through his research, had found that “the persistent image of colonial America as a society which cherished freedom of expression is a sentimental hallucination that ignores history.”

129. In Schenck v. United States, 249 U.S. 47 (1919), Holmes upheld the conviction of the Secretary of the Socialist Party for printing pamphlets advocating opposition to the military draft. Id. at 48-49, 53. In support, he famously reasoned that “[w]hen a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right.” Id. at 52. Then, in Frohwerk v. United States, 249 U.S. 204 (1919), he upheld the conviction of an editorial writer for conspiracy to obstruct recruitment based on a series of editorials he wrote denouncing U.S. involvement in the war. Id. at 205-06, 210. Finally, in Debs v. United States, 249 U.S. 211 (1919), he upheld the conviction of socialist leader Eugene V. Debs for a speech Debs gave in Canton in which he lauded others for their refusal to serve in the military as well as their efforts to obstruct military recruitment. Id. at 212, 217.
130. RABBAN, supra note 125, at 279.
132. Id. The reader should recognize the striking similarity between these quotes and Levy’s central thesis in Legacy of Suppression. That Levy’s work was considered to be revisionist even though it was completely consistent with pre-World War I perspectives shows how completely Chafee’s work obscured these pre-war views of the First Amendment’s scope.
Based on his review of court records, Levy argued that understandings of freedom of the press in colonial America never meaningfully diverged from the Blackstonian notion, which held that "the liberty of the press . . . consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published."135 Even the much-celebrated trial in 1735 of Peter Zenger for seditious libel, according to Levy, had no significant effect upon the freedom of the press in colonial New York and did not produce in America a broad concept of freedom of expression.136 While Zenger's acquittal continues to be celebrated as a momentous victory for the American press in its enduring struggle with "the royal judges" to secure a broad freedom of the press, Levy contended that, in practice, the Zenger case had little impact on the common law and did not stimulate the development of libertarian thought.137 While acknowledging that the case, at best, established the affirmative defense of truth in seditious libel prosecutions, Levy pointed out that this defense of truth, as American libertarians later discovered, offered only illusory protections, especially considering that "one man's truth is another's falsehood" and that the truth of opinions, which were punishable, was "not susceptible of proof" at all.138 Levy also minimized the case's other supposedly momentous achievement: the establishment of the principle that juries should decide the law in addition to the facts in seditious libel trials.139 He reasoned that "juries, with the power of ruling on the guilt or innocence of alleged libels, proved to be as susceptible to prevailing prejudices as judges when they decided the fate of defendants who had expressed unpopular sentiments."140 Thus, American libertarians, according to Levy, "belatedly discovered that they had mistaken a prop of straw for brick" by Amendment's free-press clause. Id. Indeed, he did not intend to write a book on the First Amendment at all. Id. As Levy recalled, The Fund for the Republic, Inc. had commissioned him to write a scholarly memorandum on the historical background and original meanings of the First Amendment's clauses. Id. Though he thought that two other works already adequately answered the Fund's questions, at the Fund's behest, he conducted his research. Id. To both Levy's and the Fund's surprise, he found that "the Framers had a constricted view of the scope of permissible political expression." Id. at viii. Because this was not the result the Fund desired, it agreed to publish a pamphlet consisting only of Levy's work on the religious clauses and rejected his work on freedom of speech and the press. Id. Believing that his "fellow liberals seemed to be suppressing scholarship that did not support their presuppositions," Levy decided to conduct further research and write an article on the meaning of the First Amendment clause protecting freedom of speech and the press. Id. at viii-ix. Ultimately, he found himself writing an entire book, which became Legacy of Suppression. Id.

135. LEVY, EMERGENCE, supra note 134, at 12. Blackstone went on to explain that, while "[e]very freeman has an undoubted right to lay what sentiments he pleases before the public," one who "publishes what is improper, mischievous, or illegal . . . must take the consequences of his own temerity." Id. Further, "the liberty of the press," according to Blackstone, "is by no means infringed or violated" when "blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law." Id.

136. LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 131 (1960) [hereinafter LEVY, LEGACY].

137. Id. at 64.

138. LEVY, LEGACY, supra note 131, at 133.

139. Id. at 131.

140. Id.
accepting the Zenger defense's positions instead of renouncing the law of seditious libel altogether.141

Regarding the Revolutionary era, Levy found that “[n]o cause was more honored by rhetorical declamation and dishonored in practice than that of freedom of expression.”142 Based on evidence of widespread vigilantism against and intimidation of those who opposed the cause of the Revolution, he ultimately agreed with Chief Justice Hutchinson's summation that the American revolutionaries were fighting for “an unlimited Freedom of Thought and Action, which they would confine wholly to themselves”—and in Levy's words, “free speech for one side only is not free speech at all.”143

Given this context, to find that the First Amendment repudiated the English law of seditious libel would require compelling evidence that the drafting and adoption of the Constitution and the Bill of Rights represented an intention to bring about wide-ranging reforms of the press' freedoms—and Levy uncovered no such evidence. He found instead that, while many clamored for an express guarantee of freedom of the press during the debate over the Constitution's ratification, “the insistent demand for its protection on parchment was not accompanied by a reasoned analysis of what it meant, how far it extended, and under what circumstances it might be limited.” Even worse, the few statements from that time period that clarified that the extent of the freedom of the press tended to reaffirm, not overturn, Blackstonian notions of it.145 Moreover, the debates in the Congress and the states over the First Amendment and the Bill of Rights were even less revealing. If anything, they indicated, according to Levy, an utter lack of “passion on the part of anyone to grind underfoot the common law of liberty of the press.” Accordingly, though he began his inquiry expecting to confirm liberal assumptions regarding the meaning of the First Amendment, he was forced to conclude that the Revolutionary generation did not believe in an expansive freedom of expression, even in the realm of politics.147

Despite Legacy of Suppression's overturning of nearly all academic precedent on the subject, scholars generally accepted Levy's conclusions and praised his work. James Morton Smith, for instance, hailed the work as a "brilliantly argued book" and a "first-rate study of first magnitude," while Herbert J. Storing applauded Levy's "admirable impartiality in setting the historical

141. Id. at 133.
143. LEVY, LEGACY, supra note 136, at 87 (internal citation omitted). Levy also cited Arthur Schlesinger's statement that "liberty of speech belonged solely to those who spoke the speech of liberty." Id. at 176 (internal citation omitted).
144. Id. at 214-15. Among the advocates for the Bill of Rights who failed to clarify the meaning of freedom of the press were George Clinton, Elbridge Gerry, Patrick Henry, Thomas Jefferson, Richard Henry Lee, Luther Martin, George Mason, Spencer Roane, and Melancthon Smith. Id. at 215.
145. Id. at 215-19.
146. Id. at 233.
147. Id. at viii.
record straight.”148 Merrill Jensen described the work as “invaluable” and as “a healthy corrective to much woozy thinking about a central problem,” concluding that “[n]o student of early American history, be his interest law or politics, can safely ignore the book.”149 Criticisms of the work did not question Levy’s central thesis or his depiction of the legal realities of the era, but rather challenged his insinuations that the American press was suppressed in practice as much as in theory and his disparagement of American libertarians.150

Some, however, attacked Levy’s conclusion not because of any flaws in his methodology or reasoning, but because of how his conclusion might be used to restrict constitutional protections in the future. Specifically, they predicted that reactionaries in the legal community would seize upon Levy’s discoveries in their attempts to restrict the scope of the First Amendment’s protections. Justice Hugo L. Black, for instance, wrote that the book was “probably one of the most devastating blows that has been delivered against civil liberty in America for a


150. See, e.g., George L. Haskins, *Legacy of Suppression*, 34 NEW ENG. Q. 116, 117 (1961) (book review) (questioning Levy’s assertion that, through the eighteenth century, America did not have much experience with freedom of speech “as a meaningful condition of life,” by contending that the colonial period at least made some rhetorical contributions in that direction that could be seized upon by later generations); Jensen, supra note 149, at 457 (contending that, while Levy’s assertion that “speech and the press were not free anywhere during the Revolution” was correct as a matter of law, Levy paid too little attention to practice); Rabban, supra note 149, at 796 (conceding the correctness of Levy’s central thesis regarding seditious libel but challenging Levy’s failure to appreciate other libertarian advances incorporated into the Constitution); Stanford Law Review Editors, *Legacy of Suppression*, 13 STAN. L. REV. 991, 993 (1961) (book review) [hereinafter Stanford Law Review Editors] (criticizing Levy for not giving enough credence to the popular ideal and instead focusing too heavily on the “gulf between principles and practice”). It was not until decades later that scholars launched a serious attack on Levy’s central thesis. See William Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 114 (1984) (contending that the Founders, in fact, intended to reject seditious libel, as evidenced mainly by the Constitution’s federalist structure with limited powers granted to the central government); William W. Van Alstyne, *Review: Congressional Power and Free Speech: Levy’s Legacy Revisited*, 99 HARV. L. REV. 1089, 1096-97 (1986) (contending that the First Amendment should be seen within the federalist structure of the Constitution as a whole, which shows that the Framers did not intend for the Congress to have any power over the press, much less the power to prosecute for seditious libel). Levy promptly responded to these criticisms by pointing out that *Legacy of Suppression*’s thesis was not that the Founders favored seditious libel prosecutions or that they intended for Congress to have the power to prosecute seditious libel, but rather merely that their conceptions of freedom of the press—as opposed to conceptions of federalism—did not prohibit it. Leonard W. Levy, *The Legacy Reexamined*, 37 STAN. L. REV. 767, 770 (1985). More than two decades after the publication of *Legacy of Suppression*, Levy produced a revised edition of the work with a new title, *Emergence of a Free Press*, in which he acknowledged that the American experience with a free press was much more extensive in practice than by law or in theory. *Id.* Despite its considerable revisions, however, this new edition ultimately reiterated the central thesis from *Legacy of Suppression*. See generally LEVY, *EMERGENCE*, supra note 134 (expanding on the central thesis from the original book, albeit with a more optimistic framing).
long time." The Stanford Law Review even entertained premonitions of the Supreme Court upholding the conviction of a newspaper editor "for 'excessive' and 'untrue' criticism of a local political figure," citing "Libertarian Levy's history in a generous footnote."152

Instead, just a few years after Levy's publication of Legacy of Suppression, the Supreme Court, in New York Times Co. v. Sullivan, delivered an opinion that prominent First Amendment scholar Alexander Meiklejohn, who long favored an absolute freedom for political discourse, hailed as "an occasion for dancing in the streets."153 This might be part of the reason Levy later complained that the Supreme Court merely "resorts to history for a quick fix, a substantiation, a confirmation, an illustration, or a grace note," rather than "really look[ing] for the historical conditions and meanings of a time long gone in order to determine the evidence that will persuade it to decide a case in one way rather than another."154 Importantly, it also shows that Levy's observation applies to judges across the philosophical spectrum.

None of this is to say that Brennan's law office history in Sullivan presents the same issues as Scalia's in Heller. For one, Brennan's history, while problematic, does not evidence an antagonistic attitude toward the professional study of history. Notably, Brennan could have simply ignored Levy's work altogether in favor of works which more fully supported Brennan's view of the First Amendment. He did not do that. In contrast, Scalia completely dismissed the entire notion of there being a professional history requiring a special expertise. Less than two years after Heller, the Supreme Court faced the issue of whether the same Second Amendment protections Scalia had established in Heller applied as against state governments via the Fourteenth Amendment's due process clause. In a scathing dissent to a majority opinion that largely mirrored Scalia's historical mistakes in Heller, Justice Stephen Breyer, in McDonald v. City of Chicago,155 cited to several post-Heller professional historical accounts, from which he concluded that "[t]he historians now tell us . . . that the right to which Blackstone referred had, not nothing, but everything, to do with the militia," and that historians could not "find any convincing reason to believe that the Framers had something different in mind than what Blackstone himself meant."156

This history of course flatly contradicts Scalia's history in Heller.

153. Kalven, Jr., supra note 127, at 221 n.125. Concurring with Meiklejohn, Harry Kalven, Jr., added that "the theory of the freedom of speech clause was put right side up for the first time." Id. at 208.
156. Id. at 915-16 (Breyer, J., dissenting).
While professional historians are far from monolithic in their interpretations of the Second Amendment’s history, Breyer conjectured that the Supreme Court’s version of history “would lose a poll taken among professional historians of this period, say, by a vote of eight to one.”¹⁵⁷ “If history, and history alone, is what matters,” Breyer asked rhetorically (and seemingly frustratingly), “why would the Court not now reconsider Heller in light of these more recently published historical views?”¹⁵⁸ Scalia wrote a concurring opinion specifically to address Stevens’ dissent.¹⁵⁹ Rather than contesting Stevens’ characterizations as to the shape of the historical field as it came to the Second Amendment, Scalia instead questioned “whether or not special expertise is needed to answer historical questions,” before stating confidently that “judges most certainly have no ‘comparative . . . advantage’ . . . in resolving moral disputes.”¹⁶⁰

¹⁵⁷ Id. at 916. For works of professional historians arguing that the second amendment incorporated an individual right to firearms, see Cottrol & Diamond, supra note 57, at 314 (citations omitted) (stating that “[a]t the heart of the individual rights view is the contention that the framers of the Second Amendment intended to protect the right to bear arms. The first of these was to ensure popular participation in the security of the community, an outgrowth of the English and early American reliance on posses [sic] and militias made up of the general citizenry to provide police and military forces. The second purpose was to ensure an armed citizenry in order to prevent potential tyranny by a government empowered and perhaps emboldened by a monopoly of force”); Robert E. Shalhope, The Ideological Origins of the Second Amendment, 69 J. OF AM. Hist. 599, 613-14 (1982) (arguing that the amendment incorporated a right to possess arms for both personal defense and the protection of the state). It is worth noting, however, that neither of the above articles suggested, much less explicitly argued, that the right was understood as prohibiting the state from enacting reasonable time, place, and manner restrictions on the possession and use of firearms. For works arguing that the second amendment protected only a collective right or one otherwise limited to the context of militia service, see Saul Cornell, A WELL REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA 18 (2008) (arguing that the second amendment embodied a “civic right,” by which he meant a duty of citizens to the republic to arm themselves so that they could serve in a “well-regulated militia” and that it did not impede the power of states to regulate individual sales and uses of firearms); Lawrence Delbert Cress, An Armed Community: The Origins and Meaning of the Right to Bear Arms, 71 J. OF AM. Hist. 22, 23 (1984) (“[T]he Second Amendment assured ‘the people,’ through the agency of ‘a well regulated Militia,’ a role in the preservation of both the external and the internal security of the Republic. It did not guarantee the right of individuals, like Daniel Shays and his followers, to closet armaments.”); David Thomas Konig, The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of “The Right of the People to Keep and Bear Arms,” 22 L. & Hist. Rev. 119, 158 (2004) (arguing that the second amendment represented neither an individual nor a collective right, but rather a civic one—an “individual right exercised collectively” and solely in the context of militia service). See also Robert H. Churchill, Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment, 25 L. & Hist. Rev. 139, 162 (2007) (stating that “colonial and early state governments routinely exercised their police powers to restrict the time, place, and manner in which Americans used guns”). For an interesting political-scientific analysis of legal scholarship on the second amendment, see Robert J. Spitzer, Lost and Found: Researching the Second Amendment, 76 CHI.-KENT L. REV. 349 (2000) (showing that legal scholarship largely took a collective-rights view of the second amendment until the 1980s, when the number of articles arguing for an individual right (almost all written by non-historians) skyrocketed).

¹⁵⁸ McDonald, 561 U.S. at 916. In his questioning (implicitly of Scalia and the conservative wing of the Supreme Court), Breyer also hit on another element that distinguishes Brennan’s flawed historical account from Scalia’s and that of his originalist counterparts. That is, to Brennan and other non-originalists, historical understandings do not constitute the foundational element for constitutional interpretations as they supposedly do for originalists. One would arguably expect originalists, given the importance of history to their philosophy, to try even harder to ensure their histories are as reliable as possible.

¹⁵⁹ Id. at 791 (Scalia, J., concurring).

¹⁶⁰ Id. at 804-05 (quoting id. at 880 (Stevens, J., dissenting)).
In this one passage, Scalia suggested that history is not a field worthy of respect, even as he relied upon history as a way ostensibly to prevent himself from injecting his own biases or moral judgments into his opinions. It is especially problematic for him to have pretended he was doing so as an alternative to relying upon his own moral judgments, given that the insights of professional historians—those Scalia chose to ignore—were indeed developed through years of reading historical texts and training in historical methodologies to minimize the risks of interjecting their own personal biases in their search for historical truths. For Scalia to ignore that truth is to fully embrace anti-intellectualism. It is, to borrow Scalia’s own terminology, “[p]ure applesauce.”

The point still stands, however, that law-office history, on its own a mild form of anti-intellectualism, is not tied to any particular political or judicial philosophy. It is rather a phenomenon capable of cutting across the political spectrum. This is not a partisan issue, but it is a serious one.

As Part III discusses, the law (as well as lawyers and judges) occupies a special position in American social and political structures, one based on the perceived intellectual character of law and the superior intellects of lawyers and judges. As with other institutions comprised of “experts” in their respective fields, the increasing prevalence of anti-intellectual sentiments, including from the bench of the nation’s highest court, threatens to undermine law’s (always fragile) position in American life.

III. THE ROLE OF LAW IN AMERICAN SOCIETY

The United States is not a pure democracy, as we all know. Rather, Americans have come to see political power, whether held by “the people” or by some elite segment of society, as being inherently constrained by rights and privileges as defined in, and protected by, federal and state constitutions and by the broader legal system. They generally see courts, especially the Supreme Court, as the protectors of fundamental rights as against the democratic will of the people—as against a “tyranny of the majority,” as Alexis de Tocqueville famously called it. As Justice Robert J. Jackson wrote in a 1943 opinion,

163. TOCQUEVILLE, supra note 34, at 263. See also Andrew Cohen, Supreme Court Review: The Tyranny of the Majority, THE ATLANTIC (June 29, 2012), https://www.theatlantic.com/national/archive/2012/06/supreme-court-review-the-tyranny-of-the-majority/259025/ (“Our federal courts are supposed to be a bulwark against the tyranny of the majority.”); RONALD DWORKIN, A MATTER OF PRINCIPLE 33-71 (1985) (discussing original intention in relation to Constitutional analysis); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (addressing guidelines for the Supreme Court’s application of the Constitution to modern life); James D. Smith, Private Property Protection Legislation and Original Understandings of the Takings Clause: Can They Co-Exist?, 21 J. LEGIS. 93, 94 (1995) (“What must be remembered though, is that the Fifth Amendment Takings and Just Compensation Clauses are constitutional guarantees of a civil right, expressly designed to guard against tyranny by the majority. The courts are the guardians of these rights.
The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. Jackson's historical claims were inaccurate, however. As this Part will show, the notion of the judiciary serving as the supreme voice on the constitutional make-up of American governance and society, including ideas of it being the primary protector of the rights of individuals as against a duly-elected, representative government, was not a perspective generally held by America's founding generation. Rather, it emerged in fits and starts over the United States' first two centuries. Although views of judicial review have ebbed and flowed, one near constant in American history has been the prominence and prestige of the law and its practitioners in American life. While the role of the broader legal community has evolved through time, its power has always been rooted in law's intellectual character.

A. A (BRIEF) HISTORY OF JUDICIAL REVIEW

The concept of judicial review, as we observe it today, has been far from a constant feature of the American political order. Indeed, the notion of an unelected group of people overturning federal legislative policies duly enacted pursuant to constitutional procedures was hardly debated at all during the drafting and ratification of the Constitution. As legal historian Larry Kramer has concluded, "[t]he idea of depending on judges to stop a legislature that abused its power never even occurred to the vast majority of participants in the debates." Rather,

and have frequently found legislation to be unconstitutional, despite being the true determination of the majority's will.


165. See infra Part III.A (discussing the evolution of judicial review in the United States).

166. See infra Part III.B (discussing the prominent role of attorneys in the United States).


168. Id. They did, however, contemplate the Supreme Court striking down state laws it found "repugnant" to the Constitution. That was likely rooted in notions of preserving the federalist structure of the new union rather than in the relative powers between the executive, legislative, and judicial branches. BARRY FRIEDMAN, THE WILL OF THE PEOPLE 5, 34-37 (2009); William Michael Treanor, Judicial Review before "Marbury," 58 STAN. L. REV. 455, 455-562 (2005). But see Mary Sarah Bilder, The Corporate Origins of Judicial Review, 116 YALE L.J. 502, 502-566 (2006) (arguing that the lack of debate regarding the question of judicial review was because the founding generation presumed that the judiciary would have the power, or even the obligation, to strike down legislation it found "repugnant" to the Constitution). Bilder's argument is belied by the intense debate that raged about the power of the judiciary in the decades after the Constitution's ratification. See, e.g., RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS & POLITICS IN THE YOUNG REPUBLIC (1971) (examining the intense political debate surrounding the power of the federal judiciary); James M. O'Fallon, Marbury, 44 STAN. L. REV. 219, 219-260 (1992) (examining
American legal thinkers largely shared with their English counterparts the notion that constitutional limits would be enforced through the political process.\textsuperscript{169} Whereas in England, the Parliament was considered the ultimate sovereign and was responsible for ensuring the constitutionality of government actions, Americans by the time of the revolution had come to place ultimate sovereignty not in the legislature, but rather in "the people themselves."\textsuperscript{170} Mechanisms for enforcing the Constitution in both England and America included elections, petitions, service on juries, and impeachment. With its placement of ultimate authority in the people, though, America added three more avenues for enforcement, namely conventions, mobs, and (if all else fails) revolution.\textsuperscript{171}

This is not to say that the founding generation did not fear the unrestrained power of democratic forces. Concerns about the purported excesses of democracy were central to the constitutional debates of 1787. The Constitution that emerged from those debates was premised on limiting majoritarian avarice through the very structure of the government it created. As James Madison, one of the principal architects of the Constitution, recognized,

\textsuperscript{169} As historian Gordon S. Wood has shown us, they shared the notion that proper statecraft required there be "but one final, indivisible, and incontestable supreme authority in every state to which all other authorities must be ultimately subordinate." WOOD, supra note 167, at 345. See also KRAMER, supra note 167, at 91 ("That the Founders expected constitutional limits to be enforced through politics and by the people rather than in courts is hardly surprising. Their history, their political theory, and their actual experience all taught that popular pressure was the only sure way to bring an unruly authority to heel."); FRIEDMAN, supra note 168, at 20-22 (describing English notions of parliamentary supremacy).

\textsuperscript{170} See KRAMER, supra note 167, at 7 (writing that it was "the people themselves" who were responsible for ensuring that the constitution was properly interpreted); JOHN PHILIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF LAW 43-51, 69-82 (1993) (showing the divergence of American and English constitutionalism in the decades prior to the revolution); JOHN PHILIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY TO TAX 116-18 (discussing parliament supremacy and its relation to the doctrine of consent); WOOD, supra note 168, at 344-90 (describing the eighteenth-century concept of sovereignty, including how American notions diverged from their English roots).

\textsuperscript{171} This disconnect is why, according to Larry Kramer, "many in England were genuinely puzzled, and not merely angered, by the rebellion in America." KRAMER, supra note 167, at 35. As Kramer explained, the American rebellion that culminated in declarations of independence and the Revolution was "a rebellion in defense of a concept of constitutionalism, a concept Americans did not suddenly decide to abandon or repudiate upon achieving independence." KRAMER, supra note 167, at 37. See also WOOD, supra note 168, at 344-83 (detailing the divergent concepts of sovereignty as between Americans and their English counterparts and the emergence of a new understanding of "sovereignty of the people" in America in the decade following the Declaration of Independence).
In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.\(^{172}\)

One of the great threats, in Madison’s view, was the threat of what he called “the violence of faction,” a phenomenon he characterized as a “mortal disease[]” from which popular governments everywhere had succumbed and died.\(^ {173}\) In particular, the danger of “factions,” by which Madison meant groups of people seeking to use the mechanisms of the State for their own passions or selfish interests, was in its tendencies to destabilize political and social structures, to disregard the “public good,” and to decide on measures “not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.”\(^ {174}\) To Madison, “the causes of faction cannot be removed, and that relief is only to be sought in the means of controlling its effects.”\(^ {175}\) He thought the Constitution would do precisely that.

One feature of the new government Madison thought would ensure its adherence to the will of the people was its mere size. Many of the founding generation theorized that a republic the size of the United States could not survive, thus arguing for more power to be retained by the individual states.\(^ {176}\) Madison, however, contended that the large size of the national republic would further the republican enterprise in two important ways. First, it would make it more likely that only qualified persons be elected to office—persons with the skills and character to use their positions to serve the public good and thus perpetuate the republic. “[A]s each representative will be chosen by a greater number of citizens in the large than in the small republic,” he explained in Federalist No. 10, “it will

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172. *THE FEDERALIST* NO. 51 (James Madison).
174. *Id.* Madison defined “a faction” as “a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.” *Id.*
175. *Id.* (emphasis in original).
176. An Anti-Federalist writing under the name “Brutus,” for instance, wrote, “If respect is to be paid to the opinion of the greatest and wisest men who have ever thought or wrote on the science of government, we shall be constrained to conclude, that a free republic cannot succeed over a country of such immense extent, containing such a number of inhabitants, and these increasing in such rapid progression as that of the whole United States.” 2 HERBERT J. STORING, THE COMPLETE ANTI-FEDERALIST 368 (1981). Among the “greatest and wisest men” to which Brutus referred was Montesquieu, who wrote in *The Spirit of Laws* that “[i]t is natural to a republic to have only a small territory, otherwise it cannot long subsist. In a large republic there are men of large fortunes, and consequently of less moderation; there are trusts too great to be placed in any single subject; he has interest of his own; he soon begins to think that he may be happy, great and glorious, by oppressing his fellow citizens; and that he may raise himself to grandeur on the ruins of his country. In a large republic, the public good is sacrificed to a thousand views; it is subordinate to exceptions, and depends on accidents. In a small one, the interest of the public is easier perceived, better understood, and more within the reach of every citizen; abuses are of less extent, and of course are less protected.” *Id.* See also ELLIS, supra note 168, at 11 (explaining the concerns of Anti-Federalists as to the powers of the central government, including the judiciary); John C. Yoo, The Judicial Safeguards of Federalism, 70 S. CAL. L. REV. 1311, 1378 (1997) (recounting the concern of Anti-Federalists would allow the new government to become despotic).
be more difficult for unworthy candidates to practise with success the vicious arts by which elections are too often carried; and the suffrages of the people, being more free, will be more likely to centre in men who possess the most attractive merit and the most diffusive and established characters.”  

Second, the large size of the republic would make it less likely for a majority to form with an interest in invading the rights of their fellow citizens. As Madison wrote, if you “extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.”

Beyond that, the Framers designed the Constitution with a series of checks and balances within the governmental structure and electoral processes. These included not just allocating governmental power to three distinct branches of government, each deriving their authority from the people, and establishing certain inter-branch “checks,” such as the presidential veto and the Senate’s role in confirming judicial and administrative appointments, but also dividing the legislative branch—one that some founders felt “necessarily predominates” in a republic—into two chambers. For his part, Madison had concluded that the potential for a republican government to betray the people was “evidently greater where the whole legislative trust is lodged in the hands of one body of men, than where the concurrence of separate and dissimilar bodies is required in every public act.”

In addition, the Constitution insulated one chamber, the Senate, from what Madison saw as the vagaries of democracy by providing for six-year terms for senators and in allowing senators to be elected by state legislatures rather than

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177. THE FEDERALIST No. 10 (James Madison).
178. Id.
179. Id.
180. THE FEDERALIST No. 51 (James Madison). As Madison explained, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

Id. Madison argued “[i]t is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others.” However, he recognized the judiciary as an exception to that rule:

Some deviations, therefore, from the principle must be admitted. In the constitution of the judiciary department in particular, it might be inexpedient to insist rigorously on the principle: first, because peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice which best secures these qualifications; secondly, because the permanent tenure by which the appointments are held in that department, must soon destroy all sense of dependence on the authority conferring them.

Id.

181. THE FEDERALIST No. 63 (James Madison). James Wilson concurred: “If the Legislative authority be not restrained, there can be neither liberty nor stability; and it can only be restrained by dividing it within itself, into distinct and independent branches. In a single house there is no check . . . .” Vince Eisinger, Auxiliary Protections: Why the Founders’ Bicameral Congress Depended on Senators Elected by State Legislatures, 31 TOURO L. REV. 231, 246 (2015) (internal citation omitted).
by popular election.182 According to Alexander Hamilton, the relatively undemocratic nature of the Senate would ensure the “strength and stability” of the new government.183 The Senate, Hamilton argued, would exist “to correct the prejudices, check the intertemperate passions, and regulate the fluctuations, of a popular assembly.”184 When Madison argued that the Constitution would adequately protect “the rights of the minority” from the avarices of the majority, he was not referring to the powers of the Supreme Court. Rather, he cited to the fact that American society itself would “be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority.”185 The political restraints on power were extensive, so much so that one political scientist recently concluded that “the Framers’ enthusiasm for constitutional checks and balances—‘chains’ with which to fetter governmental power—remains unrivaled in world history.”186

In the decades after the Constitution was ratified, American notions of constitutionalism continued to evolve away from their Anglo roots. In the 1790s, a view held by only a few just a decade earlier came to be mainstream among Federalists, namely the view that judges had the authority to refuse to enforce unconstitutional federal laws.187 This was, they argued, because the Constitution was binding on every branch of government, such that judges would be violating their oath to uphold the Constitution were they to enforce an unconstitutional law.188 Notably, this authority was not based on judges being special protectors of people’s constitutional freedoms, but rather because as citizens they had the authority and duty to oppose unconstitutional government action.189 In this incarnation of judicial review, the people still bore ultimate responsibility for the

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182. Whereas there was little debate regarding the division of Congress into two chambers, there was a great deal of debate regarding the relative powers between each and how members of each were selected. WOOD, supra note 168, at 553-62.
183. Id. at 557.
184. Id. at 557-58.
185. THE FEDERALIST NO. 51 (James Madison). He also wrote, If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods of providing against this evil: the one by creating a will in the community independent of the majority that is, of the society itself; the other, by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable. The first method prevails in all governments possessing an hereditary or self-appointed authority. This, at best, is but a precarious security; because a power independent of the society may as well espouse the unjust views of the major, as the rightful interests of the minority party, and may possibly be turned against both parties. The second method will be exemplified in the federal republic of the United States. Whilst all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority.
186. Id.
187. KRAMER, supra note 167, at 98-105.
188. Id.
189. Id.
course of Constitutional law; the courts merely acted as “the people’s faithful agents,” as Kramer summarized it, much as members of Congress and the president were in regards to their respective departments.190

Some in the Federalist camp went further, however, in contending that courts not only had a role in interpreting the Constitution, but indeed a supreme one.191 Based on their view of ordinary people and their capacity for self-governance, these Federalists felt that ordinary people should have no role in influencing government outside of voting in elections, if even then.192 Thus, legal scholar James Kent and others argued that the judiciary was necessary to protect “the equal rights of a minor factions” from “the passions of a fierce and vindictive majority.”193 The people, in other words, were no longer to be trusted with something as important as the Constitution. This view of the judiciary’s role was dealt a seemingly devastating blow in the election of 1800, the result of which was Republicans, who ran on a platform highly critical of judicial supremacy, winning both chambers of Congress and the presidency.194

It was just a few years later, in 1803, when Chief Justice John Marshall, speaking for the court, supposedly established the power of the judiciary to invalidate congressional legislation it found to violate the Constitution. The case, Marbury v. Madison,195 arose out of the so-called “Midnight Judges” Act, which the Federalist-led Congress passed during the lame-duck session before Republicans took control of both Congress and the presidency.196 The legislation created sixteen new federal judgeships that could then be filled by John Adams, a Federalist, prior to leaving office.197 A group of “midnight appointees,” including William Marbury, had been confirmed by the Senate but had yet to receive their formal commissions before the change in administrations.198 Upon being sworn in as the new secretary of state, James Madison refused to deliver the commissions, even though they had already been signed and stamped.199 Marbury and the other midnight appointees petitioned the Supreme Court to issue a writ of mandamus to Secretary Madison ordering him to take the wholly ministerial act of delivering the commissions.200

190. Id. at 98.
191. Id. at 128-44.
192. Id.
193. Id. at 131.
194. Id. at 144; SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN 90-94 (2005).
195. 5 U.S. 137 (1803).
196. Id. at 143-46.
197. The Act infuriated Republicans, many of whom ran on campaigns railing against an activist Federalist judiciary. Some Federalist judges had already been impeached, with some Republicans even arguing for the repeal of the judiciary altogether. ELLIS, supra note 168, at 19-21.
199. Marbury, 5 U.S. at 143-46.
200. Id.
The Court found that Marbury and the others had vested rights to the commissions, that Madison’s refusal to deliver the commissions violated those rights, and that federal statutory law, specifically the Judiciary Act of 1789, provided a legal remedy for that violation, namely the issuance of a writ of mandamus ordering their delivery, precisely what Madison and the other petitioners requested. 201 However, writing for the court, Marshall also reasoned that the Constitution did not list the issuance of writs of mandamus as being within the court’s original jurisdiction, and that Congress lacked the authority to expand the court’s Article III jurisdiction, such that the provision purporting to do so—the one on which the petitioners’ cases depended—was invalid. 202 In doing so, Marshall delivered one of the most frequently cited passages in the history of judicial opinions: “It is emphatically the province and duty of the judicial department to say what the law is . . . . If two laws conflict with each other, the courts must decide on the operation of each.” 203

Although this opinion—and especially the above passage—has routinely been cited as the basis for the judiciary having the ultimate (if not exclusive) say on constitutional issues, the opinion, on its own, was fully consistent with the more moderate view of the judiciary’s role in enforcing the Constitution. 204 Nothing in the opinion claimed for the judiciary the exclusive role for interpreting or enforcing the Constitution. 205 Indeed, the result itself was seemingly an exercise in judicial restraint. Chief Justice Marshall, a Federalist, refused to recognize the judiciary’s power—which Congress explicitly provided it—to issue writs of mandamus, and he refused to order the executive branch to place yet another Federalist on the bench. 206 At the time, it seemed more of an olive branch to

201. Id. at 137.
202. Id.
203. Id. at 177. In his 2006 book, Adrian Vermeule stated that Larry Kramer “raise[d] serious doubts about the understanding in Marbury v. Madison,” particularly in regard to judicial supremacy and “interpretation of the Constitution.” ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 235 (2006). Larry Kramer suggested that for some of the Framers, judicial review was a “substitute for popular resistance,” and should be used “only when the unconstitutionality of a law was clear beyond dispute.” Id.; KRAMER, supra note 167, at 44.
204. See, e.g., Perez v. Mortg. Bankers Ass’n, 135 S. Ct. 1199, 1220-21 (2015) (illustrating the proposition that “[t]he Framers expected Article III judges to engage in similar efforts, by applying the law as a ‘check’ on the excesses of both the Legislative and Executive Branches”); Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 538 (2012) (citing Marbury, 5 U.S. at 175-76) (demonstrating the proposition that “there can be no question that it is the responsibility of this Court to enforce the limits on federal power by striking down acts of Congress that transgress those limits”).
205. See FRIEDMAN, supra note 168, 60-64 (arguing that Marshall said nothing new on the subject of judicial review); KRAMER, supra note 167, at 115-27 (arguing that the case, though not as important in the development of judicial review as some assume, still played a “supporting role in a bigger drama about the place of the judiciary in American government,” primarily in “insulating the Court from the extremes of the political age and preventing the power of judicial review from perhaps being “forced down a dead end road”); Michael Stokes Paulsen, The Irrepressible Myth of Marbury, 101 MICHIGAN L. REV. 2706, 2706-43 (2003) (arguing that Marbury, despite its mythic status, was entirely consistent with the departmental theory of judicial review prevalent at the time); Jack N. Rakove, The Origins of Judicial Review: A Plea for New Contexts, 49 STAN. L. REV. 1031, 1031-64 (1997) (arguing that scholars and lawyers have over-estimated the significance of Marbury v. Madison in the development of judicial review as a critical component of the American constitutional order).
Republicans in regard to the question of judicial review than a groundbreaking grab of power for the judicial branch.

The power of the judicial branch was far from unquestioned after Marbury. It was not until the Supreme Court’s decision in Dred Scott v. Sandford that the Court used its purported power of judicial review to strike down another piece of federal legislation. In that case, the issue was whether Dred Scott had standing, a determination the Court held to depend upon whether he was a citizen. Dred Scott had spent years in the free state of Illinois and the Territory of Minnesota, in which Congress had prohibited slavery as part of the so-called “Missouri Compromise” of 1820, before returning to Missouri, a slave state, and being sold to a new owner, John F. A. Sandford. Writing for the Court, Chief Justice Roger B. Taney held that only citizens of the United States could be citizens of any particular state, including Missouri, and that Congress had never recognized slaves or their descendants as citizens. That was enough to dismiss the case for lack of Article III standing, yet Taney went on to declare the Missouri Compromise invalid and the power to prohibit slavery in the territories beyond Congress’ authority.

To say Dred Scott provoked controversy would be a gross understatement. To Republican abolitionists, the decision represented a conspiracy not just to maintain slavery in the states in which it currently existed but ultimately to extend it to all the states of the Union. It was seemingly, after all, but a small legal step from prohibiting the federal government from preventing slavery in its territories based on the inviolable property rights of slave owners to prohibiting states from doing the same in their respective jurisdictions. As Abraham Lincoln observed in one of his seven debates with Stephen Douglas in Illinois over the fall of 1858, the Dred Scott decision “lays the foundation, not merely of enlarging and spreading out what we consider an evil, but it lays the foundation for spreading that evil into the States themselves.”

While the most important aspects of the case, particularly at the time, regarded the question of slavery and its potential expansion into the territories (and

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207. 60 U.S. 393 (1857).
208. Id. at 450-51.
209. Id. at 426-27.
210. Id. at 396-97.
211. Id. at 393-94.
212. Id.
215. FEHRENBACKER, supra note 213, at 452.
possibly even to northern states), it also provoked questions regarding the role of the judiciary in American governance.\textsuperscript{217} Those who agreed with the opinion unsurprisingly defended the Supreme Court’s authority to decide the controversial question regarding the rights of slaveholders to bring their slaves to territories.\textsuperscript{218} The \textit{Louisville Democrat}, for example, lectured that “what this tribunal [the Court] decides the Constitution to be, that it is; and all patriotic men will acquiesce.”\textsuperscript{219} Similarly, the \textit{Constitutionalist}, a Georgian paper, proclaimed that “Southern opinion upon the subject of southern slavery... is now the supreme law of the land... and opposition to southern opinion upon this subject is now opposition to the Constitution, and morally treason against the Government.”\textsuperscript{220}

Republicans were less sure of the Supreme Court’s authority to settle the most important questions regarding slavery. Some northern presses not only criticized the substance of the opinion itself, but also challenged the authority of the Court altogether.\textsuperscript{221} Still, Republican politicians, for their part, mostly took a more moderate approach. As Don E. Fehrenbacher concluded in his monumental study of the Dred Scott decision and its aftermath, “the Republican remedy for the Dred Scott decision was to win the election of 1860, change the personnel of the Court, and have the decision reversed,” not to undermine the Court’s authority to issue such decisions.\textsuperscript{222} Lincoln, for instance, assured a crowd at an Illinois debate (and all those reading transcripts of the debate in any one of the newspapers in which it would be printed) that Republicans respected \textit{Dred Scott} as the law of the land, at least until it could be modified or repealed through the proper constitutional processes.\textsuperscript{223} Speaking for the Republican party, he specified that “[w]e do not propose that when Dred Scott has been decided to be a slave by that court, we, as a mob, will decide him to be free,” and further that, were the Court to determine others likewise to be slaves, they would not “in any violent way disturb the rights of property thus settled.”\textsuperscript{224} Lincoln qualified his statement, though, by distinguishing between legal and political rules. He specified that, while the decision was worthy of respect as it pertained to the legal status of Dred Scott, it did not bind “the voter to vote for nobody who thinks [the decision]

\textsuperscript{217} See generally FEHRENBACHER, supra note 213 (discussing the controversies the Dred Scott decision provoked).
\textsuperscript{218} \textit{Id.} at 417-19.
\textsuperscript{219} \textit{Id.} at 418.
\textsuperscript{220} \textit{Id.}
\textsuperscript{222} FEHRENBACHER, supra note 213, at 454.
\textsuperscript{223} LINCOLN, supra note 216, at 405.
\textsuperscript{224} \textit{Id.}
The backlash to *Dred Scott* exemplifies Kramer’s thesis that each victory for what we now (mostly) accept as the power of the judiciary to be the ultimate arbiter of constitutional questions has been followed by a resurgence of “populist” conceptions of constitutionalism. Later, when the Supreme Court became associated with corporate interests, Theodore Roosevelt warned that “if the people are not to be allowed finally to interpret the fundamental law, ours is not a popular government.” Then, during the Great Depression, Franklin Delano Roosevelt responded to many key programs of his New Deal by threatening the judiciary with a court-packing scheme that echoed the Federalists’ response to losing the presidency and both chambers of Congress in 1800. Ultimately, the Court reached a compromise with the administration by limiting the Court’s power of review to the highly deferential “rational basis” scrutiny for most cases, while reserving a higher standard of review of cases of alleged violations of personal freedoms. This deal for the most part remains intact today, though it remains a tentative one.

In recent decades, there has been renewed scrutiny of the anti-democratic or counter-majoritarian aspects of the judicial power, especially as it comes to the judiciary invalidating the actions of the elected branches of government. In

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225. *Id.* Interestingly, Lincoln’s views appear to have evolved in the years after the *Dred Scott* decision. The summer before the *Dred Scott* decision, for example, Lincoln seemingly recognized, without qualification, the authority of the Supreme Court in deciding important constitutional questions such as those involving slavery. See Baker, *supra* note 213, at 35 (internal citation omitted) (“[T]he Supreme Court of the United States is the tribunal to decide such questions, and we will submit to its decisions; and if you [slavery sympathizers] do also, there will be an end of the matter.”). As he became president, however, he stated that “if the policy of the government upon vital questions . . . is to be irrevocably fixed by the decisions of the Supreme Court . . . the people will have ceased to be their own rulers . . . .” *Lincoln, supra* note 216, at 405 (internal citation omitted).

226. See generally *Kramer, supra* note 167 (demonstrating Kramer’s thesis regarding the power of judicial review).

227. *Id.* at 216.

228. *Id.* at 213-18.

229. *Id.*

230. See generally, e.g., Alexander M. Bickel, *The Least Dangerous Branch* (1962) (recognizing the inherent counter-majoritarian aspects of judicial review); William J. Quirk & R. Randell Bridwell, *Judicial Dictatorship* (1995) (arguing that judicial review is inherently anti-democratic and that it only emerged out of a distrust for majoritarian government); Larry D. Kramer, *Judicial Supremacy & the End of Judicial Restraint*, 100 Cal. L. Rev. 621, 621-34 (2012) (reiterating his argument against judicial supremacy and in favor of a more populist form of constitutionalism); Adrienne Stone, *Judicial Review Without Rights: Some Problems for the Democratic Legitimacy of Structural Judicial Review*, 28 Oxford J. Leg. Studies 1, 1-32 (2008) (arguing that judicial review is just as democratically illegitimate when it is applied to a constitution’s structural provisions as it is when defining and enforcing legal rights); Mark Tushnet, *Taking the Constitution Away from the Courts* (1999) (arguing for a more populist form of constitutionalism, one in which we as citizens bare primary responsibility for protecting our constitutional liberties); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 Yale L.J. 1346, 1346-1406 (2006) (summarizing the normative arguments against judicial review, including that judicial review is counter-majoritarian and does not necessarily protect rights better than democratic institutions would do). For defenses of the Supreme Court and judicial review in light of these criticisms, see Friedman, *supra* note 168, at 14-16 (arguing that the function of judicial review today is to be a “catalyst” for public debate and ultimately to accept the public’s consensus views on constitutional matters once they emerge); Jeffrey Rosen, *The Supreme Court: Judicial
response, several prominent scholars and jurists, including Scalia, have advocated for fundamentalist—or universal—methods of constitutional interpretation to justify judicial review (so long as judges follow their respective instructions) by removing the need for judges to exercise discretion. As constitutional scholars Daniel A. Farber and Suzanna Sherry described their mission, these theorists “seemingly hope to make judicial decisions more objective and to defuse the charge that constitutional law lacks legitimacy in a democracy,” and they, therefore, “seek to constrain judicial discretion by specifying with particularity the rules that judges must follow.” The reason they generally seek a universal theory is that to acknowledge that a particular rule of interpretation applies only in certain circumstances is to recognize that judges still have a choice as to whether and how that rule applies, thereby providing judges an opportunity to inject their own will and values into their decisions.

The fundamentalist theories these scholars developed do not survive close scrutiny. None succeed in removing discretion from the judicial lawmaking process. The reason is simple: interpreting “the law” inherently requires choices, often as between contradictory axioms that can be negotiated but never fully resolved. As Sherry explained specifically regarding constitutional interpretation, judges are confronted with the task of “navigat[ing] between fidelity to the past and the needs and values of the present, between the general and the particular, and between the abstract and the concrete.”

The scholarship regarding the indeterminacy of law is too voluminous to do it justice here, but for some excellent examples, see, e.g., OLIVER WENDELL HOLMES, THE COMMON LAW 5 (Pereira & Beltran, eds. 2011) (“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.”); MORTON J. HORWITZ, TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY (1994) (tracing the development of legal realism as a fundamental challenge to notions of law as a neutral, objective system for allocating rights, duties, privileges, and liabilities); DUNCAN KENNEDY, THE RISE & FALL OF CLASSICAL LEGAL THOUGHT (1975) (describing a particular brand of legal formalism, one that dominated legal thinking in the late-nineteenth century, as a “verbal trick” that utterly failed as a method for dictating legal results in particular cases); Matthew Liebman, Who the Judge Ate for Breakfast: On the Limits of Creativity in Animal Law and the Redeeming Power of Powerlessness, 18 ANIMAL L. 133, 133-50 (2011) (providing an accessible survey of scholarship on the indeterminacy of law and applying it to the subject of animal law); KARL N. LLEWELLYN, THE BRAMBLE BUSH 2 (1930) (arguing that the “general propositions” which purportedly decide concrete cases are in fact “empty,” the learning of them “worthless”); Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed, 3 VAND. L. REV. 395, 396.
she continued, “individual clauses of the Constitution create tensions of their own: between liberty and equality, between religious exercise and religious establishment, and between governmental powers and accountability.”

Even Scalia recognized the inherent fallibility of all fundamentalist modes of judicial thought, including the one he came to personify: formalistic originalism. In one article describing his brand of formalism, Scalia clarified that he “[had] not said that legal determinations that do not reflect a general rule can be entirely avoided.” Rather, he explained, “we will have totality of the circumstances tests and balancing modes of analysis with us forever—and for my sins, I will probably write some of the opinions that use them.” In another article, he defended originalism as a “lesser evil,” while also recognizing that it should not dictate results in all cases.

Farber and Sherry were harsher in their assessment when they stated that fundamentalist approaches to law are “both fundamentally misguided and doomed to failure.”

Since judges cannot be fully constrained in their lawmaking by any substantive theory of legal interpretation, some have rightly recognized the importance of who the judges are and the manner in which they decide cases. The reasoning is that if judges must make choices in at least some cases, they should possess a particular set of character traits to make it more likely they make good choices rather than bad ones. While there is some disagreement as to the precise parameters of the desired character traits, there is some consensus that it involves both a capacity for intellectual reasoning and a respect for the project of intellectual inquiry itself. Prominent legal scholar Anthony Kronman, for example, argued that judging required a “deliberative imagination,” a term he used to signify an ability to consider and to understand a point of view defined by interests, attitudes, and values that differ or even conflict from one’s own “without actually endorsing that point of view.” That is quite simply intellectualism by
another term. Beyond the legal academy, the American Bar Association (ABA) evaluates potential judges on the basis of their integrity, professional competence, and judicial temperament. Two of those elements include key components of intellectualism. Specifically, the ABA defines “professional competence” to include “intellectual capacity” and “judicial temperament” to include an “open-mindedness” and “freedom from bias,” both important features of an intellectual mind.241

B. A (BRIEF) HISTORY OF THE AMERICAN LEGAL PROFESSION

It is not just the legitimacy of the Supreme Court, or even the judiciary, that is an issue, but the power that the “law” itself holds in society. In a way, lawyers have always held an elite status within American society—perhaps uniquely so. Writing in the 1830s, for instance, French political theorist Alexis de Tocqueville wrote, based on his travels in the United States, that lawyers “occup[ied] the highest stations” in the American political order.242 Tocqueville indeed saw lawyers as an “American aristocracy” in a country where “the wealthy, the noble, and the prince” were all “excluded from the government.”243 Much later, political scientist Mark C. Miller wrote in The High Priests of American Politics that “[l]awyers are, and always have been, omnipresent in American political institutions and in the American public-policy-making process . . . . And it seems that the more important the political office, the more lawyers occupy that office.”244 Empirical data supports the generalizations of both Tocqueville and Miller. From the second decade of the nineteenth century to the middle of the twentieth century, at least half of all members of the U.S. House of Representatives in each decade were lawyers.245 Lawyers have typically been even better represented in the Senate, with roughly two-thirds of Senators from 1790 to 1930 having law backgrounds.246

“reasonable judgment about what they can do within the bounds of law,” must display “good or at least reasonable practical or moral judgment,” and must support their judgments with rational arguments they “advance in good faith”); Daniel A. Farber, The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law, 45 VAND. L. REV. 533 (providing an excellent overview of Llewellyn’s arguments (and those building upon them) regarding the process and requirements of judging and arguing that judges, like “physicists, radiologists, chess players, and computer programmers,” must exercise “situation sense”—must employ “practical reason”—effectively); Chad M. Oldfather, Of Judges, Law, and the River: Tacit Knowledge and the Judicial Role, 2015 J. OF DISPUTE RESOLUTION 155, 164-65 (arguing that judges must possess and rely upon a “tacit knowledge,” meaning that they “must engage in a constant process of learning and relearning that can come only through continuing engagement with the material,” that “material” being a whole array of cultural norms and social needs).

242. TOCQUEVILLE, supra note 34, at 280.
243. Id. at 280, 283.
244. Id. at 58.
245. Id. at 57.
Scholars continue to debate why lawyers have been so omnipresent in American politics generally. The one takeaway is that there seemingly is no single explanation. Some scholars have emphasized, for instance, the social status of lawyers, whether it be that they represent a "high status" akin to an aristocracy or that they represent the middle class interests in a society oriented towards the middle class.\textsuperscript{247} Echoing Tocqueville's observations from the 1830s, Robert Stevens perhaps best represented the "high status" thesis, albeit with an instrumentalist flavor, when he wrote the following in his 1983 work on legal education:

[w]ithout a monarch or clearly defined aristocracy, with a practical utilitarian outlook, with little by way of competing professions, the new nation was almost inevitably bound to rely on lawyers to perform a wide range of functions. Lawyers became the technicians of change as the country expanded economically and geographically, a development that partly explains why even today lawyers play a more significant role in the United States than in any other developed society.\textsuperscript{248}

Another explanation points to the role of America's political culture in treating policy questions as legal or constitutional ones, while yet another posits that lawyers gain political power primarily through exploiting the same skills that make them successful attorneys, namely in advocating, communicating, negotiating, and compromising.\textsuperscript{249}

\textsuperscript{247.} See id. at 64, 72 (discussing "reason[s] offered by many scholars for the dominance of lawyers in U.S. politics").


\textsuperscript{249.} MILLER, supra note 244, at 64-75. Lawrence M. Friedman also pointed to the unique skill set of attorneys to explain their political power. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 647 (2d ed. 1985). One last explanation deserves some discussion, namely that the practice of law is flexible enough in terms of time commitments to allow for political aspirations. Lawyers have typically been able to devote sufficient time to political endeavors while still practicing, and they are often able to leave practice if necessary to serve in state or federal political roles. Add in the prospect of courting new clients and making other powerful allies while serving in a public office, and entering into politics becomes an even more attractive option. MILLER, supra note 244, at 67-68. Scholars have also debated how "thinking like a lawyer" impacts policymaking, given lawyers' disproportionate representation in legislative bodies. As early as the 1830s, Tocqueville argued that lawyer-politicians would act as defenders of "order" and "security" against what he saw as "the excesses of democracy." TOCQUEVILLE, supra note 34, at 277. Scholars generally agree with Tocqueville's observations regarding the conservatism of the bar. Some believe that lawyers generally disfavor radical social change based on the legal profession's emphasis on predictability and stability. Edgar Bodenheimer, The Inherent Conservatism of the Legal Profession, 23 IND. L.J. 221 (1948). This conservatism has even pervaded the field of American legal history, at least according to Morton Horwitz. See Morton J. Horwitz, The Conservative Tradition in the Writing of American Legal History, 17 AM. J. OF LEG. HIST. 275 (1973) (analyzing conservatism in legal history). He wrote, "[I]t is the ideological character of professionalization that makes lawyer's legal history inevitably conservative . . . . [A]n elitist and anti-democratic politics pervades most of the traditional writings on American legal history, just as it appears in virtually all of the rhetorical literature of the legal profession throughout American history." Id. at 281, 283. Similarly, in his study of lawyer-politicians, Miller added that lawyers tend to emphasize the regularity of socio-legal procedures over the substantive justness of results. MILLER, supra note 244, at 27. Moreover, when lawyers do advocate for social change, they tend to do so by pushing for changes in the law's definition of rights and in its protection of formal equality. Id.
As lawyers came to have an even more robust role in American society in the late-nineteenth century, including in guarding against constitutional abuses, the profession itself underwent substantial changes to accommodate—and to solidify—this new role. The emergence of the corporate law firm and in-house legal offices especially represented a major transformation in American legal culture. Legal historian Lawrence M. Friedman went so far as to call it “one of the most striking developments of the late 19th century.” As of 1850, legal issues remained simple (and even understandable by non-lawyers), and the most successful lawyers were “generalists” whose primary role was to represent their clients’ interests in court in regard to a variety of legal concerns. In the last decades of the nineteenth century, however, law became more complex, and the most powerful lawyers were increasingly “specialists” housed in law firms. As historian Jerold S. Auerbach concluded, “[b]y the turn of the century corporate law firms were edging to the pinnacle of professional aspiration and power . . . . [T]he emergence, rapid proliferation, and growth of corporate law firms, their impact upon patterns of recruitment and styles of practice, and their appeal to ambitious young attorneys invested them with significance (and their partners with professional power) that far exceeded their number and size.”

Scholars have offered several explanations for the rise of the law firm. A consensus seems to have formed, though, that the shifting demands of economic entities on the legal profession at least played a role. According to Auerbach, for instance, increasingly large and complex business enterprises required efficient legal practitioners to service their needs, not just in advocating on their behalf in court, but in organizing the companies and their relationships and preventing litigation in the first place. William G. Thomas has proposed a different—albeit, still instrumentalist—interpretation in contending that it was the strategic attempts of corporations to monopolize the best legal talent to promote their interests that contributed to new structures such as regional and national law firms and in-house corporate legal departments. Once one member of a firm represented a particular client, it became difficult, if not forbidden, for any other member of the same firm to represent a client with conflicting interests. Auerbach’s Unequal Justice: Lawyers and Social Change in Modern America also points to a deeper cultural element that contributed to its transformation, namely

250. FRIEDMAN, supra note 249, at 640.
251. JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 22 (1976). With the emergence of law firms also came a bifurcation of the bar between corporate and plaintiffs’ attorneys. In his study of railroad attorneys in the American South, historian William G. Thomas III showed how the emergence of corporations contributed to the bifurcation of the bar between those with “corporate clientele” and those who “represented plaintiffs confronting corporations.” WILLIAM G. THOMAS, LAWYERING FOR THE RAILROAD: BUSINESS, LAW, AND POWER IN THE NEW SOUTH 38 (1999). This bifurcation of the bar was due both to the lawyerly duty not to represent clients whose interests were directly adversarial to the interests of other past and present clients, but also to the fact that the increasing complexities encouraged lawyers to specialize in one area of the law. J. WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 297 (1950). The “railroad lawyer” epitomized the corporate side of the bar. Id. He was, for the most part, detested. Id.
252. AUERBACH, supra note 251, at 23.
253. THOMAS, supra note 251, at 43-45.
the legal profession’s “search for order in a complex society.”\textsuperscript{254} Similarly, legal scholar Robert Stevens has argued that there was an “urge to professionalize” that combined with the economic changes “to promote the growth of a new type of law firm, with several partners and assistants, catering to the needs of the developing corporations.”\textsuperscript{255}

This “urge to professionalize” can also be seen in the re-emergence and rapid growth of bar associations and in the rise of formal legal education. What separates professions from mere occupations is the “special power and prestige” they hold in society, to quote sociologist Magali Sarfatti Larson.\textsuperscript{256} Though the boundaries of what defines something as a “profession” are blurry, there are generally two components: one of knowledge, the other of norms. Both are necessary to justify the special advantages bestowed on professions. As historian Burton J. Bledstein summarized the knowledge component, a profession requires its members attain and demonstrate, typically through “a fairly difficult and time-consuming process . . . an esoteric but useful body of systematic knowledge.”\textsuperscript{257} As for normative values, professions tend to be those occupations purportedly dedicated to public service rather than individual accumulation of wealth.\textsuperscript{258} Whatever the field, professional associations normally have served an important purpose in the formation and maintenance of a professional culture, namely in ensuring compliance with both the intellectual and the normative requirements of a profession. Thus, it is no coincidence that in the generation following the Civil War there was what Kermit L. Hall called a “rebirth of bar associations.”\textsuperscript{259}

While bar associations tried to promote the development of a professional legal culture through informal means, states imposed higher standards on admission to the bar. Whereas in 1860 admission standards were “largely nonexistent,” to quote one legal historian, by 1890 admission had “tightened noticeably.”\textsuperscript{260} In that year, nearly all states required bar applicants to pass an examination, and over half of the states also required either some duration of legal education or a formal apprenticeship to enter the profession.\textsuperscript{261} According to Lawrence Friedman, this was a form of unionization “to protect the boundaries of the calling.”\textsuperscript{262} As he explained, “[t]he organized profession raised (or tried to raise) its ‘standards’; tried to limit entry into the field, and (above all) tried to resist

\begin{footnotes}
\item[254.] Auerbach, supra note 251, at 23.
\item[255.] Stevens, supra note 248, at 22.
\item[257.] Burton J Bledstein, The Culture of Professionalism: The Middle Class and the Development of Higher Education in America 86-87 (1976).
\item[258.] Kermit L. Hall and Peter Karsten, The Magic Mirror: Law in American History 232 (2d ed. 2009); Larson, supra note 256, at x.
\item[259.] Hall & Karsten, supra note 258, at 234.
\item[260.] Stevens, supra note 248, at 25.
\item[261.] Id.
\item[262.] Friedman, supra note 249, at 634.
\end{footnotes}
conversion of the profession into a ‘mere’ business or trade.” 263 If professions require their members to have a certain intellectual expertise and to hold certain ethical values, admission standards (as well as standards of practice) were meant to ensure lawyers measured up to the bar, so to speak.

Although few state bars, even at the end of the century, required formal legal education prior to practicing, law schools still played an increasingly important role in the development of a professional legal culture. The last half of the nineteenth century indeed saw a dramatic rise in the number of law schools. In 1850, there were just fifteen law schools; by the end of the century, there were more than a hundred. 264 Accompanying this increase in schools, of course, was a similar explosion in the number of law students, as the number of law students more than quadrupled in just a single generation towards the end of the nineteenth century. 265 In 1900, more than ten thousand were enrolled in law schools across the country. 266

If professionalization required an occupation be grounded in “an esoteric but useful body of systematic knowledge,” legal educators provided that system of knowledge. 267 It is hence no coincidence that a philosophy regarding law as a science—one similar to other sciences students learned in college—accompanied the rapid growth in legal education as an institution. Beginning as dean of Harvard Law School in 1870, Christopher Columbus Langdell developed what came to be the model of law school curriculums for at least the next century. 268 His “case method” of teaching was rooted in his scientific view of law. As he prefaced his first case book, Contracts,

Law... considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law. Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases; and much the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied... If these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable from their number. It seemed to me, therefore, to be possible to take such a branch of the

263. Id. See also Larson, supra note 256, at 40-52 (arguing that professionalization is a project to translate "superior cognitive rationality" into a commodity, while at the same time monopolizing the market that is consequently established).
264. Friedman, supra note 249, at 607.
265. Id. at 608; Albert J Harno, Legal Education in the United States 82 (1953).
266. Hall & Karsten, supra note 258, at 239.
268. Friedman, supra note 249, at 612.
law as Contracts, for example, and, without exceeding comparatively moderate limits, to select, classify, and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of any of its essential doctrines; and that such a work could not fail to be of material service to all who desire to study that branch of law systematically and in its original sources.\footnote{Id. at 613-14.}

To Langdell, law was a science, and it was an empirical one whose object of study was confined to the universe of reported cases. The "legal science" that Langdell expounded and that came to dominate legal education was not value-free. Rather, through the case method, students learned most notably that law was inaccessible to lay people, that law was impartial and defined through logic, that law's development was divorced from all other social and political processes, and that legal change occurred slowly if at all. In this way, the modern law school founded on Langdell's vision came to be a crucial component of socializing aspiring members of the legal profession into accepting its core ideologies.

Langdell was not the first lawyer to advocate for a "scientific" view of law, but he was perhaps the most influential in doing so. The importance of Langdell's model of legal education to the profession of law can perhaps best be demonstrated by the fact that his model's influences can still be seen in law school curricula, even though a vast majority of legal scholars have long rejected Langdell's notion of law as an objective phenomenon whose development proceeds solely on logic.\footnote{See Lawrence M. Friedman, Law, Lawyers, and Popular Culture, 98 YALE L.J. 1579, 1581 (1989) (observing that "[p]robably no serious scholar clings absolutely to either one of the two polar positions; nobody thinks that the legal system is totally and absolutely autonomous").} Americans still think of the practice of law as requiring a special expertise that can only be obtained through a process including formal education specifically concerning legal doctrines and the skills needed to practice law. Institutions exist to ensure only those with the appropriate educational experiences, qualifications, and character are able to practice law.

Among those qualifications is the ability to engage in critical thinking, which Francis Bacon once defined as "a desire to seek, patience to doubt, fondness to meditate, slowness to assert, readiness to consider, carefulness to dispose and set in order; and hatred for every kind of imposture."\footnote{Curtis Silver, The Importance of Logic and Critical Thinking, WIRED (Mar. 10, 2011), https://www.wired.com/2011/03/the-importance-of-logic-critical-thinking/.} This definition tracks closely with Hofstadter's definition of intellectualism. Its importance to the practice of law (including as a judge) should be obvious upon reading the following passage from Linda Elder, an educational psychologist whose research focuses on critical thinking:

Through critical thinking, as I understand it, we acquire a means of assessing and upgrading our ability to judge well. It enables us to go into virtually any situation and to figure out the logic of whatever is happening in that situation. It provides a way for us to learn from new experiences through the process of continual self-assessment.

\footnote{269. Id. at 613-14.}
\footnote{270. See Lawrence M. Friedman, Law, Lawyers, and Popular Culture, 98 YALE L.J. 1579, 1581 (1989) (observing that "[p]robably no serious scholar clings absolutely to either one of the two polar positions; nobody thinks that the legal system is totally and absolutely autonomous").}
Critical thinking, then, enables us to form sound beliefs and judgments, and in doing so, provides us with a basis for a ‘rational and reasonable’ emotional life.272 This is why law schools across the country have as one of their fundamental missions to teach their students critical thinking skills.273 Lawyers may not think of themselves as “intellectuals,” but an intellectual perspective is an important part of what they do—and indeed an important part of what the law requires of them.

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The above histories highlight both that the scope and shape of judicial authority is historically contingent and subject to changes based on social circumstances outside of the law, and that the profound role of lawyers (and law) in society too has depended upon social justification, one largely provided for by the professionalization of the bar. While the initial justification for the law’s transcendence as a social institution—namely that law is an objective phenomenon and lawyers and judges are the scientists specially trained to observe and to reveal its features—has long been challenged if not fully repudiated, law’s continued crucial place in American governance still depends upon law being regarded as an intellectual enterprise comprised of dedicated experts.

IV. CONCLUSION

This is a time in which institutions of all sorts are under attack, and in which the knowledge they produce—the expertise they represent—continues to lose the trust of the American people. In a 2017 national survey conducted by the Pew Research Center, for example, less than one in five Americans said they trust the federal government to do the right thing “just about always” or even “most of the


273. For example, the University of South Dakota School of Law has as a “learning outcome” that students will demonstrate an ability “to apply knowledge and critical thinking to perform competent legal analysis, reasoning and problem-solving.” USD SCHOOL OF LAW LEARNING OUTCOMES, http://www.usd.edu/law/learning-outcomes (last visited Feb. 14, 2018). See also CORNELL LAW SCHOOL MISSION STATEMENT AND LEARNING OUTCOMES, http://www.lawschool.cornell.edu/Registrar/aba_standards.cfm (last visited Apr. 16, 2018) (“Upon completion of the program of legal education, Cornell Law School graduates will...be able to independently and critically analyze common law and statutory authority.”); GEORGETOWN LAW INSTITUTIONAL LEARNING OUTCOMES, https://www.law.georgetown.edu/admissions-financial-aid/aba509/Learning-Outcomes.cfm (last visited Apr. 17, 2018) (stating that a specific institutional learning outcome is the “[a]bility to engage in critical and strategic thinking...”). This is often what people mean when they talk about “thinking like a lawyer.” See, e.g., Kelley Burton, “Think Like a Lawyer”: Using a Legal Reasoning Grid and Criterion-Referenced Assessment Rubric on IRAC (Issue, Rule, Application, Conclusion), 10 J. OF LEARNING 57 (2017) (explaining how to “think like a lawyer”).
time," a level of public trust near historic lows. Journalists do not fare much better. A 2017 Gallup poll showed that just over a quarter of Americans had "a great deal" or "quite a lot" of confidence in newspapers. Even scientists are no longer trusted, at least as it comes to issues of political salience like climate change. A fall of 2016 poll found that only one-third of Americans believed that climate scientists understood "very well whether... climate change is occurring[,]” with even less thinking they knew the causes of or best ways to address climate change. As for the legal profession, only eighteen-percent of Americans, according to one late 2017 poll, rated the "honesty and ethical standards” of lawyers as “very high” or “high.” It is not just particular institutions that have been challenged, but seemingly expertise itself. Indeed, a majority of Republicans now believe colleges and universities, the principal producers and purveyors of expert knowledge, are bad for the country. If anti-intellectualism has indeed ebbed and flowed throughout American history, it appears it is now once again flowing.

An anti-establishment perspective dominated much of the rhetoric of the 2016 campaign season, including in Bernie Sanders’ challenge to the Democratic Party’s eventual nominee, Hillary Clinton. It was most notable, however, in the Republican primary race and later in Donald J. Trump’s general election campaign. Trump himself ran on a slogan of making America “great again,” ostensibly by taking back control from a class of bungling professional elites and returning it to the people who had for too long been forgotten. Trump made his “outsider” status the central theme of his campaign, while also claiming to know more than anyone else about various matters of governance, including taxes, trade, monetary policy, the political process, the national debt, the military, and

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279. This is to put the campaign message in its most favorable light. It is not to suggest that other factors, such as racism, white supremacy, white nationalism, sexism, and patriarchy, did not also play a part in the campaign’s messaging and, ultimately, in its success.
the visa system. Regarding our military leaders, a group Americans still generally hold in high esteem, Trump claimed to “know more about ISIS than the generals do,” and accused U.S. generals of being “embarrassing to our country.” While at first blush, Trump’s claim to both the “outsider” and “the one who knows everything” mantles might seem paradoxical, it makes sense when viewed through an anti-intellectual prism. Viewed in that way, Trump knows more through “doing” than the so-called experts studying social problems in Washington D.C. and on college campuses across the country.

Beyond going after the political establishment, Trump also routinely sought to undermine professional journalists and scientists. In regard to the media, Trump ran “a media campaign directly against the media, helping himself to the copious media attention available to a TV star while disparaging journalists at every podium and venue,” as Jack Shafer of Politico described it in the days before the election. Trump also dismissed scientific consensus on anthropogenic climate change and mocked those, including President Barack Obama, who believed in it. Although he attempted on a couple instances to distance himself from his previous remarks that climate change was a con job or a “hoax,” once even having accused China of being behind the concept as a ploy to make the United States less competitive, he continued to dismiss the notion of anthropogenic climate change and to run against Obama’s relatively (for a U.S. politician) aggressive response to it.

The legal system has not made it through Trump’s campaign and early presidential term unscathed. In May of 2016, at a campaign rally in San Diego, for example, Trump famously (or infamously) accused a federal judge of lacking


the capacity for impartiality in a case involving Trump’s ill-fated Trump University based upon the judge, Judge Gonzalo Curiel, being both “a hater of Donald Trump” and a “Mexican.” Trump has not softened his rhetoric against the judiciary since becoming president. In February of 2017, after U.S. District Judge James L. Robart, an appointee of George W. Bush, issued an order blocking enforcement of Trump’s travel ban, Trump challenged Robart’s integrity and qualifications by calling him a “so-called judge” and characterized the opinion as “essentially tak[ing] law-enforcement away from our country.” After the Ninth Circuit Court of Appeals unanimously upheld Judge Robart’s order, Trump criticized courts for being “so political” and not doing “what’s right,” and he repeated his allegations that the judiciary itself was undermining national security.

As he put it in an official public statement, “THE SECURITY OF OUR NATION IS AT STAKE!” Later, after another federal district judge blocked the federal government from withholding funding from so-called “sanctuary cities,” Trump called the ruling “a gift to the criminal gang and cartel element in our country” and claimed it was “putting thousands of innocent lives at risk.” He also highlighted the fact that federal judges are unelected.

Trump’s criticisms of judges—and in particular his evoking a false choice between having an independent judiciary and being safe—have rightly drawn the ire of some in the legal community. Even his own nominee to the Supreme Court, Neil Gorsuch, felt compelled to admit to a senator that Trump’s comments regarding Judge Robart were “disheartening” and “demoralizing” to the independent functioning of the judiciary. An Indiana University law professor, Charles Geyh, observed that, with his incendiary comments, Trump was not just expressing disagreement with court rulings, as past presidents have done, but rather “essentially challenging the legitimacy of the court’s rule,” all “without any reference to applicable law.”

When the most visible members of the legal profession—justices on the Supreme Court of the United States—lend support for anti-intellectualism, they also, perhaps unwittingly, play into the wider distrust of all areas of intellectual expertise, including that which underlies the law itself. This occurs simply when


286. Id.
287. Id.
288. Id.
289. Id.
290. Id.
291. Id.
judges and lawyers presume they have expertise in areas where they lack the requisite training, experience, and other qualifications. That is because their doing so implicitly devalues the expertise of those who do in fact possess the proper credentials. We see this often in the use of law office history, as Brennan’s opinion in *New York Times Co. v. Sullivan* and Scalia’s opinion in *District of Columbia v. Heller* exemplify. It is especially dangerous for prominent jurists to explicitly question or dismiss the value of expertise, as Scalia did in a successor case to *Heller* and Roberts did in his questioning in a recent partisan gerrymandering case. Scalia specifically questioned “whether or not special expertise is needed” in the doing of history.292 It is. It is for the practice of law too, as the history of the American legal profession shows. As lawyers and judges, we must be constantly aware of that fact and represent the law accordingly. Our profession depends upon it, as does a society reliant upon law for its order.