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Martin S. Flaherty

Fordham University School of Law

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Practice of Faith

Cover Page Footnote

Associate Professor, Fordham Law School. B.A., Princeton University, 1981; M.A., Yale University, 1982; M. Phil., Yale University, 1987; J.D., Columbia Law School, 1988. I would like to thank Mark Tushnet and the Georgetown Biennial Discussion Group on Constitutional Law for the opportunity to present an earlier version of this piece. Thanks as well to Minna Jung and Ed Shapiro for valuable research assistance.

THE PRACTICE OF FAITH

Martin S. Flaherty*

INTRODUCTION

“CONSTITUTIONAL meaning,” observes Bruce Ackerman, “is not fueled by the intellectual curiosity of a juristic elite, but by crucial historical events which provoke popular efforts to modify, sometimes radically, pre-existing starting points”¹ True to this premise, Professor Ackerman has spent the better part of the last decade attempting a “narrative reconstruction”² of those historical events that have been most crucial.³ Lately he has, both here and elsewhere, excoriated we, today’s “generation of midgets,” for ignorantly betraying the achievements hard won by “We the People” of the New Deal generation.⁴ For Ackerman, constitutional history not only matters, it is, and ought to be dispositive—at least, that is, until a later generation itself makes constitutional history on a similar scale.

For all his distinctiveness and for all his protestations, Ackerman merely raises, in acute form, an increasing concern for our constitutional past in general. If this Symposium is any indication, many if not most of the constitutional theories now competing for attention assign a significant role to history in ways far more genuine and sophisticated than the caricatured appeals to the past made by Judge Bork⁵ or Edwin Meese.⁶ Lawrence Lessig, for example, whose efforts have made the term “fidelity” stylish, clearly means fidelity—faithfulness—to a given principle set down at a given point in our constitutional history to be given life today through intelligent “translation.”⁷ This “fidelity” Symposium, moreover, does appear to be an indication. In her recent, comprehensive, and elegant survey of postwar constitutional

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1. Bruce Ackerman, *A Generation of Betrayal?*, 65 *Fordham L. Rev.* 1519, 1519 (1997) [hereinafter Ackerman, *Generation of Betrayal*].

2. *Id.* at 1536.

3. See Bruce Ackerman, *We the People: Foundations* (1991) [hereinafter Ackerman, *Foundations*].

4. Ackerman, *Generation of Betrayal*, *supra* note 1, at 1528; Bruce Ackerman, *We the People: Transformations* chs. 9-13 (forthcoming 1997) [hereinafter Ackerman, *Transformations*].

5. See Robert H. Bork, *The Tempting of America* (1990).

6. Edwin Meese III, *Interpreting the Constitution*, in *Interpreting the Constitution* 13, 13-21 (Jack N. Rakove ed., 1990)

7. Lawrence Lessig, *Fidelity and Constraint*, 65 *Fordham L. Rev.* 1365, 1366-67 (1997).

theory, Laura Kalman places special emphasis on what she calls, "the turn to history" as one of the most important recent trends in constitutional thought.⁸

With a predictable lag, the recent turn to history is only now prompting the hard questions of how this should be done. For a time, constitutional theorists interested in history followed the advice Earl Weaver gave to Dennis Martinez about pitching and simply proceeded to do it⁹ rather than worry about sound methods for doing so. This approach, moreover, has its defenders among theorists and even historians. Yet it has become more and more apparent that, unlike Dennis Martinez, the turn to history has too often resulted in history that is at best "lite"¹⁰ or at worst, just plain "bad."¹¹ As a result, just doing it is giving way to the concern for standards. What those standards should be, however, is another matter.

This Response takes this occasion to develop the argument that lawyers who make historical assertions should rely on historians. Seemingly mundane, this position has generated little resistance except among the legal audience to whom it is addressed¹²—one reason for expanding the point further.¹³ Part I looks in greater depth at the dependence of theory, any theory, on history and the problems that result. Part II attempts to demonstrate that reliance on historians mitigates these difficulties more effectively than any other plausible approach. This Response concludes that while more rigorous attention to the past may not resolve raging interpretive debates, it could not fail to improve what medieval theologians in another context termed the "practice of faith."

I. THE PAST AS PROLOGUE

This conclusion assumes that the past *will* be useful in coming to terms with the larger conflict. Many would agree that this assumption seems safe, though few might agree why. To rule out at least one possibility at the outset, the past itself cannot justify guidance by the past.

8. Laura Kalman, *The Strange Career of Liberal Constitutionalism* ch. 5. (1996) [hereinafter Kalman, *Liberal Constitutionalism*].

9. Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 *Yale L.J.* 1773 (1987).

10. See Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 *Colum. L. Rev.* 523 (1995) [hereinafter Flaherty, *History Lite*]; see also Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 *Colum. L. Rev.* 121, 147 & n.150 (1996) (citing Flaherty, *History Lite, supra*); Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-In-Law*, 71 *Chi.-Kent L. Rev.* 909, 925 & n.68 (1996) (same) [hereinafter Tushnet, *History-In-Law*].

11. See Ackerman, *Foundations, supra* note 3, at 91, 334-35 n.21.

12. See *infra* text accompanying notes 45-48.

13. Recent response to earlier versions of my argument have generated sufficient response, in print and informally, that I leave for another day developing the theme of "Constitutional Erosion" that I spoke to at the Symposium itself. See *infra* text accompanying notes 47-48.

As Ronald Dworkin points out, it is circular to argue that the views of the Founders, for example, must bind later generations simply because the Founders themselves thought their views should be binding.¹⁴ Instead, the past's theoretical relevance to constitutional interpretation must come from theory. The problem of how far the past ought to bind the present is another matter. Yet few if any theorists contend that the past is irrelevant. To the contrary, many if not most agree that it is significant, even essential.

The most obvious devotion to past issues comes from those who err on the side of democracy. For a wide array of intentionalist thinkers, the keys to the great constitutional mysteries can be discovered in the views of the Founders. Sometimes explicitly, more often implicitly, intentionalists justify their reliance on this particular history with some variant of Hamilton's famous passage in *Federalist No. 78*. Because the "people" articulate constitutional law, and subsequent generations govern themselves within the framework of that law, those generations must consult the "people's" views when determining what the original framework leaves open—unless of course one of those subsequent generations itself successfully claims to act for "the people" and changes the framework.¹⁵

Originalists take this argument to its most extreme conclusion, holding that the historical understandings initially underlying constitutional norms are dispositive. Unfortunately those who gave this approach its current name have also given it a bad name. As has by now been oft-noted, originalists such as Meese, Bork, Scalia, and Thomas almost always, suspiciously, come up with original understandings that are narrow applications rather than broad principles.¹⁶ Even more suspiciously, these narrow applications, in turn, almost always lead to conservative results in modern political terms. On this view, for example, the Cruel and Unusual Punishment Clause could never pro-

14. Ronald Dworkin, *A Matter of Principle* 33, 53-55 (1985). This is not to say that the Founders in fact thought any such thing. See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885 (1985). But see Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 Const. Commentary 77, 79 (1988) (arguing that "although the originators rejected the use of framer intent, they did not thereby envisage that Constitutional interpretation would exclude consideration of original intent").

15. *The Federalist No. 78*, at 527-28 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). This is not to say that all of these ideas necessarily result from Hamilton's treatment.

16. These criticisms come in addition to numerous theoretical objections. Initial manifestoes either assumed that original understanding ought to be binding, see, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 862 (1989) (stating that the purpose of Constitutional guarantees is to prevent the law from reflecting changes in original values), or, fell prey to Dworkin's objection with the circular claim that original understanding ought to bind because such was the original understanding, see, e.g., Bork, *supra* note 5 at 143-85, 251-59 (discussing the significance of original understanding).

hibit disproportionate prison sentences,¹⁷ nor the Fourteenth Amendment protect a right to die,¹⁸ nor the Establishment Clause prevent government aid to religion in general¹⁹—all on the ground that the original understanding ostensibly demonstrates a commitment to contemporaneous practices at odds with such results.

Yet not all originalists, including ones often termed conservative, appear so unrelentingly simplistic or suspicious. Consider Michael McConnell. McConnell clearly defends originalism both in concept and name.²⁰ He does not, however, commit the error of invariably equating original understanding with original application.²¹ To the contrary, he sagely observes that a historical search for original understanding often may fail to produce a clear answer even on an abstract level.²² Not surprisingly this insight does not always yield politically conservative—or at least retrograde—results. Recently, for example, he has argued that the original understanding of the Fourteenth Amendment does not foreclose applying “equal protection” to public education today.²³

Not everyone who does this sort of thing even employs the term originalism, particularly modern liberals. Here return to Ackerman. The more one ponders dualist theory, the harder it becomes to distinguish it from the approach claimed, if not practiced, by Antonin Scalia. Put aside disputes about particular original understandings or even the exclusivity of Article V. To say that constitutional meaning is fueled primarily by crucial historical events²⁴ is all but indistinguishable from asserting that the way “to establish the meaning of the Constitution [is] . . . by examining various evidence, including not only, of course, the text of the Constitution and its overall structure, but also the contemporaneous understanding.”²⁵ Dualist originalism, however, will never be confused with applications. And despite a common

17. *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991) (Scalia, J.).

18. Antonin Scalia, Remarks at Catholic University, LEXIS Counsel Connect, Hot Topics File (Oct. 1996).

19. *Lee v. Weisman*, 505 U.S. 577, 636 (1992) (Scalia, J., dissenting).

20. Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 *Fordham L. Rev.* 1269 (1997).

21. *Id.* at 1284.

22. *Id.* at 1284-87.

23. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 *Va. L. Rev.* 947 (1995). Perhaps ironically, this particular conclusion has not escaped criticism from the left on grounds of historical method. Tushnet, *History-In-Law*, *supra* note 10, at 917-25. In general, though, McConnell's methods stand out for their extensive reliance on an array of primary and secondary sources. See, e.g., Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 *Harv. L. Rev.* 1409, 1511 (1990) (concluding that interpretation of free exercise clause which mandates religious exemptions was contemplated by the framers); see also *infra* text accompanying notes 51-63.

24. See Ackerman, *Generation of Betrayal*, *supra* note 1.

25. Scalia, *supra* note 16, at 852.

criticism, Ackerman's theory will generate political results often at considerable odds with his own theory of justice, as he is quick to point out.²⁶

Yet originalists are not distinctive for their appeals to the past, only the weight they place upon it. An array of other thinkers—call them historicists²⁷—may not view particular accounts of the Founding or Reconstruction as dispositive, but still consider them as authoritative, privileged, or highly probative. Count among this group such important thinkers as Lawrence Lessig, Akhil Amar, Cass Sunstein, and Richard Epstein. Whatever their considerable differences each theorist typically bolsters their prescriptions with historical assertions, albeit often to considerably different degrees. Even Dworkin, who may not always have done as he has said in this regard,²⁸ places what is for him a novel premium on the historical context of constitutional text. Now, officially in his “later” incarnation, Dworkin makes strikingly direct appeals to history in the service of what he terms “linguistic intent.”²⁹

Reliance on the past also figures heavily in those theories that err on the side of rights and justice. The past that rights-oriented approaches typically invoke, however, is less the history underlying particular constitutional texts than the evolving traditions that shape our constitutional culture.³⁰ As with intentionalist reliance on history, justifications for invoking tradition are also often left unstated. Of those who do articulate a rationale, some rest on some democratic foundation.³¹ For others, tradition appears to matter out of a concern for feasibility, that is, for determining which rights the society sufficiently honors (even in the breach) to be candidates for judicial protection

26. Ackerman, *Generation of Betrayal*, *supra* note 1, at *902-03.

27. Cf. Robert W. Gordon, *Historicism and Legal Scholarship*, 90 *Yale L.J.* 1017 (1981) (asserting that “historicism” is not intended to describe the view that meanings be exclusively derived by reference to a unique time and place).

28. James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 *Fordham L. Rev.* 1335 (1997).

29. Ronald Dworkin, Symposium, *Fidelity in Constitutional Theory*, Fordham University School of Law 8 (Sept. 20, 1996) (transcript on file with the Fordham Law Review).

30. Tradition in this sense can predate constitutional texts by centuries—think of Justice Frankfurter's invocations of English law—and continue well beyond them. Nowhere is reliance on tradition more evident than in the Supreme Court's substantive due process jurisprudence, where tradition continues to play a dominant role in the definition of fundamental rights. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 847-49 (1992).

31. Perhaps the most well known instance of a democratic justification for a rights-based approach is Justice Brennan's reliance on evolving tradition as a means to maintain the people's “ongoing consent” to our constitutional order, including the work of the Supreme Court. William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, in *Interpreting the Constitution*, *supra* note 6, at 23, 23-34.

and which are not.³² Accordingly, some theorists contend that the ideas of the Founders should matter because they were unusually able thinkers, with a wealth of practical experience, facing problems that endure.³³ Others simply believe that history matters because we cannot intelligently develop new norms without comprehending old ones.³⁴ Here Dworkin, arguably in a more familiar “early” mode, counsels understanding history and tradition by positing “fit” to our constitutional culture *and* past as a basic criterion of legitimacy.³⁵

So heavy is “the weight of the dead hand of the past” that Christopher Eisgruber makes the intriguing observation that it is less to be consulted than, if not resisted, at least regulated.³⁶ Taken as a normative claim, this suggestion hardly advocates abandoning history altogether—as Eisgruber’s own work amply demonstrates.³⁷ To the contrary, as a descriptive insight, Eisgruber’s observation suggests that considering the past when considering the Constitution simply cannot be avoided.

Too often, though, the resulting attempts to identify either history or tradition—to borrow a technical phrase from Bruce Ackerman—stink.³⁸ For all that various theories esteem the past, the actual estimation remains in the strictest sense theoretical, at least as far as historians would be concerned.³⁹ In part the law’s shoddy use of the past simply reflects the difficulties of interdisciplinary exchange. Historians seek explanations while lawyers make arguments, and from this basic distinction a host of more specific methodological differences flow. In particular, most legal academics lack the perspective, time,

32. This idea is not confined to the identification of rights. Perhaps the most articulate defense for reliance on tradition comes from Larry Kramer, who counsels invoking evolving practice as a source of constitutional authority in such structural areas as federalism and separation of powers. Larry Kramer, *Fidelity to History—And Through It*, 65 Fordham L. Rev. 1627, 1638-41 (1997).

33. See William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 856-59 (1995).

34. Don Herzog, *Happy Slaves: A Critique of Consent Theory* 33 (1989).

35. Dworkin, *supra* note 14, at 143-45.

36. Christopher L. Eisgruber, *The Living Hand of the Past: History and Constitutional Justice*, 65 Fordham L. Rev. 1611, 1617 (1997).

37. Christopher L. Eisgruber, *Dred Again: Originalism’s Forgotten Past*, 10 Const. Commentary 37 (1993) (discussing the historical significance of the *Dred Scott* decision in modern substantive due process analysis); Christopher L. Eisgruber, *The Fourteenth Amendment’s Constitution*, 69 S. Cal. L. Rev. 47, 47-48 (1995) (identifying the shifting impact that historical events can have on constitutional interpretation).

38. Ackerman, *Foundations*, *supra* note 3, at 170.

39. Documenting this assertion would be more tedious than challenging. Suffice it to say that the task is best left to other venues. See Mark Tushnet, *Red, White and Blue* 23-45 (1988) [hereinafter Tushnet, *Red, White and Blue*]; Martin S. Flaherty, *The Most Dangerous Branch*, 105 Yale L.J. 1725, 1745-55 (1996); Flaherty, *History Lite*, *supra* note 10, at 524-28.

and knowledge of sources to pursue historical study particularly well.⁴⁰

Perhaps even higher interdisciplinary hurdles result from imperatives inherent in constitutional discourse in particular. Those committed to democratic, intentionalist approaches often succumb to the temptation of cooking the record precisely because such approaches make the stakes of defining the record so high. Conversely, those who are more directly rights-oriented often sidestep any real inquiry into the past altogether perhaps, one suspects, because the messiness that such an inquiry usually yields inevitably does violence to neat, theoretical constructs.⁴¹

Should constitutional theorists, then, forget the whole thing? The sorry record might well tempt one to say as much. And in fact it has prompted a number of theorists to conclude the legal community should simply employ historical arguments as just one more polemical technique⁴²—which from a historian's vantage point is much the same as forgetting the whole thing.

Defenders of this result advance a number of justifications, ranging from traditional to postmodern. The most venerable of these starts with the problem of competing accounts. Advanced by such scholars as Mark Tushnet,⁴³ the argument goes that the historical disagreement evident in law reviews is no stranger to history books either, and each case demonstrates that widespread accord, much less consensus, on a single interpretation of a given event is a chimera. It follows that anyone arguing for a particular constitutional position should feel perfectly free to choose that version of constitutional history that provides the best support, or better still, tailor one to size.

Lately, a more popular rationale issues from a fairly formalistic commitment to modern university departments, otherwise known as interpretive communities. The potent roster for this view includes Tushnet,⁴⁴ Cass Sunstein,⁴⁵ and Stanley Fish.⁴⁶ This group argues that

40. See Flaherty, *History Lite*, *supra* note 10, at 526 n.16. Laura Kalman apparently—and reasonably—took an earlier version of this argument to be that members of the legal community *cannot* pursue history credibly. With this contention she disagrees. Kalman, *Liberal Constitutionalism*, *supra* note 8, at 168-71. Instead, my point is merely that the cultural incentives of the law and legal education make the enterprise difficult in itself, and significantly more difficult than it is for professional historians. On this point I hope that our disagreement, if any, is considerably more narrow.

41. A case in point, as noted, is Dworkin, whose pronouncements about the value of fit have yet to yield corresponding attempts to discern fit to much beyond recent, and selected, Supreme Court precedents.

42. Cass R. Sunstein, *The Idea of a Useable Past*, 95 Colum. L. Rev. 601, 601-02 (1995) [hereinafter Sunstein, *Usable Past*]; Tushnet, *History-In-Law*, *supra* note 10, at 932-35.

43. See Tushnet, *Red, White and Blue*, *supra* note 39, at 23-45.

44. Mark Tushnet, *Constituting We the People*, 65 Fordham L. Rev. 1557 (1997).

45. Sunstein, *Usable Past*, *supra* note 42, at 605.

46. Stanley Fish, *Professional Correctness* (1996).

lawyers and historians look to the past with different goals and should therefore not be judged by the same criteria. While historians attempt to reconstruct the past, lawyers seek to create narratives that have self-consciously normative implications. "On this view," argues Sunstein, "the historically-minded lawyer need not be thought to be doing a second-rate or debased version of what the professional historians do well, but is working in a quite different tradition with overlapping but distinct criteria."⁴⁷ As Tushnet concisely puts the point, "Law-office history is a legal practice, not a historical one. The criteria for evaluating it, for determining what is a successful performance, must be drawn from legal practice rather than from historical practice."⁴⁸

Potentially the most interesting justification for conceiving history as rhetoric springs from the problem of historical revisionism. This argument has yet to gain currency in law reviews though it is more familiar among historians themselves. On this view, the law's attempts to invoke the past may flounder not simply because lawyers appear ill-equipped to do it or because they need not do it except as it benefits a particular position. Rather, the entire enterprise may be doomed to failure because no one, not even the most careful historian, is in a position to do it. Two versions seem worth raising for present purposes. The more radical critique holds that the past is almost entirely a construct of the present. On this view neither history nor tradition can provide meaningful constraints because interpreting the past, like all interpretation, turns on the conditioning, desires, and whims of the interpreter. A more modest, yet still sweeping, challenge contends that while the past can yield certain constraints, it does not provide enough to matter. In particular, even those interpretations based on the most rigorous study only rarely provide genuine guidance, and then usually fall to the revisionist accounts of later generations anyhow.

Either way, and really in all of these ways, the best that any of us can do in the end is make virtue of necessity. Rather than chase for historical truth, we must admit that the only real criterion for a constitutional lawyer's use of the past should not be whether a given event ever happened but whether it convinces anybody to go the lawyer's way.⁴⁹

II. PAST PLAUSIBLE

Before resorting to that, it may be that the enterprise can still be saved upon further consideration. It may be that such consideration will actually lead to methods that permit constitutional thinkers to use

47. Sunstein, *Usable Past*, *supra* note 42, at 605.

48. Tushnet, *History-In-Law*, *supra* note 10, at 934-35.

49. For a description of postmodern challenges to history, see Joyce Appleby et al., *Telling the Truth About History* 198-237 (1994).

the past credibly rather than just forensically. It may also be, finally, that such methods can withstand current challenges, whether traditional or postmodern. In each regard the bottom line will be reliance on historical standards as employed by historians, which will in turn mean relying on historians themselves to an extent only rarely attempted in the legal community. To paraphrase Brandeis, the best way to combat poor history is more history.

Just as there is no formula for maintaining fidelity to the past, still less is there an algorithm for the prior question of figuring out what those past instructions, or traditions, are. Though only recently considered in the pages of law reviews, certain ways of making assertions about the past are clearly better than others. These logically come from the discipline of history itself. This conclusion follows not so much because historians determine what is historically true,⁵⁰ but because they commonly resolve what is historically convincing. Legal arguments relying on economics, philosophy, or sociology are more convincing when they comport with the standards set by those disciplines. Nothing prevents the same point from applying to arguments based upon history.

To the contrary, the logic of using the past compels it. Constitutional theorists do not ordinarily cite Madison, Hamilton, or Wilson simply because these thinkers had compelling ideas. Instead, they invoke them for authority that derives from something external to the substance of their thought, namely for the fact that their ideas arose in a certain time and place that directly connects them to our constitutional history and tradition. Seeking such external authority entails playing by external rules. Or at least it entails playing by external rules until it can be shown, as postmodernists claim they can, that the external rules themselves do not provide the authority that they promise.

Ultimately—and this rightly makes lawyers nervous—reliance on historical standards means reliance on historians. In part those standards involve too much drudgery for most in the legal academy to attempt. In part those standards themselves dictate turning to established scholarship, at least initially.

Jack Rakove, both in these pages⁵¹ and in his exemplary book entitled *Original Meanings*,⁵² helps demonstrate why. Taking originalism

50. Whether a matter can be deemed historically "true" in an objective sense need not be resolved to assert the utility of historical standards. For a discussion on historical objectivity, see Peter Novick, *That Noble Dream: The "Objectivity Question" and the American Historical Profession* (1988) and Thomas Haskill, *Objectivity Is Not Neutrality: Rhetoric vs. Practice*, in *That Noble Dream, History and Theory* (Peter Novick ed., 1990).

51. Jack N. Rakove, *Fidelity Through History (Or to It)*, 65 *Fordham L. Rev.* 1587 (1997) [hereinafter Rakove, *Fidelity Through History*].

52. Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (1996).

in particular as "a problem of historical recovery with legal implications,"⁵³ Rakove posits four broad categories of evidence that may be brought to bear when attempting to uncover the original understanding, meaning, or intention of a constitutional provision. First come the notes collected in Max Farrand's *The Record of the Federal Convention*,⁵⁴ along with a small number of background papers such as important letters and memoranda by James Madison. In addition, a good historian would have to look at the more diffuse and voluminous records surrounding the state ratification conventions.⁵⁵ Rakove does not believe that either of these basically "textual"⁵⁶ sources would at first blush present insurmountable problems to a legal community that, after all, is trained to work with texts. What the historian does not point out, however, is that a thorough examination of just these first two types of sources would probably press most lawyers further than they might want to go. Nor, as Rakove aptly notes, is the usual shortcut of relying on *The Federalist* a reliable way out.⁵⁷

Yet the real work begins with Rakove's remaining categories, which he terms "contextual."⁵⁸ One is "the general heading of those intellectual sources of influence that shaped the mental world of the revolutionary generation . . . [including, among others] . . . Hobbes, Locke, Montesquieu, Hume . . . Blackstone . . . Grotius, Puffendorf, and Delolme."⁵⁹ Still one more source essential for any inquiry into constitutional origins is perhaps most demanding of all—"the habits, attitudes, lessons, and concerns that Americans derived from their own political experiences."⁶⁰

Consider these strictures applied. Gordon Wood, for example, noted that he began his epic *Creation of the American Republic*

simply with the intention of writing a monographic analysis of constitution-making in the Revolutionary era; yet I soon found that I could make little or no sense of the various institutional or other devices written into the constitutions until I understood the assumptions from which the constitution-makers acted. I [therefore] needed . . . to steep myself in the political literature of the period⁶¹

53. Rakove, *Fidelity Through History*, *supra* note 51, at 1594.

54. Yale reprinted the original three 1911 volumes in 1987, together with a fourth volume of documents assembled by James Hutson. Max Farrand, *The Record of the Federal Convention* (James H. Hutson ed., 1987).

55. See Rakove, *Fidelity Through History*, *supra* note 51, at 1597-1600.

56. *Id.* at 1600.

57. *Id.* at 1597. For more on the use and abuse of *The Federalist*, see Flaherty, *History Lite*, *supra* note 10, at 553-54 & n.137.

58. Rakove, *Fidelity Through History*, *supra* note 51, at 1595.

59. *Id.* at 1598.

60. *Id.* at 1599.

61. Gordon S. Wood, *The Creation of the American Republic, 1776-1787* vii-viii (1969).

Doing this, like most other standards historians attempt to live by, is immensely labor intensive. A historian would take years steeping herself in the relevant sources before venturing forth with any authoritative overview of even the most modest event, much less one as momentous as the Founding. Forrest McDonald, for instance, at least implies he did Wood one better by refusing to generalize about the Founding until he had, "read virtually every line of virtually every extant American newspaper for the period and a large body of personal correspondence," among other things.⁶²

As if all this were not enough, neither McDonald, Wood, Rakove nor any other respected historian goes forward without also according the same type of scrutiny to yet *another* type of source, namely, the work of fellow scholars.⁶³ In doing this, historians are especially on the lookout for either accounts that their colleagues more or less generally agree upon or, failing that, at least a framework for further debate and research. Most scholars seek a dominant account or framework to follow, to build upon the information and interpretation of those who have spent lifetimes in a particular field to better focus upon outstanding questions and locate the answers in a meaningful context. A select few also master the current paradigms to expose their weaknesses and debunk them.

Paradoxically, the problems that these standards present to the legal community also generate their own solution. Legal scholars, and still less practitioners, do not have the luxury of "steeping" themselves in a given period. Cases and controversies rage here and now; tentative answers must be advanced. Against these odds, the professionals who serve the law cannot possibly hope to meet the standards of their counterparts who serve history (no more, perhaps, than Jack Rakove could argue a case before the Supreme Court). They can, however, rely on those who do. Much like historians themselves, constitutional professionals can at least look to prevailing historical accounts or debates when trying to resolve specific issues. While this is also time consuming, reading one or two dozen of the acknowledged leading books on a topic beats reading the thousands of sources that the authors of those books had to consult. Yet doing this, especially in the legal context, does not sacrifice historical credibility. Following these rules, by definition, comports with the external standards through which the legal community seeks external guidance. In fact, this practice seems to be the only practical hope.⁶⁴

62. Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* 67 n.25 (1985).

63. *See Id.* at 313-41; Wood, *supra* note 61, at 619-33.

64. One example of someone who does this economically is Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. Chi. L. Rev. 123 (1994). Another scholar who has embarked on a more full-fledged excursion into the past in order to explore federalism is Larry Kramer. *See* Larry Kramer, *Understanding Federalism*, 47 Vand. L. Rev. 1485 (1994).

In the first instance, practice of this sort goes a long way toward addressing the problem of competing accounts. Interestingly, some of the same scholars who argue that widespread agreement on crucial events is rare, themselves display a command of historical scholarship to expose the chronic failings of their colleagues.⁶⁵ Put more directly, they demonstrate how the past can be credibly pursued in asserting that it cannot. Many chronic failings, moreover, seem readily correctable with just a modicum of additional homework. It just is not the case, for example, that we need throw up our hands about the initial public understanding of the Fourteenth Amendment's evident textual centerpiece, the Privileges or Immunities Clause. True, one historian, Robert Kaczorowski, asserts that the Clause was initially read broadly while another, Raoul Berger, contends that it was meant to be viewed as especially contentious.⁶⁶ A little more time on the database, however, would quickly reveal that while legal historians respect the former scholar, they have time and again challenged both the conclusions and methods of the latter.⁶⁷ At least on the practical level, perhaps we should not give up too hastily.

Then again, maybe not hastily, but ultimately nevertheless. That, at any rate, is the challenge put forward by those who in essence argue that the standards of historians need not apply to theorists because historians are historians and theorists are theorists.⁶⁸

The premise of relying on sound historical standards, however, is the very reason why the legal community appeals to history in the first place. For most theorists most of the time, the whole point of invoking history is either implicitly or explicitly to seek authority external to the theory being put forward. When, for example, Cass Sunstein claims that the Founding generation was primarily "republican," he does so not just because those republican ideals remain convincing on their own terms, but because the historical fact that this group of people practiced these ideals at a certain place and time add something to his theory of constitutional interpretation that logic, originality, and reason cannot themselves supply, however powerful or otherwise convincing.⁶⁹ Such additional authority has at least two facets, which might broadly be termed postmodern and modern. For the more fashionable set, the appeal to another discipline augments a theoretical

65. See Tushnet, *Red, White and Blue*, *supra* note 39, at 36 (1988).

66. Compare Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. Rev. 863 (1986) (reading the Privileges and Immunities Clause broadly) with Raoul Berger, *Government by Judiciary* (1977) (emphasizing the puzzlement that historical figures share over the meaning of the clause).

67. For two solos in an unforgiving chorus, see Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 Yale L.J. 453, 523 n.139 (1989); John J. Gibbons, *Book Review*, 31 Rutgers L. Rev. 839 (1978).

68. See *supra* text accompanying notes 42-48.

69. See Cass R. Sunstein, *The Partial Constitution* 17, 24 (1993).

truth-claim with a truth-claim from that outside discipline, rendering the claim that much more potent. For the less newfangled crowd, a theoretical claim drawing on history in particular makes a theoretical point additionally attractive by grounding it in experience, or for the truly old-fashioned, in some form of reality.

Either way, once a historical appeal becomes nothing more than a trope, it falls prey to an inevitable dilemma. To the extent it serves as a postmodern appeal to another craft, it must abide by that craft or lose its authority. To the extent it functions as an assertion of fact or something close, it must rely on some verifiable source beyond rhetorical power or lose that authority. Now it could be argued that all of this is harmless error so long as the legal audience is unfamiliar with the accepted conventions for making a credible historical point.⁷⁰ But this contention appears to be little more than a defense for misrepresentation. Pushed to the extreme, it takes the form of something like a made-up quotation from James Madison (“the best republican government ever witnessed has been the military rule of Oliver Cromwell”), never mind that historians don’t do this sort of thing, or that it simply never happened, so long as it will convince the legal community. Yet this type of argument cannot work given the premise that theorists make historical arguments to gain additional authority. So long as this is true, it follows that Madison extolling military dictatorship either does not deliver the goods from a separate discipline or ground the theoretical point in fact, as the very gesture of making the assertion advertises. The second facet of the problem, moreover, goes beyond false advertising. Even if this matter goes undetected, a theory relying on truly deficient accounts of what people say and do must ultimately run into problems, at least if it hopes to have some connection to human behavior.⁷¹ If this is on the right track, then the only way to restore power to the trope or greater reliability to a theory is to rely on historians.

But if so, it is a hope that also seems easy prey for an even more fundamental, postmodern set of objections. Consider the following dilemma. Under the proposed approach, anyone hoping to interpret the Constitution by examining its origins has no credible choice but to rely in the first instance on historical scholarship, doubly so when a recognized body of scholarship offers a provisional account or framework. Fifty years ago that would have meant turning to the economic

70. Cf. Tushnet, *History-in-Law*, *supra* note 10, at 934-35 (arguing that combining law and history is a legal practice, not a historical method).

71. Hamilton put this thought elegantly, and prophetically, in a letter to Lafayette about the French Revolution: “And I dread the reveries of your Philosophic politicians who appear in the moment to have great influence and who being mere speculatists may aim at more refinement than suits either with human nature or the composition of your Nation.” Letter from Alexander Hamilton to the Marquis de Lafayette (Oct. 6, 1789) in *5 Papers of Alexander Hamilton* 425 (Harold C. Syrett & Jacob Cooke, eds. 1962).

interpretations of Charles Beard, whose model dominated historiographical discourse for decades.⁷² Today the initial choice would be the very different narrative offered by Rakove, Wood, McDonald, Bailyn, and Edmund Morgan. Fifty years from now it will probably be an account—if there is a single account at all—crafted by scholars with very different sounding names. Surely such turnover exposes the fallacy of looking to the past for guidance. The constant shifts in the accounts that even professional historians create confirms that neither history nor tradition offer any real outside constraints for those who occupy the present. At the very least it demonstrates that whatever does limit historiographical creativity does not limit it much. Those meager limits permit successive generations to reinvent the past even when there has been temporary agreement on a dominant framework, and that leaves anyone who would rely on any momentary paradigm with little more than a rope of sand. Trying to salvage the past, it appears, merely exposes the project's futility.

But a claim is not over 'till it's over. Further reflection suggests that the past can come out of the encounter not only unscathed, but stronger. The more radical challenge simply proves far too much. The more modest objection, moreover, actually complements the use of historical scholarship precisely because such scholarship changes.

Take the more radical objection. The shift from Beard to Wood (to someone perhaps only now in high school) demonstrates the strength of the constraints that operate upon historians rather than their malleability. The "Beardian view" went out of fashion for many reasons, but one of the most important was the discovery that Beard's thesis simply could not comport with newly accessible sources and more rigorous research. In particular, McDonald led the way—in fact made his reputation—in showing that wealthy creditors did not support the Constitution, nor did embattled debtors oppose it, with anything like the consistency Beard posited.⁷³ Now a postmodern critique might retort that the sources McDonald used to refute Beard are themselves malleable. And on a deeper level that may well be true. But that is not the level upon which people operate. Even the most cynical originalist stands willing to concede a point when a relevant source cuts directly against her.⁷⁴ No less important, accepting such radical indeterminacy for historical sources necessarily compels accepting the

72. Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (1913).

73. Forrest McDonald, *We the People: The Economic Origins of the Constitution* (1958).

74. Or, to employ the pronoun descriptively, him. This phenomenon may explain why Justice Scalia, for example, is curiously silent in those areas where he has reason to believe that the weight of historical scholarship is against him. Compare *Harmelin v. Michigan*, 501 U.S. 957, 961-85 (1991) (Scalia, J.) (relying extensively on idiosyncratic versions of English and American history) with *Employment Division v. Smith* 494 U.S. 872 (1990) (not relying on history at all).

same type of indeterminacy for other materials that have been more easily manipulated, such as cryptic constitutional text.

By contrast, the turnover of historical models does support the more moderate postmodern challenge, but this turns out to actually support following such models, or at least the most current version. Only a dinosaur of the most Whiggish sort would argue that history is a dispassionate search for truth, immune from the forces in which historians live. Beard's progressive views flourished while he was speaking to a society influenced by the Progressive movement. Wood's ideological interpretations arguably first came to dominate because his work first addressed an era steeped in the ideological competition of the Sixties and the Cold War. Future historians will perhaps develop a multicultural framework to connect with the nation's growing pluralist and multicultural concerns.

Yet far from undermining the integrity of these models, this element of contingency furnishes all the more reason to employ them. As three pragmatic historians recently put it, "Successive generations of scholars do not so much revise historical knowledge as they reinvest it with contemporary interest New versions of old narratives are not arbitrary exercises of historical imagination, but the consequence of the changing interest from cumulative social experience."⁷⁵ Contemporary historians formulate questions and approaches that, at some level, reflect the concerns of the society in which they live. So, too, do contemporary constitutional interpreters. Following a current historiographical framework, therefore, speaks to present day constitutionalists in a way that no previous or future account could. For now, it is better historical practice to rely on Wood rather than Beard (or, say, Foner rather than Fairman) not just because Wood's account brings us closer to an objective reality, though something like that is for most intents and purposes true. It is also better because the issues Beard pursued—class warfare, economic determinism, elitist misrule—at best engage our own concerns tangentially and sometimes not at all.

CONCLUSION

Assuming any of this is on the right track, resolving how those who aim to interpret the Constitution can plausibly use the past, in turn, raises a host of problems that are no less difficult, maybe more so. Supposing a useable account can be developed, just how should it be used? Should it be dispositive, as originalists hold; presumptive, as a historicist might argue; or merely probative, as justice-seeking theorists commonly imply? And if the past should have some weight, how precisely should the norms it offers be identified and isolated, how can they be isolated and translated to often radically different circum-

75. Appleby, et al., *supra* note 49, at 265.

stances, and how can they be reconciled with norms that arise from subsequent periods? In one sense, each of these questions is itself simply another facet of the larger quest to resolve competing claims of, among other things, democratic will and reasoned judgment. At least on one point, however, both will and judgment appear to concur: it is best to take these matters one facet at a time.