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Cover Page Footnote

Professor of History, University of California, Santa Barbara. This article was the basis of the Robert L. Levine Lecture delivered at Fordham University School of Law on March 20, 1997. I am very grateful for the hospitality of the Fordham faculty on that occasion, and especially for the kindness and excellent criticism of James Fleming. An earlier version of this article was delivered at the USC Law School Faculty Workshop, where it was brilliantly critiqued by Nomi Stolzenberg. I also thank Scott Altman, John Blum, David Cruz, Jody Enders, Barry Friedman, W. Randall Garr, Ariela Gross, Gregory Keating, Pnina Lahav, and David Marshall. Finally, I am grateful to the editors of the Fordham Law Review for allowing me to keep my parentheticals to a minimum. In omitting as many parentheticals characterizing cited sources as possible, I cast my allegiance with those who would resist "the tyranny of the paraphrase" and encourage readers to ask questions of, express ideas about, and be inspired by texts. See Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 *Cornell L. Rev.* 163, 165, 168 (1993).

BORDER PATROL: REFLECTIONS ON THE TURN TO HISTORY IN LEGAL SCHOLARSHIP

Laura Kalman*

INTRODUCTION: THE TURN TO HISTORY

THE resurgence of American history is evident everywhere—from literary theory to television. Just consider the work of Michael Sandel. In 1982, his *Liberalism and the Limits of Justice*,¹ bewailing the loss of self-government and community, played an important role in spreading the “republican revival,” which swept history, philosophy, and political theory across a range of disciplines. His new book, *Democracy’s Discontent: America in Search of a Public Philosophy*,² (“*Democracy’s Discontent*”) makes the same argument, but his focus has shifted. Well over half of *Democracy’s Discontent* is devoted to a survey of American history from the early republic to the present, with an eye to discovering when the forces of good—that is, republicanism—were overtaken by those of liberalism. Further, Sandel argues that “the key features of contemporary liberalism—rights as trumps, the neutral state, and the unencumbered self”³—not only have come to dominate constitutional law but have spread out from there “to set the terms of moral and political debate.”⁴ Here, Sandel has taken a leaf from some law professors, who have placed both history and, ostensibly, the revolt against liberalism at the heart of constitutional theory.

The very vitality of history has made the last decade a busy one for historians. We history police have patrolled our turf, guarding our dis-

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1. Michael J. Sandel, *Liberalism and the Limits of Justice* (1982).
2. Michael J. Sandel, *Democracy’s Discontent: America in Search of a Public Philosophy* (1996).
3. *Id.* at 116.
4. *Id.* at 108.

ciplinary borders against the encroachment of others.⁵ Even our attempts at hospitality have been lame. To borrow from Terrence McDonald, historians have too often reinvented and reinforced the boundaries between history and other disciplines, even as we have pretended to speak across them.⁶

In *The Strange Career of Legal Liberalism*,⁷ ("Strange Career") I joined the historians prowling the borders. There, I argued that law professors seized upon the historiography of republicanism in the 1980s in an effort to recapture the politics of the Warren Court, resolve the "counter-majoritarian difficulty" that dogged constitutional theory,⁸ respond to the Reagan Administration's embrace of originalism, jump on the Sandel bandwagon, and embrace interdisciplinarity. The republican revival in constitutional theory, so often seen as a rebellion against liberalism, also represented a renewal of liberalism—originalism for law professors whose political orientation might be described, however imperfectly, as one of "sixties liberalism." The book developed from a sense that an epistemological crisis was going on in the legal academy and reflected an attempt to focus on one area—constitutional theory—where it seemed acute. *Strange Career* represented an effort to explore the implications of the crisis for "legal liberalism,"

5. See, e.g., Elizabeth Fox-Genovese, *Literary Criticism and the Politics of the New Historicism*, in *The New Historicism* 213 (H. Aram Veveser ed., 1989); Robert B. Toplin, *History on Television: A Growing Industry*, 83 *J. Am. Hist.* 1109 (1996); see also Robert F. Berkhofer, Jr., *Beyond the Great Story: History as Text and Discourse* (1995); *History and . . . Histories Within the Human Sciences* (Ralph Cohen & Michael S. Roth eds., 1995); *The Historic Turn in the Human Sciences* (Terrence J. McDonald ed., 1996) [hereinafter *The Historic Turn*].

6. Terrence J. McDonald, *What We Talk about When We Talk about History: The Conversations of History and Sociology*, in *The Historic Turn*, *supra* note 5, at 91, 112-13.

7. Laura Kalman, *Strange Career of Legal Liberalism* (1996) [hereinafter Kalman, *Strange Career*].

8. Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16 (1962). With those words, Bickel enshrined what Erwin Chemerinsky has called "the majoritarian paradigm" in constitutional theory: "the philosophy . . . that American democracy means majority rule; that the legislatures and executives are majoritarian, but the Court is counter-majoritarian; and that as a result, the Court should invalidate government actions only when they violate clear constitutional principles that exist apart from the preferences of the Justices." Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 *Harv. L. Rev.* 43, 60 n.77 (1989) [hereinafter Chemerinsky, *The Vanishing Constitution*]. This was unfortunate because it ensured the dedication of constitutional theory to the search for a solution to a problem which did not exist. To quote Chemerinsky again, "the key error in much of constitutional scholarship is that it begins with a definition of democracy that does not correspond to the American Constitution. The Constitution is based neither on a concept of democratic rule that is purely majoritarian nor on an assumption that all policies must be chosen by electorally accountable officials." Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 *Tex. L. Rev.* 1207, 1232-33 (1984); see also Erwin Chemerinsky, *Interpreting the Constitution* (1987).

that is, faith in the potential of courts, particularly the Supreme Court, to bring about wide-ranging social and political reform.⁹

This article is another exercise in border patrol. It explores how historians do, and to use one of law's favorite words, "should," react to the legal community's use of their work for originalist purposes. Part I describes the rise of legal liberalism and its vicissitudes. It shows how the Reagan Administration's embrace of originalism deepened the crisis of legal liberalism. Part II examines how law professors left-of-center used the republican revival as an originalist response to the problems of legal liberalism and how historians reacted. Part III contends that, for all the sophistication toward historical scholarship these law professors of the republican revival have shown, the republican revival is an example of the "law office history" historians love to hate. It also suggests that, regardless of whether the republican revival is legal liberalism by another or an authentic alternative to legal liberalism, it is of limited use. Part IV urges historians who sympathize with legal liberals to recognize the rhetorical value of originalism for constitutional discourse. Part V distinguishes between "lawyers' legal history," of which originalism is one example, and "historians' legal history." It claims that the two varieties of history are equally valid and examines some instances in which historians have worked with liberal law professors to develop originalist arguments. Part VI both warns the law professors and historians who are working on a more credible originalism that they are playing with fire and exhorts them to continue doing so. In the conclusion, I argue that both historians and law professors should recognize originalism as a necessity—for now.

9. I draw my definition of legal liberalism from Gerald Rosenberg, who critiqued its assumptions and effectiveness. Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* 4 (1991). "Legal liberalism" is often referred to as "liberal legalism." David Trubek has provided a definition of "liberal legalism" that emphasizes its links to the liberalism of the 1960s: "To be a liberal . . . meant favoring a stronger role for the state in the economy, moderate redistribution of income, state action to improve the lot of the disadvantaged, legal protection for the accused and mentally ill, and legal bans on racial discrimination." David Trubek, *Back to the Future: The Short, Happy Life of the Law and Society Movement*, 18 Fla. St. U. L. Rev. 4, 8 (1990). To be legalist meant maintaining the "faith in law as an instrument of progressive social change." *Id.* at 9. Legalists, such as Lyndon Johnson and Earl Warren, assumed that "most of the 'flaws' in American society could and would be corrected through legal means. They had faith in the immanent liberalism of legal institutions and equated 'law' with 'freedom' and 'equality.'" *Id.* There was a foreign policy dimension as well, which entailed the exportation of "democratic capitalism." *Id.* at 23. In short, the liberal legal agenda was one of legal, social, political, and economic reform at home and globalism abroad to preserve capitalism and fight poverty and injustice. Because I find the term "liberal legalism" pejorative, I refer to it as "legal liberalism."

I. THE CRISIS OF LEGAL LIBERALISM

Because of the nation's experience with the Warren Court, legal liberalism has been linked to political liberalism since mid-century.¹⁰ Like legal realism, the Warren Court asked whether principled decision-making and objective foundations of justice existed. But that issue barely bothered the children of the legal realists—the legal liberals—who dominated the law professorate between World War II and the Vietnam War and who shared the politics of the Warren Court. One group of law professors, those identified with the Legal Process school, tempered praise for the results that the Warren Court reached with concern over its “subjectivity,” pointing to the “counter-majoritarian difficulty,” the alleged conflict between an expansive notion of judicial review—especially when perceived to be exercised idiosyncratically—and majoritarian concepts of democracy, and urging the Court to become more craftsmanlike. Members of another group devoted themselves to writing elaborate apologies for the Court's judicial activism, arguing that the counter-majoritarian difficulty posed no problem for a Court so obviously committed to furthering the causes of democracy and social justice. Both groups, however, appreciated the substance of the Warren Court's decisions and shared its faith in law as the key to progressive social change.¹¹

Outside the law schools, the right's demonization of the Warren Court for expanding individual and civil rights only helped matters. Because it attracted so much fire, the Warren Court fostered solidarity among law professors and law students. The revolts that rocked campuses left the law schools “relatively untouched.”¹²

At the end of the 1960s, then, liberalism fared better in law than it did in politics and other disciplines. Law professors celebrated the greatness and courageousness of Warren and his Court when Warren surrendered the Chief Justiceship in 1969. The Warren Court became “judicial Camelot.”¹³

As the Warren era ended, however, it seemed that the judicial activism it practiced, which helped constitute its legal liberalism, had not fared as well as legal liberalism. Although law professors were encouraged by the early Burger Court, their enthusiasm waned by 1973.

10. I emphasize that I mean “political liberalism” not in the sense that John Rawls has recently used the phrase, but in the amorphous sense it has been used in political discourse. See John Rawls, *Political Liberalism* 3-47 (1993).

11. See Kalman, *Strange Career*, *supra* note 7, at 26-50; Barry Friedman, *Neutral Principals: A Retrospective*, 50 *Vand. L. Rev.* 503, 507-25 (1997).

12. Paul N. Savoy, *Towards A New Politics of Legal Education*, 79 *Yale L.J.* 444, 444 (1970); see also Kalman, *Strange Career*, *supra* note 7, at 50-53 (describing the atmosphere in law schools).

13. See Russell L. Caplan, *The Paradoxes of Judicial Review in a Constitutional Democracy*, 30 *Buff. L. Rev.* 451, 456 (1981). I discuss the travails of liberalism in other disciplines and the celebration of the Warren Court in Kalman, *Strange Career*, *supra* note 7, at 50-59.

They were annoyed by the Court's "rootless activism,"¹⁴ or "Lochnering,"¹⁵ its constitutional theory of fundamental rights, and decisions such as *Roe v. Wade*,¹⁶ "the already classic example of judicial usurpation and fiat without reason."¹⁷ Legal liberals' agenda, as many saw it, was to develop a way of identifying principled decisions that rationalized the Warren Court, demonstrated that principled decision-making and objective foundations of justice prevailed, and provided a basis for its continuation. They would show that the "paradigmatic" decision for their generation,¹⁸ *Brown v. Board of Education*,¹⁹ was correctly decided. At the same time, they would say something important about the two Anti-Christ's of constitutional law—*Lochner v. New York*,²⁰ whose results and reasoning they reviled, and *Roe v. Wade*, whose results they held in high regard, but whose reasoning they despaired of justifying.

The introduction of new political and disciplinary perspectives made legitimating legal liberalism difficult. In 1972, thirty-four of the thirty-eight law professors at Harvard defined themselves as McGovern supporters,²¹ but by the end of the 1970s, law faculties were attracting individuals with more diverse politics. New perspectives—ranging from the Critical Legal Studies ("CLS") critique of rights to the Law and Economics demonstrations that efforts at reform only hurt the intended beneficiaries—posed new challenges for legal liberalism at the same time that affirmative action fragmented it. Further, with the job market for humanists and social sciences collapsing, individuals who would have become humanists and social scientists in a better market were instead becoming law professors, thereby making "law and" fashionable.²²

Legal liberals tried to make use of the new interdisciplinarity. For instance, Frank Michelman reached out to Rawls, attempting to bolster his argument for constitutionalizing welfare rights.²³ As many noted, though, Rawls only proved helpful to those predisposed to-

14. See Vincent Blasi, *The Rootless Activism of the Warren Court*, in *The Burger Court: The Counterrevolution That Wasn't* 198, 211 (Vincent Blasi ed., 1984).

15. See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *Yale L.J.* 920, 944 (1973) (describing "Lochnering" as the Supreme Court's ability to "ram[] its personal preferences down the country's throat").

16. 410 U.S. 113 (1973).

17. Gary C. Leedes, *The Supreme Court Mess*, 57 *Tex. L. Rev.* 1361, 1437 (1979).

18. Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 *Yale L.J.* 1287, 1316 (1982).

19. 347 U.S. 483 (1954).

20. 198 U.S. 45 (1905).

21. See Kalman, *Strange Career*, *supra* note 7, at 77.

22. See *id.* at 60-93.

23. See Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 *Harv. L. Rev.* 7, 14-15 (1969-1970).

wards his politics,²⁴ and, ultimately, the new disciplinary perspectives simply created more problems for legal liberals, particularly in the 1980s. For example, I have said that the legal liberals' concern in the aftermath of the Warren Court was to demonstrate the possibility of objective foundations of justice; but in the deconstructionist moment of poststructuralism, the opposition of subjectivity and objectivity just seemed to be quintessential expressions of the old metaphysics.²⁵

The net result of this political and interdisciplinary ferment was to leave legal liberals and their constitutional theory—with its obsession with objectivity, principle, and the counter-majoritarian difficulty—at a dead end.²⁶ By the mid-1980s, the legal liberals' jeremiads had begun: Paul Carrington's attack on CLS,²⁷ Bruce Ackerman's publication of *Reconstructing American Law*,²⁸ and Owen Fiss's despairing lecture on *The Death of the Law*.²⁹ Meanwhile, the Reagan Administration launched its originalism campaign.

A few law professors, such as Ronald Dworkin, saw no legitimate role for "originalism" in constitutional discourse from the beginning.³⁰ They beat a drum roll of disgust that has echoed to the present. For example, James Fleming has written eloquently that "[o]riginalism, as an *ism*, has no firm footing in our constitutional culture, and it has no place there."³¹ For Fleming, originalism "is a species of authoritarianism that is antithetical to a free and equal citizenry. A regime of purportedly dispositive original meanings is, at best, beside the point of constitutional interpretation, and, at worst, an authoritarian regime that is unfit to rule a free and equal people."³² Although I agree that originalism has authoritarian tendencies, my essay is based on a premise with which Fleming and other reasonable people may disagree—that though Fleming may not have made a place for originalism in constitutional culture, his ilk has; and, indeed, other law professors have made originalism *a* (not necessarily *the*) preeminent mode of constitutional discourse. Therefore, I believe it useful for the legal liberals, whose politics I share, to take originalism seriously and to

24. See Mark Tushnet, *Truth, Justice, and the American Way*, 57 Tex. L. Rev. 1307, 1316-17 (1979).

25. Kalman, *Strange Career*, *supra* note 7, at 94-131.

26. One of the early indications that legal liberalism was headed towards a dead end was law professors' admiring but skeptical reaction to John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980) [hereinafter Ely, *Democracy and Distrust*]. See Kalman, *Strange Career*, *supra* note 7, at 87-90.

27. See Paul O. Carrington, *Of Law and the River*, 34 J. Legal Educ. 222, 226-27 (1984).

28. See Bruce A. Ackerman, *Reconstructing American Law* (1984).

29. See Owen Fiss, *The Death of the Law?*, 72 Cornell L. Rev. 1 (1986).

30. See Ronald Dworkin, *A Matter of Principle* 34-57 (1985).

31. James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 Fordham L. Rev. 1335, 1355 n.89 (1997) [hereinafter Fleming, *Our Imperfect Constitution*].

32. *Id.*

develop an originalist strategy of their own as one component of their array of strategies.

First, what is "originalism?" As Martin Flaherty has observed, "[i]f ever a term muddied as much as it clarified, 'originalism' is it."³³ In this essay, I follow Flaherty in broadly defining "originalism" as the effort to show fidelity to the Constitution by preserving "privileged meanings from earlier eras of constitutional lawmaking."³⁴ Thus, "originalism" refers not only to the narrow and intentionalist interpretive strategy of Edwin Meese,³⁵ Robert Bork,³⁶ Justice Scalia,³⁷ and Michael McConnell,³⁸ (what Cass Sunstein describes as "hard originalism"³⁹), but to many others as well, including the "soft originalism" Sunstein sometimes espouses⁴⁰ (and which I believe characterizes the republican revival), Lawrence Lessig's (and sometimes Sunstein's) "translation,"⁴¹ Ahkil Amar's "Neo-Federalism,"⁴² and Bruce Ackerman's "Neo-Federalism," or "synthesis" of "constitu-

33. Martin S. Flaherty, *The Most Dangerous Branch*, 105 Yale L.J. 1725, 1812 (1996) [hereinafter Flaherty, *The Most Dangerous Branch*]. Originalism looks one way if compared with textualism, another if opposed to nonoriginalism. To quote Kenneth Burke, such words are:

"titular" Titles like "Elizabethanism" or "capitalism" can have no positive referent, for instance. And though they sum up a vast complexity of conditions which might conceivably be reduced to a near-infinity of positive details, if you succeeded in such a description you would find that your recipe contained many ingredients not peculiar to "elizabethanism" or "capitalism" at all. In fact, you would find that "Elizabethanism" looked different, if matched against, say, "medievalism," than if matched against "Victorianism." And "capitalism" would look different if compared and contrasted with "feudalism" than if dialectically pared with "socialism." Hence terms of this sort are often called "polar."

Kenneth Burke, *A Rhetoric of Motives* 184 (1950).

34. Flaherty, *The Most Dangerous Branch*, *supra* note 33, at 1813.

35. See, e.g., Edwin Meese III, *Construing the Constitution*, 19 U.C. Davis L. Rev. 22 (1985).

36. See, e.g., Robert H. Bork, *The Tempting of America: The Political Seduction of Law* (1990).

37. See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989).

38. See, e.g., 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); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995) [hereinafter McConnell, *Originalism and the Desegregation Decisions*].

39. See Cass R. Sunstein, *Legal Reasoning and Political Conflict* 173-75 (1996) [hereinafter Sunstein, *Legal Reasoning*]; Cass R. Sunstein, *Five Theses on Originalism*, 19 Harv. J.L. & Pub. Pol'y 311, 312-13 (1996) [hereinafter Sunstein, *Five Theses*].

40. See, e.g., Sunstein, *Legal Reasoning*, *supra* note 39, at 173-75; Sunstein, *Five Theses*, *supra* note 39, at 313.

41. See, e.g., Lawrence Lessig, *Fidelity in Translation*, 71 Tex. L. Rev. 1165 (1993); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1 (1994).

42. See, e.g., Ahkil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 Colum. L. Rev. 457 (1994); Ahkil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev.

tional moments."⁴³ The Reagan Administration explicitly described its particular brand of originalism as an effort to enshrine judicial restraint, roll back the jurisprudence of the Warren Court (even though this aspect of its mission would not entail judicial restraint), place judicial review in the service of democracy, and honor the intentions of the Founders.⁴⁴

The originalist offensive and effort to drag "external" and "objective" historical facts into law and constitutional theory seemed ridiculous to historians,⁴⁵ who could easily show that originalism was indeterminate,⁴⁶ anachronistic,⁴⁷ not the original understanding,⁴⁸ and risked enslaving the present to the dead hand of the past.⁴⁹ Peter Onuf recalled that historians spent the Bicentennial "defending 'history' against alien disciplines,"⁵⁰ most notably the proponents of originalism. "As custodians of the documentary record, historians found themselves compelled to demonstrate that the founders' original intentions rarely could be definitely established, and certainly not on questions the founders did not even consider."⁵¹ For historians, Reaganite originalism represented an unnecessary detour. They protested "that the cottage industry of original intent scholarship and analysis" simply diverted scholars' attention "from exploring the history of the Founding Period on its own terms."⁵² The Reagan Administration's originalism seemed an especially bad example of the "law office history" historians had long gotten their kicks out of disparaging,⁵³ "inept and perverted" research aimed at adorning work with

1043 (1988); Ahkil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425 (1987).

43. See, e.g., Bruce Ackerman, *We the People: Foundations* (1991); Bruce Ackerman and Neal Katyal, *Our Unconventional Founding*, 62 U. Chi. L. Rev. 475 (1995).

44. See Kalman, *Strange Career*, *supra* note 7, at 132-39.

45. See Peter Novick, *That Noble Dream: The "Objectivity Question" and the American Historical Profession* 598 (1988) ("Perhaps the most striking feature of the way in which historians signaled their abandonment of traditional objectivist axioms [in the mid-1980s] was the casual, matter-of-fact fashion in which they did so; the sometimes condescending attitude they adopted toward those who clung to what they regarded as outworn shibboleths.").

46. See James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 Tex. L. Rev. 1, 38-39 (1986).

47. See Leonard W. Levy, *Constitutional Opinions: Aspects of the Bill of Rights* 232 (1986).

48. See Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 339-65 (1996) [hereinafter *Rakove, Original Meanings*]; H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885, 948 (1985).

49. See Rakove, *Original Meanings*, *supra* note 48, at xv.

50. Peter S. Onuf, *Reflections on the Founding: Constitutional Historiography in Bicentennial Perspective*, 46 Wm. & Mary Q. 341, 342-43 (1989).

51. *Id.* at 343.

52. Richard B. Bernstein, *Charting the Bicentennial*, 87 Colum. L. Rev. 1565, 1604 (1987).

53. See Alfred Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 Sup. Ct. Rev. 119, 122-23 (1965).

“the trappings of scholarship and seeming roots in the past”⁵⁴ One historian entitled his sarcastic assessment of the Reaganite originalism, *Mr. Meese, Meet Mr. Madison*.⁵⁵

While historians were mocking Meese, however, most law professors treated originalism far more seriously than they had its two previous incarnations.⁵⁶ They recognized it gave the appearance of avoiding the alternative, which, given the vicissitudes of legal liberalism,⁵⁷ the Reagan Administration successfully intimidated, was undisciplined judicial subjectivity. As Mark Tushnet said:

Meese’s speeches strike a chord in our understanding of the Constitution, because they direct attention to our fear that judges, like other government officials, can do us serious harm. The dilemma is that Justice Brennan’s confident liberalism, though it recognizes that governments and judges can do good, fails to express our concern that they do evil as well.⁵⁸

Most law professors considered originalism too valuable to surrender to Meese and Company. Recognizing the value of preserving it as a form of constitutional adjudication, they wanted to hang onto it in some form. After all, the “dominant tradition of constitutional discourse”⁵⁹ had emphasized “static originalism,”⁶⁰ rather than a “historically changing constitution.”⁶¹ Consequently, most of originalism’s most vehement critics still felt obligated “to tether their arguments to some form or original intent.”⁶²

II. LAW PROFESSORS, HISTORIANS, AND THE REPUBLICAN REVIVAL

Seeming to seize upon Sandel’s revival of virtue, community, and republicanism, some legal liberals therefore eagerly bolstered Sandel’s vision with history to respond to the challenges posed by Reaganites.

54. Charles A. Miller, *The Supreme Court and the Uses of History* 6 (1969).

55. Jack N. Rakove, *Mr. Meese, Meet Mr. Madison*, *Atlantic Monthly*, Dec. 1986, at 77.

56. Compare the legal community’s dismissive reaction to 3 William Winslow Crosskey & William Jeffrey, Jr., *Politics and the Constitution in the History of the United States: The Political Background of the Federal Convention* (1980), and Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (1977), with its reaction to the original intent discussion of Meese and others. See also Kalman, *Strange Career*, *supra* note 7, at 72-77, 259-60 n.39.

57. See Kalman, *Strange Career*, *supra* note 7, at 88-131.

58. Mark Tushnet, *The U.S. Constitution and the Intent of the Framers*, 36 *Buff. L. Rev.* 217, 218 (1987).

59. Morton Horowitz, *The Supreme Court, 1992 Term—Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 *Harv. L. Rev.* 30, 40 (1992).

60. *Id.* at 44.

61. *Id.* at 51.

62. Frederick Schauer, *An Essay on Constitutional Language, in Interpreting Law and Literature: A Hermeneutic Reader* 133, 138 (Sanford Levinson & Steven Mailoux eds., 1988).

Why concede the historical background to the right? It seemed only practical to root republicanism in history by proving that the Founders revered republicanism. By this storyline, the republican revival among academic lawyers reflected not only civic longings and anxiety about legal liberalism, but a strategic move to steal the thunder of conservative originalists.

Two historians were especially important in the law professors' republican revival—Gordon Wood and J.G.A. Pocock. With the publication of Bernard Bailyn's *Ideological Origins of the American Revolution*⁶³ in 1967, Wood's *Creation of the American Republic*⁶⁴ ("Creation") in 1969, and Pocock's *The Machiavellian Moment*⁶⁵ in 1975, historians became "obsessed with forever ridding the college curriculum of the baleful influence of Louis Hartz."⁶⁶ In place of Hartz's theory of an America born free, rich, and modern, which he used to explain American exceptionalism—where a Lockian liberalism based on the values of individualism, self-interest, pluralism, and natural rights had always been dominant⁶⁷—historians now detected the language of republican virtue everywhere in eighteenth-century America. Unlike Hartz, for example, Wood found in *Creation* that "[t]he sacrifice of individual interests to the greater good of the whole formed the essence of republicanism and comprehended for Americans the idealistic goal of their Revolution."⁶⁸ Like Hartz, however, Wood emphasized the triumph of liberalism in 1787, describing the Constitution as "the climax and the finale of the American Enlightenment."⁶⁹

Although it shared Wood's focus on republicanism, Pocock's contribution, *The Machiavellian Moment*, told a different story. The Revolution and the Constitution did not represent an effort to transform America into a liberal, capitalistic democracy. Rather, they constituted "the last act of the Civic Renaissance."⁷⁰ Pocock explored the normative vocabulary and vision behind the republican paradigm. Where Wood read "virtue" as "self-denial," Pocock interpreted "vir-

63. Bernard Bailyn, *The Ideological Origins of the American Revolution* (1967); see also Joyce Appleby, *Liberalism and Republicanism in the Historical Imagination* 280 (1992) ("With the publication of Bernard Bailyn's *The Ideological Origins of the American Revolution*, the study of the American Revolution was itself revolutionized, although curiously the word *republicanism* does not figure prominently in his text.").

64. Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (1969) [hereinafter Wood, *Creation*] (linking the ideology Bailyn placed at the core of the Revolution to a one-word bundle—"republicanism," *id.* at 48).

65. J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (1975).

66. Isaac Kramnick, *The "Great National Discussion": The Discourse of Politics in 1787*, 45 *Wm. & Mary Q.* 3, 4 (1988).

67. See Louis Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought Since the Revolution* 9-11 (1955).

68. Wood, *Creation*, *supra* note 64, at 53.

69. *Id.* at 606.

70. Pocock, *supra* note 65, at 462.

tue” as something more positive: “public self-activity,” or throwing oneself “into citizenship, patriotism and civic life.”⁷¹ Unlike liberalism, which focused on rights, self-interest, and constraints on government, Pocock’s republicanism bespoke commitment to common interest, civic virtue and civic humanism, community values, responsibility, deliberative democracy, and self-determination.

At a time when liberalism seemed “expendable,”⁷² Pocock was suggesting that America possessed a home-grown alternative to the liberal tradition. If he was correct, Americans might not be as “inevitably individualistic and capitalistic” as Hartz had suggested.⁷³ Such implications became even more important when Pocock maintained that republicanism might have survived into the present.⁷⁴

Law professors left-of-center adored Pocock. They made him the Rawls of the 1980s. He had suggested that republicanism still lived, and they interpreted him to have imbued the republican synthesis with a “prescriptive authority.”⁷⁵ *The Machiavellian Moment* has been cited in nearly 200 law review articles.⁷⁶ Because many left-liberal law professors focused on the normative language and vision of republicanism, they were as taken with republicanism as they were with Pocock.

The most prominent left-liberal academic lawyer first to harness the new historical scholarship to originalism was Bruce Ackerman. His 1983 Storrs Lectures, published in 1984, acknowledged his debt to Wood,⁷⁷ and he would soon be jousting with both Hartz and Pocock.⁷⁸ Indeed, Ackerman’s “Neo-Federalism,” or “synthesis,” has always subscribed to some basic premises of the republican revival by intimating that at certain “constitutional moments”—though not as frequently as other republican revivalists indicate—a deliberative and engaged citizenry can recast the Constitution outside the cumbersome amendment procedure spelled out in Article V.⁷⁹

Yet Cass Sunstein is more frequently credited with igniting the blaze of the republican revival in the legal academy. His essay, *Inter-*

71. See Daniel J. Rodgers, *Republicanism: The Career of a Concept*, 79 *J. Am. Hist.* 11, 19 (1992).

72. Gordon S. Wood, *Hellfire Politics*, *N.Y. Rev. of Books*, Feb. 28, 1985, at 29, 29.

73. *Id.*

74. Pocock, *supra* note 65, at 543-45.

75. See Stephen A. Gardbaum, *Law, Politics, and the Claim of Community*, 90 *Mich. L. Rev.* 685, 690 & n.14 (1992).

76. See Kalman, *Strange Career*, *supra* note 7, at 154. This does not necessarily mean anything.

77. See Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *Yale L.J.* 1013, 1060 n.82 (1984).

78. See, e.g., Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 *Yale L.J.* 453, 478-86 (1989).

79. *Id.* at 490, 515.

est Groups in American Public Law,⁸⁰ appeared in 1985, the same year the Reagan Administration began promoting originalism and Richard Epstein painted the Founders as Hartzian liberals and acquisitive Lockeans in *Takings: Private Property and the Power of Eminent Domain*.⁸¹ Sunstein declared that "the purpose of this article is to help revive aspects of an attractive conception of government—we may call it republican—to point out its often neglected but nonetheless prominent place in the thought of the framers, and to suggest its availability as a foundation from which judges and others might evaluate political processes and outcomes."⁸² As he noted, "[t]he republican understanding is in the midst of a general revival in various disciplines."⁸³

80. Cass R. Sunstein, *Interest Groups in American Public Law*, 38 Stan. L. Rev. 29 (1985) [hereinafter Sunstein, *Interest Groups*].

81. Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985).

82. Sunstein, *Interest Groups*, *supra* note 80, at 30-31.

83. *Id.* at 30 n.7. Certainly the ideas Sunstein expressed were "in the air" in the law schools for some time and had already begun to be articulated by those on the left, such as Gerald Frug, *see infra*. Sunstein, however, was probably the first legal liberal really to place those ideas in the historical context of the Founding, although he himself credited two previous articles as preceding his own in the republican revival: Frank I. Michelman, *Politics and Values or What's Really Wrong with Rationality Review?*, 13 Creighton L. Rev. 487 (1979), and Richard B. Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 Yale L.J. 1537 (1983). Stewart's article, however, that asserted the compatibility of liberalism with the modern regulatory state did briefly place liberalism in its historical context, *see id.* at 1543-46, but paid little attention to either the Founding or the republican tradition (though it did, in passing, argue that "civic virtue" was an ingredient of a "more ample" liberalism, *id.* at 1568-69). Frug's response, *Why Neutrality?*, 92 Yale L.J. 1591 (1983) [hereinafter Frug, *Why Neutrality?*], continued the work Frug had begun in *The City as Legal Concept*, 93 Harv. L. Rev. 1057 (1980), by borrowing on Pocock to excavate the republican tradition and appropriate it for the left, while arguing that Stewart "is more of an Eisenhower Republican than he is a classical republican." Frug, *Why Neutrality?*, *supra*, at 1596, 1598. Similarly, Michelman's published work did not yet explicitly pay much attention to the Founders or to the interplay between republicanism and liberalism. It might be said, however, that Michelman's approach to law, generally, has long been a binary one in which two visions of government—corresponding roughly to the public choice and public interest models, or more recently described by him as "liberalism" and "republicanism"—compete with each other through two judicial models. *See, e.g.*, Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 Fla. L. Rev. 443 (1989); Frank Michelman, *Law's Republic*, 97 Yale L.J. 1493 (1988) [hereinafter Michelman, *Law's Republic*]; Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 Iowa L. Rev. 1319 (1987); Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self Government*, 100 Harv. L. Rev. 4 (1986) [hereinafter Michelman, *Traces of Self-Government*]; Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 Ind. L.J. 145 (1977-78).

Among those I identify in the book whose scholarship has been influenced by the republican revival and has affected the way the legal academy understands the republican revival aside from Ackerman, Sunstein, and Michelman, are Ahkil Amar, Owen Fiss, Sanford Levinson, Suzanna Sherry, and, for a time, Gregory Alexander, Morton Horwitz, and Mark Tushnet. I would add Frug and Richard Parker to this group. In

Claiming that “[r]epublican thought played a central role in the framing period,”⁸⁴ Sunstein painted a picture of Madison boiling up a republican stew, to which he had added a pinch of pluralism. For example, in Sunstein’s hands, *Federalist 10*⁸⁵ no longer enshrined interest-group pluralism. Rather, it indicated the potential of the large republic to obtain public-spirited representatives who possessed the virtue associated with republican citizens. In Sunstein’s original model, a nonrepublican Supreme Court ensured that a republican legislature made government a force of public good.⁸⁶

Ironically, though Michelman proved more cautious where republicanism was concerned, his 1986 *Harvard Law Review* foreword, entitled *Traces of Self-Government*,⁸⁷ became another flash point in sparking the republican revival. In addressing “[t]he problematic relationship between the two American constitutionalist premises—the government of the people by the people and the government of the people by laws,”⁸⁸ Michelman had long relied upon political theory. Now he raised the prospect of popular sovereignty and the possibility of viewing the judiciary as agent of the people. Michelman drew back, however, declaring that “[i]n the final analysis, the People vanish, abstracted into a story written by none of us.”⁸⁹ Instead he turned to Pocock, a political theorist as well as historian, for assistance with the question: “In what sense is the United States Constitution, as construed, a charter of self-government?”⁹⁰

addition to the works by Frug, *supra*, see generally Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 Harv. L. Rev. 1276 (1984); Richard Davies Parker, “Here, the People Rule:” A Constitutional Populist Manifesto (1994); Richard Davies Parker, *The Past of Constitutional Theory—And Its Future*, 42 Ohio St. L.J. 223 (1981). In the early 1980s, Parker was integrating historians’ and political theorists’ work on the republican tradition and its relationship to liberalism in his constitutional law classes at Harvard. I am grateful to James Fleming for providing me with syllabi (on file with the *Fordham Law Review*).

84. Cass R. Sunstein, *Beyond the Republican Revival*, 97 Yale L.J. 1539, 1540 (1988) [hereinafter Sunstein, *Beyond the Republican Revival*].

85. The *Federalist* No. 10 (James Madison).

86. In time, Sunstein made it clear that he was opposed to the “court-centeredness” of American constitutional theory. See Cass R. Sunstein, *The Partial Constitution* 9 (1993) [hereinafter Sunstein, *The Partial Constitution*]; see also Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 Harv. L. Rev. 4, 8-9 & n.8 (1996) (claiming that his “treatment is more skeptical of judges and less so of majoritarian institutions” than either Michelman’s or Bickel’s). Sunstein, who rightly observes that the legal academy is still under “the spell cast by the Warren Court,” has apparently fallen under the spell of Gerald Rosenberg. See Sunstein, *Legal Reasoning*, *supra* note 39, at 59-60, 176-77; Cass R. Sunstein, *Earl Warren is Dead*, *The New Republic*, May 13, 1996, at 35 (reviewing Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (1996) [hereinafter Dworkin, *Freedom’s Law*]).

87. Michelman, *Traces of Self-Government*, *supra* note 83.

88. Michelman, *Law’s Republic*, *supra* note 83, at 1500-01.

89. Michelman, *Traces of Self-Government*, *supra* note 83, at 65.

90. *Id.* at 55.

Surveying America's history through the Founding, Michelman portrayed republicanism as a "counter-ideology" to liberal pluralism. A partner in a dialectic, republicanism figured "less as canon than ethos, less as blueprint than as conceptual grid, less as settled institutional fact than as semantic field for normative debate and constructive imagination."⁹¹ Drawing upon Pocock's vision of republicanism as the version the colonists had carried with them across the Atlantic, Michelman implied that Wood might be correct to state that liberalism had triumphed in 1787. But what did that matter? To Michelman, originalism was a form of "authoritarianism," a "looking backward jurisprudence," which regarded "adjudicative actions as legitimate only insofar as dictated by the prior normative utterance, express or implied, of extra-judicial authority."⁹² He believed ideas had to stand on their own bottoms, and he tweaked Sunstein and Ackerman for trying to root the Constitution in the republican tradition.⁹³

Nevertheless, Michelman acknowledged, "the republican tradition of civic dialogue retains a strong, if somewhat disguised and twisted, hold on American constitutional imagination."⁹⁴ He also strongly implied that, as long as the alternative was liberal pluralism, survival was a good thing. Republicanism responded to "the demand, said to be sweeping across the various fields of thought, for recovery of practical knowledge, situated judgment, dialogue, and civic friendship."⁹⁵ By offering "historical validation for the ideal of freedom as self-government realized through politics, along with visionary resources for critical comprehension of the ideal,"⁹⁶ it could help transform the Constitution into "a charter of self-government."⁹⁷

"[W]here, if anywhere, can we find self government inside the Constitution?"⁹⁸ Michelman then asked. Unlike Sunstein, who rooted republicanism in the legislature, Michelman featured a republican Supreme Court acting as the functional equivalent of the ancient Greek city-state, in which nine citizens without pre-political ends deliberatively and dialogically considered the public good and guaranteed that the nonrepublican legislature pursued it. According to Michelman, the Supreme Court was responsible for "the modeling of active self-government that citizens find practically beyond reach. Unable as a nation to practice our own self-government . . . , [we can]

91. *Id.* at 17.

92. Michelman, *Law's Republic*, *supra* note 83, at 1496.

93. *See id.* at 1522-23; Michelman, *Traces of Self-Government*, *supra* note 83, at 19-20, 58-66.

94. Michelman, *Traces of Self-Government*, *supra* note 83, at 23.

95. *Id.* at 24-25.

96. *Id.* at 74.

97. *Id.* at 55.

98. *Id.* at 56.

identify with the judiciary's [modeling of active self-government]."⁹⁹ Judicial review provided "traces of self-government."

Maybe the traces were not large. Michelman expressed fear of a "pathology of court-fetishism" even as he admitted he might be subscribing to it.¹⁰⁰ Read one way, he seemed to say "yes, the Court does provide America's last traces of self-government, and isn't that sad?" Read another, however, he seemed to displace the counter-majoritarian difficulty, as he stressed "more optimistic possibilities in the idea of the Court as a bastion of (its own) self-government."¹⁰¹ After all, he subsequently maintained, "[j]udges perhaps enjoy a situational advantage over the people at large in listening for voices from the margins."¹⁰²

Both Sunstein's and Michelman's versions presented republicanism as a methodological and conceptual breakthrough. Both species of republicanism tried to sidestep the counter-majoritarian difficulty, offering the Court an activist and positive role as guarantor of democracy. Erwin Chemerinsky attributed republicanism's glamour partially to the fact that it avoided "viewing American democracy as primarily based on majority rule and . . . justify[d] judicial value choices based on its concept of 'civic virtue.'"¹⁰³ Republicanism also deflected attention from the intellectual incoherence some thought had characterized the Warren Court's legal liberalism, because Michelman and Sunstein viewed republicanism as an effort to steer between foundationalism and irrationalism. It would take them "beyond objectivism and relativism."¹⁰⁴ In short, republicanism held out a past and prospective deliberation, dialogue, and consensus, while offering the hope of a public interest and common good that law could serve.¹⁰⁵

Further, republicanism enabled those law professors "haunted by the ghost of Earl Warren" to go beyond his court's liberalism.¹⁰⁶ As a "communitarian virus"¹⁰⁷ swept constitutional theory, law professors used republicanism to develop theories of community that would "overcome the divide between the one and the many, the individual

99. *Id.* at 74.

100. *Id.*

101. *Id.*

102. Michelman, *Law's Republic*, *supra* note 83, at 1537.

103. Chemerinsky, *The Vanishing Constitution*, *supra* note 8, at 99.

104. Richard Bernstein, *Beyond Objectivism and Relativism: Science, Hermeneutics, and Praxis 2* (1983) (heralding the emergence of a new conversation about human rationality).

105. See Michelman, *Traces of Self-Government*, *supra* note 83, at 24-28; Sunstein, *Beyond the Republican Revival*, *supra* note 84, at 1541, 1548-51, 1566-69.

106. Linda Hirshman, *The Virtue of Liberality in American Communal Life*, 88 *Mich. L. Rev.* 983, 985 (1990).

107. Paul W. Kahn, *Legitimacy and History: Self Government in American Constitutional Theory 2* (1992).

and the majority."¹⁰⁸ Instead of thinking in terms of individual rights versus the majority and government, as Warren Court liberals had done, republicanism enabled law professors to understand self-interest and government as interconnected: Citizens could maximize self-interest only through participation in civic life and the display of civic virtue. In the meantime, republicanism would do as much as liberalism to protect individual rights. Consequently, the 1980s witnessed a "spate of articles" urging the reconstruction of various fields of law and judicial decisions "in light of the lessons of republicanism."¹⁰⁹ Law professors marketed republicanism as a theory which could solve the counter-majoritarian difficulty, avoid incoherence and achieve principle in decision-making, provide progressives with even more than they had received from the Warren Court, *and* possessed the Founders' imprimatur.

This was a more benign republicanism than historians were finding at work in America's history. To be sure, some historians, such as Lance Banning, seemed attracted to the communitarian impulse and the air-brushed Madison they placed at the core of republicanism.¹¹⁰ Most, however, had their hands full worrying about matters such as the sources and evolution of republican ideology and the various contemporary meanings attached to it. Historians described the authoritarianism of republicanism, its militarism, its elitism, its emphasis on patriarchy, and its concern with past and "country," as opposed to economic development.¹¹¹ In the process, they developed an appreciation for the complexity of republicanism and became fond of quoting John Adams's observation that "[t]here is not a single more unintelligible word in the English language than republicanism."¹¹²

Historians viewed the republican revival in constitutional theory with bemusement. On the surface, this was no "history lite."¹¹³ Mr. Sunstein had met not only Mr. Madison, but Messrs. Bailyn, Wood, and Pocock as well. Indeed, law professors, who had ignored the work

108. *Id.* at 171.

109. William W. Fisher III, *The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights*, in *A Culture of Rights: The Bill of Rights in Philosophy, Politics, and Law—1791 and 1991*, at 266, 311 (Michael J. Lacey & Knud Haakonssen eds., 1991) [hereinafter *Culture of Rights*].

110. See Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* 9-10, 77, 368 (1995) [hereinafter *Banning, Sacred Fire*]; Lance Banning, *The Jeffersonian Persuasion: Evolution of a Party Ideology* 13 (1978).

111. For an overview of historical scholarship, see the excellent essay by Rodgers, *supra* note 71.

112. Linda K. Kerber, *Making Republicanism Useful*, 97 *Yale L.J.* 1663, 1663 (1988) (quoting Adams in her comment on Sunstein and Michelman).

113. See Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 *Colum. L. Rev.* 523, 529 (1995) [hereinafter *Flaherty, History "Lite"*] (exploring "the historiography of early American constitutionalism to suggest the insights that have yet to emerge fully from a serious engagement with America's own formative constitutional experience").

of historians as important as Charles Beard and Richard Hofstadter, were suddenly falling upon Pocock and Wood. They were, as one historian they cited acknowledged, doing their "homework" by immersing themselves in historical scholarship on the Founding and treating it with almost the same reverence as they had traditionally reserved for eighteenth-century sources,¹¹⁴ such as *The Federalist*. But to what end? Historians wondered why lawyers would offer a rosy picture of republicanism in the past to justify an argument for reviving republicanism in the present.

Soon the historians and law professors were going head to head. At a packed 1987 session of the Association of American Law Schools, designed to present the work of "the legal avant garde," Sunstein and Michelman, historian Joyce Appleby commented upon their work.¹¹⁵ Reconstructing the event for me, one law professor recalled Appleby stating: "Fellas, if you find late-eighteenth-century republicanism a useful source, OK, but don't be so ahistorical as to identify the republicans' views with yours."¹¹⁶ When I listened to the tape, I found that Appleby had more tactfully told the lawyers that, for all their immersion in historians' work, they were not behaving like historians.¹¹⁷ In other words, the law professors' concentration on the texts of the Founding reflected their search for continuity between past and present and their attempt to imbue the past with prescriptive authority. Seeking to understand the Founding's context and explain change over time, however, historians, such as Appleby, focused on the differentness and irretrievability of the Founders' world and found the argument that we should "take a position" on, or "support" republicanism bizarre.¹¹⁸

Responding to Appleby, Michelman took the offensive: "Without the past, . . . who am I?,' he asked. 'Who are we? . . . Without a sense of our identity, how do we begin to make a case for anything? Without *mining* the past, where do we go for inspiration?'"¹¹⁹ The key words here were "mining" and "make a case," for that was what law professors were doing when they used history to revive republicanism: They mined the past for the purpose of finding arguments that would enable them to make a case for the social order they wanted in the present. Thus, Sunstein forthrightly told Appleby what he repeated in the *Yale Law Journal*: "[T]he presence of a historical pedigree [at the Founding] . . . adds force to the case for a republican revival."¹²⁰

114. Conversation with Joyce Appleby, Professor of History, UCLA (May, 1992).

115. See Kalman, *Strange Career*, *supra* note 7, at 175.

116. *Id.*

117. *Id.*

118. Kerber, *supra* note 112, at 1664.

119. Kalman, *Strange Career*, *supra* note 7, at 175.

120. *Id.*; see also Sunstein, *Beyond the Republican Revival*, *supra* note 84, at 1564.

III. GOOD NEWS, BAD NEWS

The "historical pedigree" is of dubious value. Like some genealogists in search of a bloodline in which they can take pride, Sunstein and Michelman have burnished their ancestors. In their more recent writings, Sunstein and Michelman suggest that they are shearing republicanism of some of the attributes that were objectionable about it in the past, such as patriarchy, authoritarianism, and militarism. It goes by the name of "liberal republicanism,"¹²¹ "republicanism of rights,"¹²² "deliberative democracy,"¹²³ or "soft originalism" supplemented by either "Madisonian considerations" or "republicanism."¹²⁴ It is, in short, neo-republicanism, and it includes some of liberalism's more attractive aspects, such as an emphasis on rights. In a sense, this is progress.¹²⁵ It reflects the growing sense of historians that "liberalism" and "republicanism" did not stand in sharp opposition to each other at the Founding and that the debate between them is "sterile."¹²⁶

Yet, this leaves a stylized and romantic republicanism more likely to appeal to political theorists than historians (bringing us back to Sandel), and reflects what one legal historian has called legal scholars' "utopian use of republicanism"—that is, their reliance on it to propose "reforms of particular doctrinal regimes."¹²⁷ To be sure, most

121. See Sunstein, *The Partial Constitution*, *supra* note 86, at 134; Sunstein, *Beyond the Republican Revival*, *supra* note 84, at 1566.

122. See Cass R. Sunstein, *Republicanism, Rights: A Comment on Pangle*, 66 *Chi.-Kent L. Rev.* 177, 179 (1990).

123. See Sunstein, *The Partial Constitution*, *supra* note 86, at 133-34; see also James Kloppenberg, *Deliberative Democracy and Judicial Supremacy*, 13 *L. & Hist. Rev.* 393 (1995) (reviewing Sunstein, *The Partial Constitution*, *supra* note 86).

124. See Sunstein, *Five Theses*, *supra* note 39, at 314.

125. See Flaherty, *History "Lite," supra* note 113, at 576.

126. See Kalman, *Strange Career*, *supra* note 7, at 174; see also Banning, *Sacred Fire*, *supra* note 110, at 428 n.3 (arguing that "nearly all Americans were both 'republicans' and 'liberals' . . . and did not see the sort of clash between these two distinguishable bodies of ideas that has been posited by many modern scholars"); Robert E. Shallhope, *Jefferson and Madison—Again*, 24 *Revs. in Am. Hist.* 401, 406 (1996) (advocating the move "beyond the sterile contest between scholars touting either republicanism or liberalism to a far more sophisticated understanding of the [Founding]"). As Martin Flaherty explains:

Contrary to H. Jefferson Powell, the difficulty is not that Sunstein advances a 'hybrid' liberal/republican Founding that cannot 'serve as a corrective to concepts that it already embodied,' such as interest-group pluralism, which Sunstein would like to correct. Rather, the problem is that Sunstein speaks of a historical 'hybrid,' but talks only about its deliberative democratic aspects when he considers governmental institutions and the ideas underlying them.

Flaherty, *History "Lite," supra* note 113, at 576 (citing H. Jefferson Powell, *Reviving Republicanism*, 97 *Yale L.J.* 1703, 1707 (1988)).

127. Fisher, *supra* note 109, at 312 n.154. There has been little or no attempt to examine the influence republicanism *actually has had* in the last ten to fifteen years on law and doctrine. What, if any, impact have scholarly proposals had on judicial opinions and legal doctrine? This would be a wonderful project for someone, but I am not

“isms” possess unattractive characteristics and may prove valuable if reconstructed without them. For historians, however, lopping off patriarchy, which was central to eighteenth-century republican thought, from republicanism as a contemporary normative vision, makes no more sense than advocating the liberalism of Lyndon Johnson without acknowledging its past relationship to the war in Vietnam. Historian Linda Kerber has used the pages of the *Yale Law Journal* to ridicule Michelman’s effort to develop an “inclusory republicanism:” “Michelman seeks to cleanse ‘We the People’ of the ironies of classical republicanism . . . , defuse it of its antique association with arms and violence, and offer an American republicanism constructed by the Many, not the Few.”¹²⁸

Thus, the neo-republicans’ account of the Founding may not strengthen law professors’ case for neo-republicanism, or a republican revival. In Kerber’s words: “It is anachronistic *and unnecessary* to reach back over the last two hundred years to claim the republicanism of the early modern era.”¹²⁹ For her, the existence of republicanism in the early republic does not make the case for the adoption of republicanism today more persuasive. Like many of legal theorists’ attempts to rely on the past, this effort to root the present in the past also ignores what has happened between past and present. In fact, left-lib-

sure there are any takers. In writing *Strange Career*, *supra* note 7, I was disappointed to find that so many of the people involved in inaugurating the republican revival in the mid-1980s seemed to have lost much of their initial excitement about it because I thought *Strange Career* might have been more interesting if the republican revival possessed ardent defenders. (Now that is liberal and self-interested reasoning!) But instead, the republican revival, though still alive, seemed to be flickering. Perhaps neo-republicanism has been absorbed, or will ultimately be absorbed into pragmatism. More generally, I am not certain how far such a project would take us because I do not know how seriously to take the language of legal doctrine as it appears in judicial opinions. Did a judge write it? Did a clerk, who took a course from Michelman or Sunstein? Undoubtedly, my skepticism about judicial opinions grows out of the jaundiced attitude I developed from writing a biography of Abe Fortas, who did not take opinion-writing very seriously and who once instructed a clerk to “decorate” an opinion with the appropriate legalese. To me, that did not mean that having read the parties’ briefs, Fortas knew the law was there, but that he did not care what the law said. See Laura Kalman, *Abe Fortas: A Biography* 271-72 (1990). The question of the republican revival’s influence on opinions is part and doctrine is parcel of a larger question being debated in the legal world today: How can we evaluate the impact of legal scholarship on opinions and doctrine? See Kalman, *Strange Career*, *supra* note 7, at 239-44; see also Steven Calabresi, *The Crisis in Constitutional Theory*, 83 Va. L. Rev. 247, 264-67 (1997) (questioning the relevance of constitutional theory in his review of Louis Michael Seidman & Mark V. Tushnet, *Remnants of Belief* (1996)). It seems obvious to me that I am not the person to answer such questions, though it will be equally obvious to readers that I do not go as far as Pierre Schlag in questioning the impact of normative and doctrinal work on legal and judicial practice. See Pierre Schlag, *Laying Down the Law: Mysticism, Fetishism, and the American Legal Mind* 28-29, 170 n.10 (1996). If I did, I would not be interested in the possibility of a “credible originalism.”

128. Kerber, *supra* note 112, at 1667-68.

129. *Id.* at 1672 (emphasis added).

eral law professors, who have focused on the civic republicanism of the Founding, might find the labor republicanism of the nineteenth century more progressive and appealing.¹³⁰ Further, the neo-republican account of the Founding risks reducing liberalism to a static concept and ignoring the historical significance of its own odyssey and continual reconfiguration.¹³¹ As Kerber says, “[i]t was not the civic humanists to whom women, blacks, Jews, and the marginalized groups of modern times have been able to turn for solutions.”¹³² Indeed, neo-republicanism borrows from and builds on modern liberalism to such an extent that it has been described as republicanism for Rawls,¹³³ and, in Sunstein’s case, as republicanism for John Hart Ely.¹³⁴ In fact, at places in *Strange Career*,¹³⁵ I suggested neo-republicanism was simply a new name for legal liberalism and Rawlsian liberalism.¹³⁶

That helps explain historians’ critical response to law professors’ neo-republicanism. Superficially, a hypothetical historian might say, the historiography of law professors’ republican revival seemed different from traditional “law office history.” The law professors who enlisted in the republican revival *seemed* to be taking the work of historians seriously. Even more significantly, they were differentiating between historians, rather than utilizing them as the supplier of fac-

130. See, e.g., Rodgers, *supra* note 71, at 23-30. See generally Sean Wilentz, *Chants Democratic: New York City & the Rise of the American Working Class, 1788-1850* (1984).

131. See Dorothy Ross, *Liberalism*, in *A Companion to American Thought* 397 (Richard W. Fox and James T. Kloppenberg eds., 1995).

132. Kerber, *supra* note 112, at 1672.

133. See Christopher Edley, Jr., *The Governance Crisis, Legal Theory, and Political Ideology*, 1991 Duke L.J. 561, 594; Lawrence G. Sager, *The Incurable Constitution*, 65 N.Y.U. L. Rev. 893, 923 (1990). According to James Pope:

In this process-enhancing role, the Court facilitates rather than displaces or represents popular participation Unfortunately, this insight yields little in the way of prescription that Michelman had not already taught us long before his journey in Pocock . . . when he argued that the Constitution compels government to provide a ‘social minimum’ of resources to every person so that he or she can function as a full participant in the political life of the community.

James G. Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. Pa. L. Rev. 287, 302 (1991) (citing Frank Michelman’s *Harvard Law Review* Foreword, *Traces of Self-Government*, *supra* note 83, drawing on Rawlsian theory). Some critics, originally attracted to neo-republicanism because of its potential to help bring about progressive politics, have expressed sadness over constitutional theorists’ use of it to bolster what the critics see as the tired agenda of political liberals. See Gregory S. Alexander, “Fragmented Survival”: *Republicanism as Rhetoric*, CLS: Newsletter of the Conference on Critical Legal Studies, November, 1989, at 76, 76.

134. See James E. Fleming, *Constructing the Substantive Constitution*, 72 Tex. L. Rev. 211, 280 (1993). Ely, however, has little use for the republican revival. See John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures*, 77 Va. L. Rev. 833, 840 n.15 (1991).

135. Kalman, *Strange Career*, *supra* note 7.

136. See *id.* at 8, 163.

toids to be plugged into legal arguments. But they were turning the historians themselves into factoids—talking heads who bolstered the law professors' case for continuity. The law professors who embraced the republican revival were assuming the same attitude toward historians' work that a prior generation of academic lawyers took toward other disciplines.¹³⁷ The republican revivalists appropriated historians for advocacy purposes, permitting the present to overwhelm the past. The more "law office history" has changed, the more it has stayed the same.

That, I argue, is the good news. Historians may dismiss the legal community's effort to reach back to the Founders as ahistorical. Yet because law professors, judges, and lawyers value the "historical pedigree" so much more than historians do, they will continue to search for it and treat the past as legitimating. The existence of such a pedigree means that a theory for the present can be presented as valuable simply "because 'the framers' thought it was valuable."¹³⁸ That means, as Gordon Wood has said, that the "stakes . . . are very high—they are nothing less than the kind of society that we have been, or ought to become."¹³⁹ Historians must recognize, to quote Wood again, that the legal community treats original intent as a "necessary fiction."¹⁴⁰ Further, though Richard Posner has mocked originalism,¹⁴¹ conservatives such as Bernard Siegan and Robert Bork celebrate it.¹⁴²

Thus, if Sunstein advances a historical pedigree for the constitutional order he advocates, he meets originalism on its own terms and attaches it to a progressive agenda. As he observes, although "there is a freestanding, nonhistorical argument for deliberative democracy as a central political ideal," constitutional lawyers' argument in its favor "draws substantial support from historical understandings."¹⁴³ He and other "liberal republicans" in contemporary constitutional theory

137. See John Hart Ely's satirical description of judicial opinions which would draw on philosophy: "We like Rawls, you like Nozick. We win, 6-3. Statute invalidated." Ely, *Democracy and Distrust*, *supra* note 26, at 58; see also Charles W. Collier, *The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship*, 41 *Duke L.J.* 191, 219-20 (1991).

138. See Mark Tushnet, *The Concept of Tradition in Constitutional Historiography*, 29 *Wm. & Mary L. Rev.* 93, 96 (1987) [hereinafter Tushnet, *The Concept of Tradition*].

139. See Gordon S. Wood, *The Virtues and the Interests*, *The New Republic*, February 11, 1991, at 32, 32 (book review).

140. Gordon S. Wood, *Ideology and the Origins of Liberal America*, 44 *Wm. & Mary Q.* 628, 632-33 (1987).

141. See Richard A. Posner, *Overcoming Law* 229-55 (1995).

142. See Robert H. Bork, *The Tempting of America: The Political Seduction of Law* (1990); Bernard Siegan, *The Supreme Court's Constitution: An Inquiry into Judicial Review and Its Impact on Society* (1987). Though the case of Richard Epstein is more complicated, I would also include him among the originalists. See Kalman, *Strange Career*, *supra* note 7, at 134-35 & 312-13 n.7.

143. Cass R. Sunstein, *The Idea of a Usable Past*, 95 *Colum. L. Rev.* 601, 606 (1995) [hereinafter Sunstein, *A Usable Past*].

make their arguments for the present much more powerful for the legal community by allying themselves with the winners at the constitutional convention, and by suggesting that it is they, the "modern republicans," who are carrying out the Founders' intent.

The bad news is the appeal to the republican tradition may not take them where they want to go. The neo-republicans have argued that their jurisprudence can do as much as a jurisprudence of rights. Michelman has maintained that *Bowers v. Hardwick*¹⁴⁴ could have been decided differently had the Supreme Court made use of a jurisprudence of neo-republicanism, which would have required the Court to protect all forms of consensual sex, including sodomy.¹⁴⁵ In a tour de force, he has even made privacy democratic.¹⁴⁶ But to me (and I am hardly alone),¹⁴⁷ it seems highly possible that the result in *Bowers* is the sort we would have to fear under a republican revival. It may be that neo-republicans, vulnerable to the lure of community and an engaged citizenry as the old consensus about legal scholarship breaks down and Earl Warren's ghost dims, have idealized the notions of community and citizenship and overvalued them at the expense of individual rights.

My concern here is different from that expressed earlier. It is not that the neo-republicans are rechristening tired political/legal/philosophical liberalism with a trendy new name. It is that neo-republicanism could be used to justify non-liberal politics.

By this analysis, the republican revival has been useful insofar as it has swung attention away from procedural justice, neutrality, and rights. But it may fit Leo Strauss's vision of America,¹⁴⁸ or the vision advanced by Robert Bork recently in *Slouching Towards Gomorrah*,¹⁴⁹ his own republican though politically conservative obverse of Sandel's jeremiad,¹⁵⁰ better than it does the vision of left-liberal communitarians, who seek a progressive politics. By this analysis, the re-

144. 478 U.S. 186 (1986).

145. See Michelman, *Law's Republic*, *supra* note 83, at 1532-33.

146. *Id.* at 1533-36.

147. For examples, see the sources cited in Kalman, *Strange Career*, *supra* note 7, at 209, 345 & n.49.

148. But see J. David Hoeveler, Jr., *Original Intent and the Politics of Republicanism*, 75 Marq. L. Rev. 863, 892-93 (1992) (noting that "conservatives have not seized on the republican theme for their cause in the way that liberal scholars have").

149. Robert H. Bork, *Slouching Toward Gomorrah: Modern Liberalism and American Decline* (1996) [hereinafter Bork, *Slouching*].

150. Whereas Sandel sadly roots the displacement of "the political economy of citizenship" by "the political economy of growth and distributive justice" in "the late New Deal, and culminating in the early 1960s," Sandel, *Democracy's Discontent*, *supra* note 2, at 250, Bork focuses his ire on the 1960s, Bork, *Slouching*, *supra* note 149, at 1-55. I wish I knew what to make of the fact that the villains of both—Thurman Arnold for Sandel and Kingman Brewster for Bork—might be identified as Yale men.

publican revival would be fundamentally flawed because it is the wrong tool to fix what is broken.

That does not mean those left of center should abandon the field of Founders' intent and originalism. If they do, the conservative originalists will overrun it with history that is no better from a historian's perspective and dangerous from the perspective of a citizen who identifies herself as left-liberal. Even Kerber concedes: "It may be useful to have these [neo-republican] claims [for the contemporary social order] made in the rhetoric of the Founders because, in practice, theirs are the voices to which we have been trained to listen."¹⁵¹ As she notes, the alternatives are unappealing. "To ally oneself with Marxian dissent is to foreclose a hearing by centrist opinion in America; to ally oneself with the Antifederalists is to be caught on the losing side."¹⁵²

What, then, should historians do? Do we opt to police our turf against the law professors, as Kerber has done in the law reviews, or to join law professors with whom we sympathize, as Kerber has also done in the courts? I believe one feasible answer is to follow Kerber in rejecting neo-republicanism for both historical and political reasons while accepting originalism and working with the legal community to craft what Michael Dorf has sardonically labeled a "kinder, gentler originalism."¹⁵³

151. Kerber, *supra* note 112, at 1672.

152. *Id.*

153. Michael Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 Geo. L.J. 1765, 1774 (1997). James Fleming has identified another possible response for historians and others: turning to history, as opposed to originalism, "in order to pursue an historically grounded moral reading" of the Constitution "à la Dworkin." Fleming, *Our Imperfect Constitution*, *supra* note 31, at 1345; see also Fleming, *Original Meaning Without Originalism*, 85 Geo. L. J. 1849 (1997) (referring to Dworkin, *Freedom's Law*, *supra* note 86). Fleming asks: "Why not conceive the turn to history as doing 'fit' work in support of a liberal or progressive moral reading rather than as a broad form of originalism that rejects the moral reading?" Fleming, *Our Imperfect Constitution*, *supra* note 31, at 1345. He notes:

[T]he answer to the question—Why have the turns to history and to text, history, and structure become turns to broad originalism and against the moral reading?—is to be found in considerations of litigation strategy or judgments about the types of arguments that are appropriate in our constitutional culture. The thought seems to be that our constitutional culture is largely originalist (or positivist), and therefore that arguments in constitutional law, to be successful, simply must be framed in an originalist mold.

Id. at 1346. Fleming disposes of those arguments to his satisfaction, *id.* at 1346-48, but not to mine. I lack his enthusiasm for Dworkinism at this juncture anyway, though Dworkin has provided us with a very helpful way of understanding one hero of legal liberalism, Earl Warren. In addition to Dworkin, *Freedom's Law*, *supra* note 86, see Ronald Dworkin, *Taking Rights Seriously* (1977).

IV. THE RHETORIC OF ORIGINALISM

Constitutional interpretation has traveled a long way since Earl Warren left the bench. "We, of course, venerate the past, but our focus is on the problems of the day and the future as far as we can foresee it," Warren declared in his farewell address.¹⁵⁴ Warren belonged to what Justice Scalia recently described as a "school of constitutional interpretation affirm[ing] the existence of what is called 'the Living Constitution,' a body of law that (unlike normal statutes) grows and changes from age to age, in order to meet the needs of a changing society."¹⁵⁵ Scalia laments that a jurisprudence of "Living Constitutionalism" is "ascendant" today,¹⁵⁶ while nonoriginalists bemoan the triumph of originalism.¹⁵⁷

Yet, despite all the efforts of both originalists and nonoriginalists to present themselves as embattled Davids crusading against Goliaths, originalism appears comfortably lodged in the legal community. Lawyers, law professors, and judges recognize that originalism serves the societal need for continuity and a "usable past"—a need at times satisfied by both law and history (and, for some academic lawyers, by the republican revival in particular).¹⁵⁸ That is why nonoriginalists in the classroom and at conference tables so frequently turn out to be originalists in the courtroom.¹⁵⁹ That is why in advocating "soft

154. Arthur S. Miller, *The Elusive Search for Values in Constitutional Interpretation*, 6 *Hastings Const. L.Q.* 487, 499 (1979).

155. Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 38 (1997).

156. *Id.* at 38, 44; see also Scalia, *Originalism: The Lesser Evil*, *supra* note 37, at 853 ("Those who have not delved into the scholarly writing on constitutional law for several years may be unaware of the explicitness with which many prominent and respected commentators reject the original meaning of the Constitution as an authoritative guide."); Jonathan R. Macey, *Originalism as an 'Ism'*, 19 *Harv. J.L. & Pub. Pol'y*, 301, 301 (1996) ("[A]mong constitutional law scholars at elite schools, the idea of being an originalist is tantamount to being some sort of intellectual Luddite.").

157. See, e.g., Sanford Levinson, *The Limited Relevance of Originalism in the Actual Performance of Legal Roles*, 19 *Harv. J.L. & Pub. Pol'y* 495, 495 (1996) ("[A]lmost everyone is an originalist in at least some limited sense."); Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 *Va. L. Rev.* 669, 687 (1991) ("It seems difficult, in American political-legal culture, to make a persuasive case for nonoriginalism That difficulty helps to explain why it is so hard to locate a real, live nonoriginalist, whether judge or, even, academic theorist."). Just consider the distance Perry himself has traveled from advising us in the early 1980s "to let the framers sleep," Michael J. Perry, *The Constitution, the Courts, and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary* 75 (1982), to his more recent acceptance of originalism, Michael J. Perry, *The Constitution in the Courts: Law or Politics?* 53 (1994).

158. See Sunstein, *A Usable Past*, *supra* note 143, at 603-05. For illuminating discussions of how Americans have historically used their collective history, past, and tradition, see Michael Kammen, *Mystic Chords of Memory: The Transformation of Tradition in American Culture* (1991), and Mike Wallace, *Mickey Mouse History and Other Essays on American Memory* (1996).

159. See Thomas B. McAfee, *Originalism and Indeterminacy*, 19 *Harv. J.L. & Pub. Pol'y* 429, 432 (1996):

originalism" as a "valuable project," Sunstein has said it avoids the "problem with hard originalism— . . . that it would result in an unacceptably narrow set of liberties for the United States in the Twentieth Century" and "is much better for rule of law reasons" than nonoriginalism.¹⁶⁰ For him, "soft originalism" avoids both "the dead hand of the past" and "uncabined judicial subjectivity."¹⁶¹

Some constitutional theorists might object that such originalism is simply an effort to have one's cake and eat it too.¹⁶² But given our recognition of the impossibility of our task—historicizing, or recreating, previous eras as perceived by those who lived through them—historians are unlikely to join *that* chorus. Further, though historians may consider all originalism indeterminate and anachronistic, surely they find some forms of it less tenable than others.

In fact, because of their familiarity with the sources and command of the scholarship, historians are well-equipped to help the legal community weed out the most untenable forms of originalism.¹⁶³ The task may seem demoralizing, but it is worthwhile: "Even the most cynical originalist stands willing to concede a point when a relevant source cuts directly against her."¹⁶⁴ Indeed, it may even be gratifying. Historians, who generally focus on a limited field or period and reach tentative conclusions,¹⁶⁵ may marvel at lawyers' breadth and boldness

Just prior to the Persian Gulf War, constitutional law scholars filed an amicus curiae brief in *Dellums v. Bush* in support of the view that President Bush could not constitutionally commit American troops to combat in that war without congressional authorization. If you read this brief, which is signed by purported critics of originalism, you will find that there is not a truly nonoriginalist argument in it. (citations omitted).

160. Sunstein, *Five Theses*, *supra* note 39, at 312-13.

161. *But see* Michael J. Klarman, *Antifidelity*, 70 So. Cal. L. Rev. 381, 394-95 (1997) (doubting whether soft originalism solves these problems).

162. *See id.*

163. *See* Flaherty, *The Most Dangerous Branch*, *supra* note 33, at 1748, 1752-53.

164. *Id.* at 1754 n.146 ("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."). *But see* Fleming, *Our Imperfect Constitution*, *supra* note 31, at 1346 ("The attempt to persuade Scalia that fidelity to the Constitution leads to any liberal or progressive conclusions is a fool's errand.").

165. Flaherty cites the example of historian Conrad Russell, "a leading historian of the English Civil War, telling a fellow student working in that field that the student would have to memorize the principal events that occurred during *each* day of the 1650s before he could attempt either his oral examinations or dissertation." Flaherty, *The Most Dangerous Branch*, *supra* note 33, at 1752 n.140. It sometimes seems that historians' favorite expression is: "That's not my field (or period)." For example, Rakove declines to speculate on the original meanings of the Reconstruction Amendments but tentatively aligns himself with Ackerman's interpretation as the one which seems most feasible to "my untutored eye." *See* Jack N. Rakove, *Fidelity Through History (Or To It)*, 65 Fordham L. Rev. 1587, 1591 n.9 (1997). Yet surely Rakove, a historian of the Revolutionary era, knows as much about the Reconstruction as some of the law professors who have written about it. The norms of what one expects oneself to know to produce scholarship, however, are different for historians and law professors. The result is that the scope of historians' work has become increasingly

in putting their research to work. Thus, historians should persist in condemning the "hard originalism" of the right and the "soft originalism" of the left-liberal republican revival. They should recognize, however, that originalism is too useful as rhetoric to surrender.

I do not use "rhetoric" in the dismissive sense in which it is frequently employed today—as when we speak of "mere rhetoric." Rather, rhetoric, "the art of persuasive communication,"¹⁶⁶ is essential to both history and law. J.H. Hexter observed, "[r]hetoric is ordinarily deemed icing on the cake of history, but . . . it is mixed right into the batter."¹⁶⁷ Similarly, academic lawyers have recently begun to study how rhetoric pervades the law.¹⁶⁸ Rhetoric consists of reality and discourse; rhetoric is about choices,¹⁶⁹ even as it is inescapable.¹⁷⁰ The perceived needs of judicial oratory that focuses on the past and deliberative oratory that concentrates on the future led Aristotle both to appreciate not only rhetoric but also the place of history in rhetoric. For Aristotle, rhetoric's greatest publicist and connoisseur of the uses of history, examples from history were simply that—"examples" or "paradigms" fitting for rhetorical induction and "a beginning."¹⁷¹ Historical examples and paradigms were valuable for deliberative oratory, aimed at projecting the future: "Although it is easier to provide illustrations through fables, examples from history are more useful in deliberation; for generally, future events will be like those of the past."¹⁷² Unlike some contemporary rhetoricians (and law professors),¹⁷³ historians no longer believe the future ordinarily resembles the past and are currently more interested in difference and change

narrow. See Thomas Bender, *Wholes and Parts: The Need for Synthesis in American History*, 73 J. Am. Hist. 120 (1986); David Thelen, *A Roundtable: Synthesis in American History*, 74 J. Am. Hist. 107 (1987). Years ago, Carl Degler opened a critical evaluation of David Riesman's use of history in *The Lonely Crowd* by observing: "It seems to be either the fate or the opportunity of historians to be checking on how others use history. For it is the non-historians who write the broad interpretations of the American past." Carl Degler, *The Sociologist as Historian: Riesman's The Lonely Crowd*, 15 Am. Q. 483, 483 (1963). Historians too often lack the chutzpah.

166. Brian Vickers, *In Defence of Rhetoric* 1 (1988).

167. J.H. Hexter, *Historiography: The Rhetoric of History*, in 6 *International Encyclopedia of the Social Sciences* 368, 390 (David Sills ed., 1968); see also Berkhofer, *supra* note 5, at 76-105; Ronald H. Carpenter, *History as Rhetoric: Style, Narrative, and Persuasion* (1995).

168. See, e.g., *Law's Stories: Narrative and Rhetoric in the Law* (Peter Brooks and Paul Gewirtz eds., 1996).

169. See Edward P.J. Corbett, *The Open Hand and the Closed Fist*, in *Selected Essays of Edward P.J. Corbett* 99, 108 (Robert J. Connors ed., 1989).

170. See Stanley Fish, *Withholding the Missing Portion: Psychoanalysis and Rhetoric*, in *Doing What Comes Naturally: Change, Rhetoric and the Practice of Theory in Literary and Legal Studies* 525, 552 (1989).

171. Aristotle on Rhetoric: *A Theory of Civic Discourse* 40, 179 (George A. Kennedy trans., 1991) [hereinafter Aristotle on Rhetoric].

172. *Id.* at 181.

173. One of the aspects of James A. Berlin's engaging essay, *Revisionary Histories of Rhetoric: Politics, Power, and Plurality*, in *Writing Histories of Rhetoric* 112 (Victor J. Vitanza ed., 1994), I find most interesting is the defiant rhetoric. It suggests

than in continuity.¹⁷⁴ Both historians and lawyers, however, recognize the value of history to rhetoric.

Indeed, there is something to be said for the use of historical examples *as* examples or paradigms by members of the legal community. I am rarely irritated when I read the normative argument “we should do it this way,” followed by “if you don’t believe this, consider the example of the Founders.” The historical example lends authority. My complaint is that too often the legal community uses history as enthymeme, which Aristotle thought appropriate for rhetorical syllogism,¹⁷⁵ as in “We should do it this way; for the Founders did it this way,” or “Since/if the Founders did it this way, we should do it this

that revisionist historians of rhetoric are fighting an old battle and they do not realize that in history, their side has won:

A commonplace of historical studies is that the past is studied in order that we may not repeat its mistakes, encountering in it lessons of value for the present. While this formulation cannot be rejected out of hand, it is often employed in the service of a historical conception that sees the past and present as identical. For instance, those who see in Cicero’s *De oratore* a discussion of argument that “serves as a good index to the subsequent history of rhetoric” (Sloan) somehow overlook the obvious differences between the violently antidemocratic Rome of Cicero and the contemporary commitment to democracy found in most Western states (however much the commitment remains unfulfilled). As I have said repeatedly, the historiographic method I am suggesting foregrounds difference over identity. This difference, furthermore, is useful not simply because it offers new conceptions of the past not yet entertained. I am also convinced it offers new interpretations of the present.

Id. at 122.

174. Compare a flat statement by Nicholas Dirks in an essay published in 1996: “Most historians would agree that history is fundamentally about change,” Nicholas Dirks, *Is Vice Versa? Historical Anthropologies and Anthropological Histories, in The Historic Turn in the Human Sciences*, *supra* note 5, at 17, 31, with Oscar Handlin’s remark fifty (!) years ago about some colleagues who had written: “In 1944 the United States is not what it was in 1927,” Novick, *supra* note 45, at 391. Handlin thought:

[their] whole statement . . . misleading. While the United States is not now what it was in 1927 in some respects, in the more important respects it is now what it was then . . . The focal point of history’s concerns is continuity, and continuity implies that elements of sameness persist. Although historians must call attention to the mutations, they must emphasize the elements of continuity. And to grant that continuity within change exists leads necessarily to the conclusion that the elements of continuity are the essentials, of mutation, the incidentals. Can we not then expect the historian, whether of 1927 or of 1944 to select the facts that bear upon the essential rather than upon the incidentals? The historian may seek to escape the problem by surrender, by concession that all is incidental. But he has a more worthy task. Working on the hypothesis that there is continuity to the human past, his primary mission is to define the nature of that continuity and of the media through which it operates.

Id. at 391-92.

175. See Aristotle on Rhetoric, *supra* note 171, at 40. Examples can be “used in making enthymemes and especially in refutation, where one example can refute a universal positive (e.g., U.S. presidents have not always lived in the White House; for George Washington never lived in the White House).” *Id.* at 212 n.259.

way." The enthymeme here seems designed to confer authority and be dispositive—to foreclose choice and surrender authority to the past. In the context of contemporary constitutional law, it may be a move from rhetorical to logical syllogism, and perhaps from rhetoric to authoritarianism. It replaces interpreter with author in a vain attempt to invest authority in author, rather than in interpreter, and to bypass persuasion and interpretation. This objection notwithstanding, the rhetoric of the Founders and originalism remains crucial to contemporary constitutional discourse.

V. VARIETIES OF HISTORY

How can historians participate in the originalist enterprise without undermining their own professional roles or appearing contemptuous of the professional needs of members of the legal community? Perhaps we might distinguish between "the past" and "history." Historians have no monopoly on the past. Law, for example, is dedicated to describing past events according to changing sets of norms and giving them legal meanings; Aristotle's "judicial rhetoric" was largely about "past fact."¹⁷⁶ The "past" can be "used to sanction or sanctify authority,"¹⁷⁷ and in the two centuries-plus since the Founding, many historians have worked valiantly to provide a usable past.¹⁷⁸ The idea of a usable past has fallen into disfavor among historians, who now concentrate on the pastness of the past,¹⁷⁹ but why must those in other disciplines, such as law professors, slavishly follow changing standards of academic history? Today "history" might be defined as "the study of the past as a systematic discipline;"¹⁸⁰ or as an intellectual process of exploring a place, "the past," "as an object of curiosity," while also seeking "significance, explanation, and meaning."¹⁸¹ But both "the past" and "history" are equally valid.

Writing about the past and in the interest of originalism, might be described as "lawyers' legal history;" writing history, as "historians' legal history." Here I draw upon William E. Nelson, who has wisely

176. Aristotle on Rhetoric, *supra* note 171, at 15, 176.

177. C. Vann Woodward, *The Future of the Past*, 75 *Am. Hist. Rev.* 711, 724 (1970).

178. Arthur M. Schlesinger, Jr., in *The Disuniting of America* (1992) writes: Historians do their damndest to maintain the standards of their trade. Heaven knows how dismally we fall short of our ideals, how sadly our interpretations are dominated and distorted by unconscious preconceptions, how obsessions of race and nation blind us to our own bias. We remain creatures of our times, prisoners of our own experience, swayed hither and yon, like all sinful mortals, by partisanship, prejudice, dogma, by fear and by hope.

Id. at 46.

179. See, e.g., Robert Gordon, *The Past as Authority and Social Critic: Stabilizing and Destabilizing Functions of History in Legal Argument*, in *The Historic Turn in the Human Sciences*, *supra* note 5, at 339, 363; Dorothy Ross, *The Origins of American Social Science* 261-319 (1991).

180. Hexter, *supra* note 167, at 368.

181. Joyce Appleby, et al., *Telling the Truth About History* 257 (1994).

distinguished between lawyers' and historians' legal history. "[L]awyers' legal history" is written "to generate data and interpretations that are of use in resolving modern legal controversies."¹⁸² "[H]istorians' legal history" is "written to provide and support new and interesting interpretations and bodies of data to advance exploration of the past."¹⁸³ Note that Nelson shifts the order here: Whereas lawyers are interested in data first, and interpretations second, historians focus on interpretations first, and data second. But both seek the same ends: data and interpretations.

Obviously, the same piece of scholarship can be both historians' legal history and lawyers' legal history. One excellent example is William Treanor's *Fame, the Founding, and the Power to Declare War*,¹⁸⁴ which recovers a too frequently neglected historian's article on the importance of fame to the Founding Fathers,¹⁸⁵ and shows the way the Founders' ideas about fame shaped the structure of the Constitution and the original understanding of the War Powers Clause.¹⁸⁶ Treanor suggests that both the "pro-Executive" scholars who have insisted that the President possessed the unilateral power to initiate war and the "pro-Congress" scholars who have maintained that Congress must approve America's entrance into war have missed the point:

The founding generation believed that, if the President could commit the nation to war, his desire for fame might lead him into war even when war was not in the national interest . . . [But] individual members of Congress would not win fame if the nation went to war and won. Therefore, Congress alone could be trusted to decide questions of war correctly. Animated by their concern that Presidents would fall prey to the lure of fame, the Founders thus structured the war power in a way that conflicts with the original understanding of the War Powers Clause as articulated by previous scholarship. The Founders intended that the clause would vest in Congress principal responsibility for initiating conflict; in this regard, pro-Congress scholars have been right and pro-Executive scholars wrong. But the Founders denied the President a veto over congressional decisions to wage war, something that all scholars have missed.¹⁸⁷

If the answer is so easy, why has it eluded so many smart people? Understandably, according to Treanor, both the pro-executive and pro-Congress conceptions of the War Powers Clause meant that "the

182. Bernstein, *supra* note 52, at 1578.

183. *Id.*

184. William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 Cornell L. Rev. 695 (1997).

185. See generally Douglas Adair, *Fame and the Founding Fathers*, in *Fame and the Founding Fathers* 7 (Trevor Colburn ed., 1974).

186. See Treanor, *supra* note 184.

187. *Id.* at 700.

Founders would have wanted to give the President a veto,¹⁸⁸ and this blinded scholars.

Whether the original understanding was that the President should be at the center of decisions on war and peace—as pro-Executive scholars maintain—or that as many barriers as possible to war should be imposed—as pro-Congress scholars maintain—presumably both ends are advanced by giving the President a veto. But if the President's desire for military fame will consistently push him [or her] towards war, then a veto is pointless because it will not be exercised. Moreover, because the President's decisionmaking in this area will be hopelessly corrupted by self-interest, it is reasonable to wholly exclude him [or her] from the warmaking process. There is, then, a simple reason why the Founders consistently described the decision to declare war as exclusively a legislative decision: *They understood it to be an exclusively legislative decision.*¹⁸⁹

This is a rare piece of work that bridges the interest of both historians and lawyers and indicates that there really is a (legitimate) place for historians in law schools. As the new emphasis on interdisciplinarity in law schools, the poor job market for historians, and the comfort level of law professors' lifestyles bring more historians into law schools, more of the kind of work we have come to expect from Treanor,¹⁹⁰ Flaherty,¹⁹¹ and Robert Kaczorowski¹⁹²—what we might call “the Fordham school” of legal historians—may appear. Perhaps it is reasonable to hope for more scholarship that is both “valid” for historians, in the sense that it represents a provocative interpretation of history, and “valid” for law professors, in the sense that it provides useful data from the past.

As a historian who does not teach in a law school, and as a former law student who recalls relishing those instances when law professors' scholarship seemed relevant to the life I anticipated as a lawyer, I believe it is reasonable to expect historians who opt to teach in law schools to produce work which is at once both good lawyers' legal history and good historians' legal history.¹⁹³ But why hold non-histo-

188. *Id.* at 757.

189. *Id.* at 757-58.

190. See Treanor, *supra* note 184.

191. See Flaherty, *The Most Dangerous Branch*, *supra* note 33; Flaherty, *History "Lite," supra* note 113.

192. See Robert J. Kaczorowski, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of Runyon v. McCrary*, 98 Yale L.J. 565 (1989).

193. Such historians might object, however, that it overly imbues their agenda with presentist concerns. Why, they might ask, should they be required to produce “relevant” work when their colleagues are not? I am aware that legal scholarship has changed and become more interdisciplinary than it was when I attended law school twenty years ago. My sense of its transformation led me to write *Strange Career*, *supra* note 7. Not everyone, of course, would agree that a transformation has occurred. See, for example, J.M. Balkin, *Interdisciplinarity as Colonization*, 53 Wash. & Lee L. Rev. 949, 952 (1996) (suggesting that the law's professional roots prevent it from becoming truly transformed), and John Henry Schlegel, *Talkin' Dirty: Twining's*

rian law professors to this standard? Historians should be satisfied with getting good "lawyers' legal history" from lawyers and law professors.¹⁹⁴

Here, there are some hopeful signs. For example, while pointing to its presentism and its function as originalism for liberals, historians have treated Ackerman's Neo-Federalist version of the Founding(s) more sympathetically than they have treated neo-republicanism. They

Tower and Kalman's Strange Career, 21 L. & Soc. Inquiry 981 (1996) (reviewing Kalman, *Strange Career*, *supra* note 7). But see my response to Schlegel, *Garbage Mouth*, 21 L. & Soc. Inquiry 1001 (1996). As *Strange Career*, *supra* note 7, indicates, I feel ambivalent about the change. As a historian, I am intrigued and gratified by it. It does my heart good to see law professors reading Wood and Pocock. I also think it makes sense. I agree with Martin Flaherty that law professors should walk, or do the reading in secondary sources, before they run, or turn to the primary texts of the Founding. See Flaherty, *The Most Dangerous Branch*, *supra* note 33, at 1752-53. As a historian who concentrates on America in the twentieth century, I am delighted by the debate about the reception of the New Deal, which has already begun in the legal community, (see, for example, the sources cited in *Strange Career*, *supra* note 6, at 348-51 n.70) and will surely swing into high gear after publication of Bruce Ackerman's second volume of *We the People: Transformations* (forthcoming).

As a former law student, however, I wonder how this change affects the classroom and find myself with more sympathy for the complaints of Judge Harry Edwards about the impractical nature of contemporary legal education than I would have imagined. See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34 (1992). To quote James White:

There is a risk . . . that people who should be in the departments of History, Philosophy, or Economics will come to the law school not because of a sincere interest in the law, but because there are more places in the law and because those places carry better salaries and more perquisites.

James T. White, *Letter to Judge Harry Edwards*, 91 Mich. L. Rev. 2177, 2179 (1993). In part because I am uncertain how one measures "a sincere interest in the law," I take this risk more seriously than White does.

194. But see generally Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, 71 Chi-Kent L. Rev. 909 (1996) [hereinafter Tushnet, *Interdisciplinary Legal Scholarship*] (distinguishing between "history-in-law"—what I have been calling lawyers' legal history—and legal history). Tushnet cites the scholarship on modern civic republicanism as an example of history-in-law. "[H]istory-in-law does not really try to explain what people in the past thought." *Id.* at 933. It follows that criteria by which "history-in-law" must be judged is by whether "[i]ts creators . . . have substantially affected the way we think about law, whether or not they have taught us much about the past." *Id.* at 932. Tushnet maintains: "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." *Id.* at 934-35. I am with him up this point. But for Tushnet, that means one can write "good" history-in-law even if he or she bungles the facts. *Id.* at 932-34, 935 n.105.

I cannot bring myself to go that far. First, I agree with Martin Flaherty: "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." Flaherty, *The Most Dangerous Branch*, *supra* note 33, at 1749. Even if one disagrees with Flaherty and me on this point, I follow him in falling back on a childhood aphorism. "[I]t is worth pursuing [the historical inquiry] on the theory that something worth doing at all is worth doing well." *Id.* at 1747. While I hesitate to define "well" in this context, I would say that at a minimum, it includes doing one's best to get the facts right.

have even been more supportive of Ackerman in print than law professors have. (Admittedly, that is not saying much.)¹⁹⁵ Sometimes one can even think that historians, on the one hand, and lawyers and law professors, on the other, are rising above their traditional antagonism to develop a more effective partnership.

Compare what liberal lawyers did with original intent in *Brown v. Board of Education*¹⁹⁶ and the abortion cases.¹⁹⁷ In *Brown*, Thurgood Marshall recruited historians to massage the history of the Fourteenth Amendment and the Civil Rights Act of 1866 to demonstrate that their drafters would have supported school desegregation.¹⁹⁸ In a sense, he was successful. Though the Court ultimately dodged the issue in *Brown*, Marshall's historians produced an originalist argument, and the first question asked about any theory of original intent advanced today is whether it would permit the Court to reach the result it did in *Brown*.¹⁹⁹ But one of the historians on Marshall's team, Alfred Kelly, later lamented:

I am very much afraid that . . . I ceased to function as and instead took up the practice of law without a license. The problem we faced was not the historian's discovery of the truth, the whole truth, and nothing but the truth; the problem instead was the formulation of an adequate gloss on the fateful events of 1866 sufficient to convince the Court that we had something of an historical case It is not that we were engaged in formulating lies; there was nothing as crude and naive as that. But we were using facts, emphasizing facts, bearing down on facts, sliding off facts in a way to do what Marshall said we had to do—"get by those boys down there."²⁰⁰

195. See Kalman, *Strange Career*, *supra* note 7, at 212-21.

196. 347 U.S. 483 (1954).

197. See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

198. Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Search for Equality* 617-41 (1976); Mark Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961*, at 196-200 (1994) [hereinafter *Tushnet, Making Civil Rights Law*]. For the argument that the original understanding of the Fourteenth Amendment supported the holding in *Brown* that school desegregation was unconstitutional, see McConnell, *Originalism and the Desegregation Decisions*, *supra* note 38; Michael W. McConnell, *The Originalist Justification for Brown: A Reply to Professor Klarman*, 81 Va. L. Rev. 1937 (1995). *Contra* Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 Va. L. Rev. 1881 (1995). See also Tushnet, *Interdisciplinary Legal Scholarship*, *supra* note 194, at 918-24.

199. See McConnell, *Originalism and the Desegregation Decisions*, *supra* note 38, at 952 ("In the fractured discipline of constitutional law, there is something very close to a consensus that *Brown* was inconsistent with the original understanding of the Fourteenth Amendment, except perhaps at an extremely high and indeterminate level of abstraction."). Perhaps, but I believe that consensus is largely unpublished—if not unspoken. *But see* Ronald Dworkin, *Freedom's Law*, *supra* note 86, at 12-13, 268-72, 295-96 (arguing very explicitly that acceptance of a truly originalist understanding would mean *Brown* was wrong).

200. See Kluger, *supra* note 198, at 640. On the other hand, another member of the team, the distinguished historian John Hope Franklin, thought "his scholarship 'did

Nearly thirty years later, Professor Sylvia Law and two lawyers filed an amicus curiae brief for several hundred American historians,²⁰¹ including Kerber, in *Webster v. Reproductive Health Services*,²⁰² a brief that was resubmitted in *Casey*.²⁰³ Some things remained the same: Here, as in *Brown*, originalism was assumed to lend added credibility to the policy argument, particularly because the Supreme Court had recently said that liberty interests were “fundamental” and protected by the due process clause only when “rooted in this Nation’s history and tradition.”²⁰⁴ Much, however, was different: few historians still realistically hoped to uncover “the whole truth, and nothing but the truth,”²⁰⁵ and historians need not twist history to demonstrate that eighteenth and nineteenth-century Americans tolerated abortion.²⁰⁶ Historians are happier about their collaboration with lawyers in *Webster*, *Casey*, and other recent cases than Alfred Kelly was in *Brown*.²⁰⁷ For example, in an article addressed to historians, entitled *The Webster Brief: History as Advocacy, or Would You Sign It?*,²⁰⁸ Michael Grossberg answered his question with a fairly resounding “yes.” He concluded: “As a historian who has written on the history of abortion, I signed the original brief; upon reflection, I would sign it again.”²⁰⁹ By my lights, as a historian, more credible originalism and improved lawyers’ legal history represents modest progress.

not suffer’ from transforming the information he came up with into ‘an urgent plea for justice.’” Tushnet, *Making Civil Rights Law*, *supra* note 198, at 198.

201. See *Brief of 281 American Historians as Amici Curiae Supporting Appellees*, *The Pub. Historian*, Summer 1990, at 57. More than a hundred additional historians added their names as signatories after the brief was filed. *Id.*

202. 492 U.S. 490 (1989).

203. 505 U.S. 833 (1992).

204. *Michael H. v. Gerald D.*, 491 U.S. 110, 127 & n.6 (1989) (quoting *Bowers v. Hardwick*, 478 U.S. 186 (1986)). For the point that Justice Scalia’s opinion in *Michael H.* constricted the formulation of “history and tradition” set down by Justice Powell in *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977), see Fleming, *Constructing the Substantive Constitution*, *supra* note 134, at 271-72.

205. For a discussion of developments in historians’ attitudes towards truth and objectivity since Kelly’s observations about historians’ role in *Brown*, see, for example, Novick, *supra* note 45, at 508-99; Joyce Appleby et al., *supra* note 181, at 198-237.

206. See generally James C. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* (1978).

207. See Otis L. Graham, Jr., *Roundtable, Historians and the Webster Case*, *The Pub. Historian*, Summer 1990, at 9; Kalman, *Strange Career*, *supra* note 7, at 198-208.

208. Michael Grossberg, *The Webster Brief: History as Advocacy, or Would You Sign it?*, *The Pub. Historian*, Summer 1990, at 45.

209. *Id.* at 52. Not everyone’s “yes” was as resounding. See, for example, James C. Mohr, *Historically Based Legal Briefs: Observations of a Participant in the Webster Process*, *The Pub. Historian*, Summer 1990, at 19. Mohr nevertheless maintains: “If asked whether that document comports more fully with my understanding of the past than the historical arguments mounted by the other side, some of which also cite my work, I would state strongly that it does. Consequently, I had no hesitation signing Law’s statement to the Court.” *Id.* at 25.

VI. THE POWER OF THE PAST—AND THE UNIVERSITY

What scares me is the prospect that originalism may not be so easily cabined. The past is powerful. It seems a short step from acknowledging the past can lend or deny authority to the argument that "our history and tradition" forbid abortion, when that serves the argument, to deriving "lessons" from the past and inviting the past to confer authority. For example, John F. Kennedy and Lyndon B. Johnson frequently cited their desire to avoid another "Munich" as they took the United States down the road to Vietnam. If they were only appealing to memories of Munich as a convenient and useful shorthand for legitimating escalation, I would be unconcerned (although I believe the policy of escalation was unwise). But for many of their generation, "Munich" was not persuasive but authoritative. It became a call to a certain kind of action; it led to, as much as it legitimated, escalation.²¹⁰

If historical analogies exercise real power, it is as important that the right analogies be selected as it is that we "translate" properly when translation is the preferred mode of constitutional interpretation.²¹¹ But how do policy-makers know which historical analogies are "right"? Listening to the tape recordings of Lyndon Johnson's recently released telephone conversations, I have been impressed anew by an old point—that the Korean analogy was more important than any other analogy, including Munich, as Johnson and his advisers decided on their policy with respect to Vietnam in 1964 and 1965.²¹² But what exactly were the "lessons of Korea" and what did the analogy of "Korea" mean to them? Consider just three of the many possible meanings. One: "Long, limited wars in Asia are unpopular with the American people, causing political difficulties for their leaders, as they did for Truman—stay out!" Another: "Stand firm, use 'reasonable' force, hold the line; 'saving' South Vietnam will be regarded as a Cold War victory in much the same way as 'saving' South Korea had become perceived as a Cold War victory." Still another: "Long, limited wars in Asia are unpopular with the American people, causing polit-

210. See Ernest R. May, *Lessons of the Past: The Use and Misuse of History in American Foreign Policy* 112-16 (1973). The Munich analogy may have meant more to Kennedy, who as a young man had traveled in Europe on the eve of World War II, than it did for Johnson. But its echoes were felt by all Vietnam advisers. At the July 22, 1965 meeting on Vietnam, George Ball outlined his doubts about escalation, arguing at length that Vietnam was not Korea. *Id.* at 109-10. At the end of the meeting, Henry Cabot Lodge, the former Ambassador to Vietnam, spoke: "I feel there is a greater threat to start World War III if we don't go in. Can't we see the similarity to our own indolence at Munich? I simply can't be as pessimistic as Ball." Yuen Foong Khong, *Analogies at War: Korea, Munich, Dien Bien Phu, and the Vietnam Decisions of 1965*, at 129 (1992). What is striking, as Khong noted, is that no one, including Ball, queried Lodge's Munich analogy. *Id.* at 134.

211. See Lawrence Lessig, *Fidelity and Constraint*, 65 *Fordham L. Rev.* 1365 (1997) (positing a theory of fidelity based in the practice of translation).

212. See Khong, *supra* note 210, at 97; Richard E. Neustadt & Ernest R. May, *Thinking in Time: The Uses of History for Decision-Makers* 87 (1986).

ical difficulties for their leaders, as they did for Truman, so let's go in and not be squeamish; we must be prepared to use tactical nuclear weapons against the North Vietnamese." The analogy cut different ways for different individuals at different times. Like precedent and Founders' intent, historical analogies can be indeterminate.²¹³

When the past involves the Founders, it is especially powerful. The legal community sometimes seems to suffer from "Founders' envy," a slavish reverence for the Founders. As Mark Tushnet has said:

[i]n a sense historians' . . . rediscovery of republicanism has been appropriated by constitutional lawyers in the same way we always appropriate historical work, by converting it into a hagiographical . . . yearning for restoration of what we have lost. Concerned that we will be unable to develop cogent defenses for what we find attractive in republican thought, we re-present this thought to ourselves as valuable *because* 'the framers' thought it was valuable.²¹⁴

From a historian's point of view, that is unfortunate. Yet, both historical analogies and history are useful for justification, advocacy, and analysis. Indeed, we cannot work free of them. Historians generally echo Robert Gordon in emphasizing that the past is so different from the present that recognition of historical contingency is liberating and empowering,²¹⁵ even as we may recognize, as Stanley Fish would remind us, that we are succumbing to "anti-foundationalist theory hope" and that "contingency acknowledged" can never be "contingency transcended."²¹⁶ Even though, as historians, we vainly try not to draw lessons from the past in our work, we continually draw lessons from the past in our lives (and especially in department meetings). Yet, it remains useful to acknowledge historical contingency, and in any event, historians are paid to do so. Because our focus is on change, we want to linger over the differences between past and present. In the case of Vietnam, we want to play the part of George Ball,²¹⁷ focusing on the differences, rather than on the similarities, between Korea and Vietnam: "no march across the border [of South Vietnam, as of South Korea]; no solid government [in South Vietnam, as in South Korea]; no resilient army [in South Vietnam, as in South Korea]; no ward-of-U.N. status [for South Vietnam, as for South Korea]; no U.N. resolution [with respect to South Vietnam, as opposed

213. Consider, for example, how many different historical analogies were appealed to as Americans became aware of the Bosnian crisis. Otis L. Graham, Jr., *Editor's Corner: The History Watch*, *The Pub. Historian*, Summer 1993, at 7, 11-14.

214. Tushnet, *The Concept of Tradition*, *supra* note 138, at 96.

215. See Stanley Fish, *Rhetoric*, in *Doing What Comes Naturally*, *supra* note 170, at 471, 523-24.

216. *Id.* at 524.

217. See Neustadt & May, *supra* note 212, at 87, 162; see also Khong, *supra* note 210, at 97, 107-117, 126-28, 136-37, 228. Ball told Khong: "I would suggest to you that if we had not gone into Korea, I think it would have been very unlikely that we would have gotten into Vietnam." *Id.* at 97.

to South Korea], and so forth."²¹⁸ We want to argue that Vietnam is not Korea.

Similarly, in *Webster* and *Casey*, historian Estelle Freedman, a signatory of the historians' brief, would have preferred to recognize that "the history of abortion practice in America is characterized more by change than by continuity,"²¹⁹ even though some women have always tried to abort. In the eighteenth century, many women possessed powerful economic and religious reasons for reproduction that many contemporary women may lack. Freedman questioned "the strategy of refuting one static historical argument with another."²²⁰ She probably spoke for many historians when she agreed that our studies "should illuminate the ways the law needs to change in response to history, rather than the ways history supports a particular legal interpretation."²²¹ She said: "I wish that lawyers could have found a legal basis to argue that women need reproductive choice today precisely because our lives *differ* from those of our foremothers even more than our lives resemble those of women in the past, despite our shared reproductive vulnerability."²²²

Forced to consider what form originalism should take, I suspect historians would follow Freedman in finding a combination of noninterpretivism and changed circumstances the least obnoxious form of originalism, largely *because* it calls attention to the changes in context historians too frequently favor over continuity²²³ and text.²²⁴ Yet, the law professors most sensitive to history dismiss such a theory as fantasy.²²⁵ To paraphrase them, to convert actors in our legal culture, one must speak their language.²²⁶ As Freedman herself acknowledged, "the constraints of the legal theory within which we operate" made it essential for the historians' brief to rebut the solicitor general's "original intent" argument with another originalist version.²²⁷

If historians are to express our activist instincts by working with lawyers, we must play by lawyers' rules. But let us remember that lawyers' rules change, and that some day the differences between both past and present, and "past" and "history," may again become impor-

218. Neustadt & May, *supra* note 212, at 87.

219. Estelle Freedman, *Historical Interpretation and Legal Advocacy: Rethinking the Webster Amicus Brief*, *The Pub. Historian*, Summer 1990, at 27, 30.

220. *Id.* at 28.

221. *Id.*

222. *Id.* at 31.

223. See Samuel P. Hays, *On the Meaning and Analysis of Change in History*, in *Theory, Method, and Practice in Social and Cultural History* 33, 47-53 (Peter Karsten & John Modell eds., 1992).

224. See Onuf, *supra* note 51, at 365.

225. See Ahkil Reed Amar, *Our Forgotten Constitution: A Bicentennial Document*, 97 *Yale L.J.* 281, 293 (1987).

226. See Ahkil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 *B.U. L. Rev.* 205, 207-208 n.7 (1985).

227. Freedman, *supra* note 219, at 31.

tant to constitutional theory. If the tide turns, and the Court again espouses the "Living Constitutionalism" of the Warren Court days, then we and the lawyers, law professors, and judges we try to assist may again benefit from stressing historical contingency.²²⁸ For that reason alone, we should remind ourselves that in an important sense, the past indeed remains a "foreign country."²²⁹

If the current need to find continuity with the past casts its own spell over law professors, so does the university. Another potential pitfall to working in the past is posed by law professors who chafe at the disciplinary boundaries between law and history. A pat on the head from the history police—turf-conscience historians who pass judgment on the (ab)use of "our" discipline—for using the past better in *Webster* and *Casey* than in *Brown* does not satisfy these academic lawyers. Rather, in their quest to fashion new roles for themselves as they careen between the profession and the rest of the university, some law professors yearn to become "real historians." Ironically, just as historians who have long complained of lawyers' approach to the past recognize originalism's power and value, some of the law professors who drank at the wells of neo-republicanism, (such as Ackerman and Suzanna Sherry), have begun hurling the word "originalist" against each other as an insult.²³⁰

By my lights as a historian, such law professors have become *too* interdisciplinary, and they risk becoming the captive of another discipline. And there is a time lag. Now time lags are characteristic of interdisciplinary travel: In the 1980s, historians made Clifford Geertz their "patron saint,"²³¹ just as he was challenged by younger anthropologists,²³² who had found deconstruction after it became "old hat" among English professors.²³³ Here the time lag is reflected by the fact that the law professors join an older generation of historians in criticizing lawyers' legal history, or law office history, instead of seeking improved law office history. We have seen that today's historians—those involved in the abortion cases, for example—are more tolerant of originalism than their predecessors. It seems both bizarre and un-

228. In that instance, I might well join Fleming in urging historians to do "'fit' work." Fleming, *Our Imperfect Constitution*, *supra* note 31, at 1345.

229. See David Lowenthal, *The Past is a Foreign Country* 232-33 (1985).

230. See, e.g., Bruce Ackerman, *Higher Lawmaking*, in *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* 63, 72-73 n.4 (Sanford Levinson ed., 1995) (criticizing Amar for originalism); Suzanna Sherry, *The Ghost of Liberalism Past*, 105 *Harv. L. Rev.* 918, 933-34 (1992) (book review) (reprimanding Ackerman for originalism).

231. See John Higham, *New Directions in American Intellectual History* xi, xvi (1979).

232. For a discussion of new developments in anthropology, see, *Writing Culture: The Poetics and Politics of Ethnography* (James Clifford and George E. Marcus eds., 1986); see also Kalman, *Strange Career*, *supra* note 7, at 125-27.

233. See, e.g., Stanley Fish, *There's No Such Thing as Free Speech: And It's A Good Thing Too* 271 (1994).

fortunate that the law professors would become dismissive of originalism just as historians are coming to appreciate its importance for legal discourse.

CONCLUSION: THE FUTURE OF THE PAST

Thus, I recognize the rhetoric of originalism as a current necessity. Like Jack Rakove, "I happen to like originalist arguments when the weight of the evidence seems to support the constitutional outcomes I favor—and that may be as good a clue to the appeal of originalism as any other."²³⁴ I do fear originalism confers too much authority and power on the past, and I would hope we distinguish the originalist enterprise of finding continuity between past and present from historians' current conception of history. But both historians and law professors should acknowledge the value of originalism to legal discourse.

More generally, we should recognize that both writing about the past and writing history, both lawyers' legal history and historians' legal history, are valuable. In fact, since neither yields determinate answers, both efforts are doomed to failure. Lawyers, law professors, and judges can never be certain they have uncovered "original intent" in the past. So, too, our contemporary perspectives make some eras more interesting than others to historians at different times and inevitably interfere with our professional attempts to present any era from the perspective of its subjects.²³⁵ Thus each generation must write its own history, just as each generation of law professors must develop its own constitutional theory. But both enterprises are edifying, and we should recognize that originalism and credible lawyers' legal history are as important as credible historians' legal history. Historians should pay less attention to policing our disciplinary borders and more to figuring out how we can cross them to open a dialogue with lawyers, judges, and law professors. For what we all say about the past and history tells us something about the past and history but even more about ourselves.

234. Rakove, *Original Meanings*, *supra* note 48, at xv n.*; *see also* Rakove, *Fidelity Through History (Or To It)*, *supra* note 165, at 1600-05.

235. Law professors have been slow to come to grips with historians' generally cheerful acceptance of the indeterminacy of history. Some academic lawyers, however, are beginning to take note of it. *See* Suzanna Sherry, *The Indeterminacy of Historical Evidence*, 19 *Harv. J.L. & Pub. Pol'y* 437 (1996).