The Living Hand of the Past: History and Constitutional Justice

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THE LIVING HAND OF THE PAST: HISTORY AND CONSTITUTIONAL JUSTICE

Christopher L. Eisgruber*

INTRODUCTION

I like much of what Jack Rakove has to say about fidelity to history, and I like his fine book, *Original Meanings: Politics and Ideas in the Making of the Constitution*, even better. I am not persuaded by his comments on the internal logic of originalism, but that is principally because I have never heard a coherent justification for originalism, and so do not have any way to tell what counts as a better or worse version of originalism. I do not propose to pursue that point here. Instead, given that Professor Rakove is almost as skeptical about originalism as I am, I would like to focus my remarks upon the broader topic of our panel, "Fidelity to the Constitution Through History."

My basic claim is this: History has a useful role to play in constitutional interpretation, but not, as is often thought, at the expense of our commitment to moral principle or justice. History should figure in

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* Professor of Law, New York University School of Law. For helpful conversations in connection with this project, I am grateful to Martin Flaherty, Jim Fleming, Larry Kramer, Ricky Revesz, and Larry Sager, as well as to participants in the Symposium on Fidelity in Constitutional Theory at Fordham University School of Law and a faculty workshop at the Hofstra Law School. I would also like to thank the Filomen D'Agostino and Max E. Greenberg Faculty Research Fund, which provided generous financial support for this research.


3. Professor Rakove's most radical critique of originalism appears in a footnote to *Original Meanings*, where he writes:
   
   I am often asked whether I think originalism offers a viable or valid theory of constitutional interpretation. My preferred answer is, I hope, suitably ambivalent. In the abstract, I think that originalism is vulnerable to two powerful criticisms. First, it is always in some fundamental sense anti-democratic, in that it seeks to subordinate the judgment of present generations to the wisdom of their distant (political) ancestors. Second, the real problems of reconstructing coherent intentions and understandings from the evidence of history raise serious questions about the capacity of originalist forays to yield the definitive conclusions that the advocates of this theory claim to find. On the other hand, 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.

*Rakove, Original Meanings*, supra note 1, at xv n.; see also Jack N. Rakove, *Fidelity Through History (Or to It)*, 65 Fordham L. Rev. 1587, 1609 (1997) [hereinafter *Rakove, Fidelity Through History*] ("[O]riginalism ultimately fails because it is false to the history it purports to describe.").
constitutional interpretation as an aid to the pursuit of justice, not a constraint upon it. "Fidelity through history," in short, is a defensible conception of constitutional interpretation only if history enlists in the service of justice.

I. THE FIDELITY PROBLEM

I begin by offering a characterization of the "fidelity problem." There is a long-running debate among constitutional interpreters about the extent to which constitutional meaning depends upon political theory. The "fidelity problem" requires constitutional interpreters to identify how, and to what extent, they must sacrifice ideal political theory in favor of historical fact.

Everybody believes that constitutional interpretation must differ from pure political theory. Were that not so, making and amending a constitution would be a sham. Public officials, including judges, would simply consult their best judgments about justice, exactly as they might do in the absence of a written constitution. If the Constitution matters at all, then constitutional interpretation, unlike political theory, must resolve some issues by reference to historical fact. More specifically, it must resolve them on the basis of the fact that particular words were drafted and ratified.

Argument about the "fidelity problem" occasionally proceeds as though the distinction between constitutional interpretation and political theory were in jeopardy. To my knowledge, no scholar, judge, or lawyer has ever come close to erasing that distinction. For example, as a matter of abstract political theory, the relative merits of the parliamentary and presidential systems are highly contestable. The Constitution, however, specifies presidential government. I do not know of any constitutional theorist who has ever doubted this fact about the Constitution (although I do know some who wished it were otherwise), nor do I know of any constitutional theory so wild that it would, even in principle, permit anybody to argue that the nation's chief executive officer must command a legislative majority.

So one solution to the "fidelity problem" would be this: No matter what your views about political theory, your interpretation of the Constitution must respect any rule explicitly stated in the constitutional text. The United States has presidential government even if you think parliamentary government would be better. Supreme Court Justices have life tenure, even if you think it would be better (as I do) were they required to retire after serving a limited term. Federal

4. See, e.g., Lloyd Cutler, To Form a Government, Foreign Aff., Fall 1980, at 126, 126-27 (arguing that the structure of our Constitution prevents us from forming an effective government).

courts must preserve the right to a jury trial in all common law actions even if you think (as I do) that this right is often pointless and inefficient. And so on.

If this simple solution to the "fidelity problem" were acceptable to most people, I dare say this Symposium would never have taken place. Constitutional interpreters would still have much to debate, of course. They would, for example, have to argue about what principles were recommended by political theory and whether judges should have a large role to play in enforcing those principles. Conceptions of fidelity would, however, have little to say about these debates. People might defend liberal or conservative views, and they might favor or oppose judicial activism, but, whatever their views, they would have to defend their position on the ground that it served the interests of justice rather than on the ground that it was especially faithful to the Constitution.

The simple solution to the fidelity problem is unacceptable to many, if not most, people who write about the Constitution. They believe that constitutionalism requires us to take a deeper discount from political theory in favor of history. Why is that belief so common?

II. THE DEAD HAND FALLACY

The answer to that question lies with two common fallacies. The first of these, which I believe to be the central and most damaging fallacy of modern constitutional theory, I shall refer to as the "Dead Hand Fallacy." The Dead Hand Fallacy holds that the purpose of the Constitution is to subordinate present-day politics to the will of past super-majorities. In more florid terms, the point of the Constitution is to empower the dead hand of the past. This result is sometimes justified by reference to ideas about popular sovereignty, which I find exceedingly odd, since the people who made the Constitution’s most important provisions are all dead. Others treat the Dead Hand Fallacy as though it were an axiomatic fact about the Constitution, perhaps incapable of justification but indispensable to constitutional interpretation.

Adherents of the Dead Hand Fallacy believe that our obligation to honor specific constitutional provisions—such as those creating an independent president or life tenure for judges or the right to a jury trial in common law civil cases—is in service of a more general obligation to yield to the will of past super-majorities. If in fact this more general obligation exists, then it is not obvious that we exhaust it merely by respecting what the Constitution says. Respect for explicit constitutional rules might be nothing more than the first step toward meeting a larger obligation to dead super-majorities, an obligation which we

(1995) (stating that life tenure for Justices was more appropriate at the Founding than it is today). Powe proposes eighteen-year terms. Id. at 197.
discharge fully only if we also respect their intentions or expectations or practices or ideologies. Solving the “fidelity problem” thus requires adherents of the Dead Hand Fallacy to develop a theory that describes the appropriate balance between deference to the past and regard for the present. Not surprisingly, this task turns out to be very difficult, if not impossible, for the simple reason that it is hard to think of any good reason for empowering dead people in the first place. Once you admit that the dead should have some power over the living, it is exceedingly hard to say how much power is enough. Conceived pursuant to the Dead Hand Fallacy, the “fidelity problem” is intractable indeed, and hence meet for clever ideas about translation, synthesis, and what not.

The Dead Hand Fallacy gets constitutionalism backwards. The purpose of constitutionalism, I want to suggest, is to discipline the present in order to enable future people to govern in the interests of justice—not to harness present-day people to protect the values of the past.

This idea will be counterintuitive to many readers. The key to my suggestion is to imagine what American politics would be like in the absence of a written constitution—or, more precisely, in the absence of the super-majoritarian barriers to amendment imposed by Article V. Adherents of the Dead Hand Fallacy suppose that under such circumstances present-day people would be free to govern themselves unfettered by the past. Not so: A nation’s history inevitably defines the choices available to it.

To begin with, any change will involve, as the economists say, “transaction costs.” Major reforms frustrate settled expectations and disrupt learned patterns of behavior. New institutions require people to test and develop strategies of political cooperation and to overcome opposition from dissident bureaucrats who wish the old institutions were still in place.

But the “presence of the past,” as Sheldon Wolin has called it, runs far deeper than these obvious, albeit substantial, “transaction costs.” First, when a nation debates institutional reform, certain people will be in power and others will be marginal. Who speaks how in the debate about a nation’s next government will depend upon the composition of its present one. Some people will have the right to vote and others will not; some people will have prestigious titles, like “Senator” or “President,” or resources, such as the power to reward their allies with desirable jobs, and others will not. Second, even if people agree that the existing system of government is inefficient or unjust, they may find it impossible to form a coalition in favor of any particular alternative. It is thus possible that no reform will occur even when everybody thinks the “transaction costs” are worth bearing. Third,

the existing system of government will affect citizens' ability to ana-
lyze alternative political schemes: It will determine what information
they have (about how institutions work and what people think); it will
determine what problems occupy their attention (those that loomed
largest in the existing system); and it may even determine what values
and interests people have.

Whether we have a written, obdurate constitution or not, we inherit
our politics from the past; no people writes upon a blank slate. In the
extraordinary moments when radical reform occurs, those who re-
make political institutions inevitably define the options available to
their successors. We must therefore ask the following question: What
would a constitution maker do if she (1) realized that her decisions
would inevitably shape the political context of those who followed her
and (2) wished to enable her successors to govern as freely as
possible?

I submit that such a constitution maker would have at least three
ambitions. First, she would want to avoid congesting political choice
unnecessarily. As we have observed, any effort to specify political in-
stitutions will constrain the possibilities for subsequent political ac-
tion, but some systems of government are more flexible than others.
Second, she would want to make sure that the institutions which she
and her contemporaries designed were good ones suited to long-term
interests. To the extent possible, the influence of the past should be
an aid, rather than a hindrance, in the future. Third, she would want
to facilitate self-conscious reflection about what was fixed by the past,
what was up for grabs in the present, and whether substantial reform
was desirable. She would, in other words, be concerned not only
about the successful design of the nation's political institutions, but
about long-term maintenance and repair of the constitutional system.

The first of these three objectives might lead one to believe that the
best constitution is the most easily amendable: Article V's stiff re-
quirements reduce the range of choices available to present-day ma-
jorities. But that tempting conclusion ignores the crucial fact that, as
we have just seen, formal constitutional barriers to change are not the
only ones or even the most important ones. Lower thresholds for con-
stitutional legislation may induce people to constitutionalize a greater
range of policies and decisions, and so to constrict the range of choices
available to later generations. Moreover, easy amendability may en-
courage imprudent choices, and so compromise the enlightened con-
stitution maker's second objective: to make sure the institutions she
creates are good ones, not only for her but for those who follow many
years after her.

My colleague and co-author Lawrence G. Sager has explained how
the counter-majoritarian features of Article V discipline constitution
makers to look beyond narrow and partisan political interests. He
points out that Article V insists upon geographic breadth, thereby re-
ducing the chance that some proposal will become part of the Constitution merely because it coincides with the interests of one narrow slice of the country. And he argues that because constitution makers know their decisions will endure for many generations, they will have an incentive to design institutions capable of accommodating changing conceptions of justice and changing constellations of interest. Article V's formal barriers to change, in other words, remind constitution makers of a fact that would be true (but which they might not recognize) even in the absence of such barriers: Errors they make will haunt their children's children because a people inevitably inherits its politics from its past.

Sager calls his account of the Constitution "justice-seeking." It interprets the Constitution's obduracy as a mechanism for getting good political institutions, not as a device for empowering transient super-majorities to impose their will on future citizens. Anybody who doubts the importance of the incentives Sager describes need only contemplate the circus that recurs every ten years when state legislatures reapportion congressional districts in the wake of new census data. Here is institutional reform conducted at regular intervals pursuant to majoritarian rules, and it is a shameful pageant of partisan self-interest. State lawmakers carve safe districts for incumbents and maximize their party's power to the extent permissible under constitutional and statutory constraints. Partisanship is, of course, never absent from politics, constitutional or otherwise, but it dominates more in some circumstances than in others. One wonders, would legislators meet the challenge of reapportionment more responsibly if forced to develop principles that could be applied many years into the future or in other states?

My proposal, in sum, is this: The Constitution's purpose is not to empower the past but, first, to enable the present to deal with the inevitable influence of the past, and, second, to discipline the present to take into account the interests of the future. A written, obdurate Constitution is best understood as an effort (1) to entrench only fundamental political decisions, (2) to facilitate self-conscious and effective design of fundamental political institutions, and (3) to facilitate self-conscious and effective maintenance and reform of fundamental political institutions.

One can, of course, argue about whether Americans would have been better off if Article V had been less demanding. People might

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reasonably conclude that the costs imposed by Article V's rigidity outweigh whatever benefits flow from its effect upon the incentives of constitutional decision makers. 10 Article V might, in other words, be a defective mechanism for mixing flexibility with foresight in constitutional reform. It might increase the weight of the dead hand of the past even if its purpose is to do exactly the opposite. But that is irrelevant to our case against the Dead Hand Fallacy. My claim here is not that the Constitution does a perfect job, or even a good job, of facilitating self-government in the present (although I do believe that it does a good job). My claim, instead, is that the Constitution's purpose is to facilitate self-government, not to empower the dead. Whether the Constitution succeeds or fails at this enterprise is a different question.

III. THE AESTHETIC FALLACY

The Dead Hand Fallacy is one source, but not the only source, of constitutional theory's misplaced obsession with fidelity. The Dead Hand Fallacy works in combination with a second fallacy, which I shall refer to as the "Aesthetic Fallacy." People in the grip of this fallacy suppose that the Constitution is like a poem, a symphony, or a great work of political philosophy. Each word and every phrase must come together to form a harmonious and pleasing composition. Interpreters who accept the Aesthetic Fallacy believe that it is a grave error to treat constitutional provisions as awkward or redundant. Interpretation demands humility: One must regard the Constitution as encoded wisdom which yields up its secrets only to the most respectful readers.

There may be a connection between the Dead Hand Fallacy and the Aesthetic Fallacy: If one imbues dead people with mystical power to control the fate of their successors, it is reassuring and convenient to believe that past generations consisted of great men who produced perfect (or nearly perfect) laws. 11 But this connection between the two fallacies, if it exists at all, is practical rather than logical. One can embrace the Aesthetic Fallacy even if one denies the Dead Hand Fallacy. Indeed, although I have persistently criticized the Dead Hand Fallacy, 12 I count myself among those who have succumbed to the

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Aesthetic Fallacy. I derive some solace from the fact that I have considerable and diverse company. The Dworkinian value of integrity, for example, can impel nonoriginalist interpreters of the Constitution to look for hidden harmonies among its provisions. Theorists who would recoil from Straussian interpretations of, say, Machiavelli or Aristotle do not hesitate to apply the principle of logocentric necessity when reading the United States Constitution.

Though the Aesthetic Fallacy's influence has been widespread, it quickly wilts when exposed to light. Jack Rakove's historical arguments remind us of what should in any event have been obvious: The Constitution is a practical political institution, fraught with compromise and experimentation and human error, rather than a quasi-divine artwork or philosophical composition. We dishonor neither the Constitution nor the Framers if we regard some of its provisions as clumsy, regrettable, or redundant. And much of the Constitution deserves exactly that kind of treatment.

As an illustration, consider the Bill of Rights. Despite frequent and cloying praise for the Bill, it is a disappointing work. The First Amendment is very nice, of course. But, as Professor Levinson has reminded us, the Second is embarrassing. We might add that the Third is obsolete; the Fifth contains the enigmatic Self-Incrimination Clause and the potentially noxious Takings Clause; and the Seventh

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13. See, e.g., id. at 62 (comparing the Constitution to a “Lockean treatise”); id. at 75-76 (defending the Constitution as a well-drafted credo). My arguments in this Response provide a different explanation for the Constitution’s purpose than the one I endorsed in The Fourteenth Amendment’s Constitution. Id. at 51-56 (describing the “representative conception” of constitutionalism). I continue to adhere to much of what I said in The Fourteenth Amendment’s Constitution, including my critique of contractual conceptions of the Constitution, id. at 57-62; my claim that the Fourteenth Amendment had a transformative impact upon the Constitution as a whole, id. at 65-74; and my critique of textual and common law “fetishes” in Supreme Court jurisprudence, id. at 75-103; however, I no longer subscribe to the “representative conception” of the Constitution.

14. See Ronald Dworkin, Law’s Empire 165-67, 255 (1986) (discussing the demands integrity makes upon the legal system); see also Ronald Dworkin, Taking Rights Seriously 111 (1977) (discussing the “gravitational force” of a legal principle). Fred Schauer’s contribution to this Symposium also describes how Dworkinian ideas about the “gravitational force” of a specific constitutional provision might cause it to have more global implications. Frederick Schauer, Constitutional Invocations, 65 Fordham L. Rev. 1295, 1302-05 & n.36 (1997).

15. “Logocentric necessity” is the idea that an author did not make any mistakes—every word and every punctuation mark is precisely chosen and precisely placed to express the author’s meaning as perfectly as is possible. If one accepts the idea of “logocentric necessity,” then the best interpretation of a work is the one that renders every word meaningful and every omission justified. For a presentation and defense of the concept, see generally Jacob Klein, A Commentary on Plato’s Meno (1965).


17. On the puzzles of the Self-Incrimination Clause, see Louis M. Seidman, Rubashov’s Question: Self-Incrimination and the Problem of Coerced Preferences, 2
is imprudent. Missing are, among other things, the right to travel, the right of parents to conduct the upbringing of their children, and, most glaringly, any sort of equality right.\textsuperscript{18} Of course, to a society that accommodated slavery these rights were more embarrassing than the Second Amendment.

The problems with the American Bill of Rights are not merely a matter of poor execution, however. When considered in light of the purposes that justify having a written, obdurate constitution, the very idea of a Bill of Rights begins to look distinctly odd. It should, by now, be obvious why it makes sense to have a written Constitution which decides, for example, whether we have a bicameral legislature or a unicameral one, and how representation will be apportioned in each house of Congress. Until these nuts-and-bolts issues are settled, no government exists.\textsuperscript{19} And once they are settled, it is foolish to pretend that one can ever reconsider them on a blank slate. For example, in debates about senatorial reform, some people who speak in the debate will hold the title “Senator.” Many citizens will have a vested interest in seeing that their Senators retain power, and some people will respect Senators because of the prestige that goes with the office. With or without Article V, the Founders’ decision to create a Senate inevitably defines the parameters of our present-day political debate.\textsuperscript{20}

But it is not so easy to see why it is necessary to include a Bill of Rights in the Constitution. Some readers may consider my puzzlement thick-headed: The point (the rather obvious point, they might say) of having a Bill of Rights in the Constitution is to provide for judicial protection of individual liberties. A Bill of Rights, however, is not a necessary antecedent to a robust civil liberties jurisprudence. One might simply include a provision saying, for example, that “The judiciary shall have the power to declare void any government actions inconsistent with the basic liberties of the people.” Or, to avoid such explicit endorsement of an active judicial role, the Constitution might


\textsuperscript{19} Sotirios A. Barber, On What the Constitution Means 50 (1984) [hereinafter Barber, On What the Constitution Means].

\textsuperscript{20} Of course, Article V is especially limiting with respect to Senatorial reform: It provides that “no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.” U.S. Const. art. V. I do not mean to argue that this extraordinary obstacle is a desirable one. See supra p. 1617 (distinguishing between the purposes of the Constitution and the question of whether the Constitution in fact serves those purposes well).
stipulate that "Neither the United States nor any of the States shall take any action inconsistent with the basic liberties and fundamental equality of the American people." Indeed, one might think that the Fourteenth Amendment, which has been considerably more important to civil rights jurisprudence than was the original Bill of Rights, says something of this sort.\textsuperscript{21}

Other readers might think my puzzlement over the Bill of Rights mistaken for a different reason. They might maintain that the point of enumerating liberties is not to empower the judiciary but to confine it within narrow limits. By articulating specific standards, they might say, the Bill of Rights expresses distrust for judicial judgment and promotes judicial restraint. This argument could work if indeed the American Bill of Rights consisted of specific rules that left judges with little discretion. Yet, even if we ignore the Ninth and Fourteenth Amendments (and of course we cannot ignore them), that would be a poor account of the Bill of Rights. Its provisions—the Free Speech and Religion Clauses of the First Amendment, the Search and Seizure Clauses of the Fourth Amendment, the Due Process and Takings Clauses of the Fifth Amendment—articulate broad principles that cannot be applied unless we trust the judiciary to make controversial judgments about what values are worth protecting and what role courts should play in protecting them. If one believes in judicial restraint, it makes sense to recommend that idea on its own terms, as an interpretation of what political justice requires, rather than as the oblique implication of a partial listing of abstract liberties.\textsuperscript{22}

The Bill of Rights thus seems to congest political choice without serving any justice-seeking purpose. More than most of the Constitution, it looks like an intrusion by the dead hand of the past, unnecessarily subordinating the values of present-day Americans to archaic judgments about guns, property, and juries. The deficiencies of the Bill of Rights were ameliorated in principle by the Ninth Amendment and in practice (to some extent) by the Fourteenth. In light of these more general guarantees, one might hope that the specific items in the Bill of Rights would serve only as supplements to the liberties recommended by political justice—so that, for example, people like me, who doubt the wisdom of jury trials in civil cases, would have to respect the right created by the Seventh Amendment, and we might have to per-

\textsuperscript{21} On the importance of the Fourteenth Amendment, see Elsgruher, \textit{Fourteenth Amendment, supra} note 12, at 48 (arguing that "the Fourteenth Amendment changed the Constitution from an ambiguously contractual law into a kind of law best described by the representative concept of constitutionalism").

\textsuperscript{22} Nothing said in this Response rules out the possibility that the best interpretation of the United States Constitution would call for a very limited judicial role. My argument is directed against the idea that "fidelity to the Constitution" requires us to discount political justice more deeply than the text of the Constitution demands. On some conceptions of political justice, however, fidelity to justice requires that the judiciary abstain from deciding controversial issues of social policy and individual right.
omit National Guardsmen to keep guns in their homes. We could view the Bill of Rights as an awkward first step in a commendable direction, eventually pursued more adeptly by the general language of the Fourteenth Amendment.

Judges and scholars have not, however, been satisfied to treat the Bill of Rights in this way. They praise it as magnificent, not awkward, and view it as limiting, not supplementing, the Constitution's more abstract provisions. They contend, for example, that the Fourteenth Amendment's Due Process Clause protects only rights named in the Bill of Rights. Forced to explain the point of including specific rights in the constitutional text, they maintain that the list is designed to constrain judges by prohibiting them from acting upon their best practical and moral judgments about what justice requires. This is the dead hand of the past with a vengeance, valuing past practices and history at the expense of not only justice but also the constitutional text itself.

IV. HISTORY, POPULAR SOVEREIGNTY, AND CONSTITUTIONAL RHETORIC

Judges and scholars should discard both the Dead Hand Fallacy and the Aesthetic Fallacy. Our obligation to respect the past is born of its inevitable presence within our politics, and does not derive from some mystical authority enjoyed by dead super-majorities or supermen. That does not mean history should play no role in constitutional interpretation. It can, for example, serve as the source of useful political theory (such as Madison's), cautionary lessons about human nature, and information about the performance of political institutions. But history must be handmaiden, not rival, to justice.

This auxiliary role no doubt will seem too modest to account for all the history that goes into, for example, Supreme Court opinions.

23. Fortunately, the Framers included a preamble to the Second Amendment: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II (emphasis added). They even had the sense, thank goodness, to refer to "well regulated" militias, thereby leaving Timothy McVeigh and his buddies out in the cold. Id. (emphasis added). It is at least arguable that the only "gun rights" protected by the Second Amendment are those that in fact support "the security of a free State"—and that might mean none at all. Id. For further discussion, see Levinson, supra note 16, at 643-45.

24. The constitutional text explicitly provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX. For perceptive commentaries arguing that the Ninth Amendment ought to be taken more seriously, see generally Sotirios A. Barber, The Ninth Amendment: Inkblot or Another Hard Nut to Crack?, 64 Chi.-Kent L. Rev. 67 (1988) (arguing for a liberal reading of the Ninth Amendment) and Lawrence G. Sager, You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth. But What on Earth Can You Do with the Ninth Amendment?, 64 Chi.-Kent L. Rev. 239 (1988) (arguing that the Ninth Amendment plays an important role in constitutional interpretation).
And, to some extent, it is; there is too much history in constitutional interpretation as it is practiced today. Some of the excess is a direct consequence of the Dead Hand Fallacy, as judges and scholars remain in the grip of originalist or other confusions. Some of it results from another, even worse phenomenon related to the Aesthetic Fallacy: namely, the undignified and indefensible attempt by judges, scholars, and lawyers to lord it over their fellow Americans by harmonizing obscure details gathered from distant corners of the constitutional tradition—something along the lines of, "So, Mr.-or-Ms.-ordinary-citizen-or-politician, you think you know something about justice? Well, I happen to have a quote here from John Rawls, and I can reconcile it with a snippet from the private letters of Gouverneur Morris, five cases from the Waite Court, and an obscure passage from Coke on Littleton. Can you? Well, then, who's the real expert on justice?" I do not think this tack is deliberately or self-consciously adopted (and, of course, it is never so explicit or so rude as the quotation I have concocted), but I do think it is quite common, and we would be better off were it less so.²⁵

Nevertheless, I believe there is a reason why history might legitimately figure much more prominently in judicial interpretations of the Constitution than it does in, say, political science analyses of American government. The point of judicial opinions is not merely to select an interpretation but to persuade people that it is correct. Professor Rakove suggests that we should sometimes regard judicial appeals to history "not as the reasons driving decisions, but as an attractive rhetorical method of reassuring citizens that courts are acting consistently with deeply held values."²⁶ I think that courts write more to persuade themselves, and other lawyers, than they do to reassure citizens; judges need most of all to convince themselves and their colleagues that they have the authority and the responsibility to stand up for what they believe is right.²⁷ With that modification, however, Professor Rakove's suggestion is very much on target. History serves a specific and indispensable rhetorical role: It reconciles the American faith in popular sovereignty with the justice-seeking Constitution.

²⁵. For criticism of this sort of technical showmanship in Supreme Court opinions, see Eisgruber, Fourteenth Amendment, supra note 12, at 84-98 (describing textualist and common law "interpretive fetishes").

²⁶. Rakove, Fidelity Through History, supra note 3, at 1591.

²⁷. See Christopher L. Eisgruber, Is the Supreme Court an Educative Institution?, 67 N.Y.U. L. Rev. 961, 1008-10 (1992) [hereinafter Eisgruber, Is the Supreme Court an Educative Institution?]. There, I suggest that students, especially law students, are the most important audience for the educative component of judicial opinions. Id. As I indicate in the text, I am now inclined to modify this claim; in addition to its longer-term effects, judicial rhetoric has an important role to play in convincing judges—including, perhaps, the author of the opinion himself or herself!—to stand up for their convictions. These convictions, I should add, may include convictions about the institutional role of the judiciary: So sometimes the role of judicial rhetoric may be to convince judges that they must uphold laws they abhor.
The idea that the people are the ultimate repository of political authority is patent both in American history and in the text of the Constitution. It raises, as Edmund S. Morgan has pointed out, "a continuing problem of authentication." Government officials, including judges, must claim to act on the people's behalf, but every official necessarily traces her commission to acts by other officials, whose own claims to speak for the people might be cast in doubt. As Morgan says, "The people . . . [are] almost as hard to approach as God. Individual people or groups of people . . . [can] be seen, heard, touched, smelled, and . . . act, do things, and cause a lot of trouble, but the people, in the sense of all those who were to be governed and [those] who could authorize government, [can] not." We might suppose that one can best recognize the sovereign people through a substantive test: What the people really want is justice and good government, and so the truest representatives of the people are the ones who advance these objectives. These propositions are philosophically and empirically contestable, but they are axiomatic to democracy: It is politically impossible to tell the people that they want injustice or bad government. "By their fruits you shall know them," we might say; it turns out that popular sovereignty and divine authority have more in common than one might at first imagine.

Nevertheless, precisely because of the difference between the people and God, this approach to popular sovereignty depends upon historical support. To quote Morgan once more, "the people have always seemed to be a good deal more tangible than God; and a government that claimed to act in their name had to present a plausible claim to their approval, a claim plausible enough to persuade actual people to submit." A judge, or anybody else who claims to act on the people's behalf, will need some evidence that actual people—the kind who vote, shout, and generally make trouble—want her to make the judgments she enforces.

And that is where history enters the picture. The judge can reinforce her conviction that the people want justice by pointing to historical figures or institutions that might plausibly, perhaps only with the benefit of hindsight, be considered especially faithful representatives of the people. When a judge uses history in this rhetorical way, she inverts originalism's connection between legal determinacy and historical determinacy. Originalism supposes that historical facts can be used to select among multiple, competing interpretations of the Const-

28. The preamble, of course, begins, "We the People . . . ." U.S. Const. pmbl. For nuanced discussion, see William F. Harris II, The Interpretable Constitution 74-78 (1993).
30. Id. I have changed the quote from the past tense to the present; hence the elisions and brackets.
31. Id.
The rhetorical treatment of popular sovereignty uses conclusions about constitutional justice to select among multiple, competing interpretations of American history. It is worth asking, I think, whether constitutional interpreters are better understood as engaging in this kind of rhetorical enterprise when they say that they are offering an originalist interpretation of the Constitution. The rhetorical account would explain why originalists often disregard ambiguities in the historical record; why they always seem to reach conclusions consistent with their own convictions about constitutional justice; and why they are, as Professor Rakove notes, apparently uninterested in advancing serious justifications for originalism.

I do not mean to suggest that originalists would embrace my reconstruction of their practice. They, or at least many of them, genuinely believe that the historical arguments they make are the reasons they have for their legal conclusions. If they were to admit that originalism was a rhetorical strategy, not an interpretive strategy, they would have to produce other reasons to justify their conclusions. They might also want to reconfigure their historical stories, since they would no longer have to protect the illusion of a completely determinate historical record.

Originalist academics face an additional challenge. Judicial opinions have a legitimate rhetorical function to play, but it is doubtful whether the same thing can be said about law review articles. The scholar’s job is to analyze which arguments are better or worse, not to inspire good works or make political myths. Much of the history that

32. I have already quoted Professor Rakove’s mischievous admission that he likes “originalist arguments when the weight of the evidence seems to support the constitutional outcomes [he] favor[s].” Rakove, Original Meanings, supra note 1, at xv n.*. This selective embrace of historical arguments would be illegitimate, of course, if one supposed that history were the ground for determining what constitutional outcomes ought to be favored. But if history’s principal point is rhetorical, to support outcomes that ought to be favored on different grounds, then Professor Rakove’s attitude is entirely appropriate.

33. See, e.g., id. at 11 (“[T]he Supreme Court’s use of originalist evidence is best described as a mix of ‘law office history’ and justificatory rhetoric which offers little reason to think that this method of interpretation can provide the faithful and accurate application of the original constitutional understandings its advocates promise.”); id. at 340 (“Nothing in [Robert] Bork’s own principal defense of originalism suggests that he has ever tested his thesis against [the] evidence . . . .”).

34. I discuss this point at greater length in Christopher L. Eisgruber, Birthright Citizenship and the Constitution, 72 N.Y.U. L. Rev. (forthcoming Apr. 1997). Cf. Rakove, Original Meanings, supra note 1, at xv n.* (“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.” (emphasis added)).

35. Rakove, Fidelity Through History, supra note 3, at 1593 (“One curious feature of the ongoing debate over originalism is that its critics have examined its premises far more seriously than its advocates (for whom its appeal sometimes seems to rest on a statement of faith).”).
suffuses judicial opinions is irrelevant to the questions that constitutional scholars usually discuss. History cannot prove that the sovereign people want justice; that conclusion is, in my view, a necessary component of the theory of popular sovereignty. Nor does history determine the right answer to constitutional questions, except in limited ways (e.g., by providing useful information about the competence and performance of American political institutions).

It would, however, be perfectly permissible for academics to ask a different question: What would a good judicial opinion look like in a particular kind of constitutional controversy? The best opinions would, presumably, not only reach the correct result but also do so persuasively. To evaluate judicial opinions, academics would have to comment upon which uses of history were more or less persuasive. Historical arguments become unpersuasive if they are demonstrably false, and so scholars should insist, as Professor Rakove does, that constitutional interpreters be faithful to history if they make historical arguments at all.

Academic commentary on constitutional opinions has for some time proceeded as though the quality of an opinion were entirely a function of its analytic rigor. The interest in the rhetorical features of judicial opinions seems, however, to be growing. If, as I have sug-

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36. Of course, my view of popular sovereignty is controversial. One might instead adopt a procedural definition of "the people" and use it to identify the popular sovereign on some basis other than the quality of the sovereign's views. Bruce Ackerman's theory is, I think, a sophisticated exercise of this kind; the theory is designed to identify "the people" by searching for appropriately engaged majorities. See Bruce Ackerman, We the People: Foundations 6-7, 266-94 (1991) (summarizing the conditions under which "higher lawmaking" occurs).

I believe that all such theories are unsatisfactory. Once one reduces "the people" to a majority of the people—no matter how engaged or complex the majority—it becomes impossible (in my view) to explain why popular sovereignty is attractive from the standpoint of justice. The appeal of popular sovereignty depends upon the idea that whole people govern, and that idea is compromised if, in fact, majorities govern at the expense of minorities. Harris, supra note 28, at 77, 116-17 n.5; Christopher L. Eisgruber, Ethnic Segregation by Religion and Race: Reflections on Kiryas Joel and Shaw v. Reno, 26 Cumb. L. Rev. 515, 516-17 (1995-96).

In this regard, I part company with Professor Sager's argument in The Incorrigible Constitution. In that article, Professor Sager opposed his justice-seeking view of the Constitution to "popular sovereignty" views. Sager, The Incorrigible Constitution, supra note 7, at 897 ("[O]ur constitutional tradition cannot plausibly be squared with the absolutism of popular sovereignty, and we should abandon the effort."). I think that popular sovereignty is so ingrained in the constitutional text and in American history that we must respect it. Sager's real complaint, in my view, is with procedural conceptions of "the people," not with the ultimate sovereignty of "the people."

gested, originalism is best understood as a rhetorical strategy, then this relatively junior branch of constitutional studies may in fact embrace a much greater portion of the discipline than has been thought.

CONCLUSION

When the Constitution’s anti-federalist critics demanded a Bill of Rights, Alexander Hamilton predicted that the change would do more harm than good. According to Hamilton, the Constitution did not authorize the government to compromise the rights of persons. Including a Bill of Rights would mislead people into thinking that the government had powers it did not. People would mistakenly come to believe that the government was free to compromise rights not specified in the Constitution.

Conventional wisdom treats Hamilton’s stance as a blunder. The United States enacted the Bill of Rights and tacked on the Ninth Amendment to deflate Hamilton’s objection. The Bill of Rights is now regarded as the fountainhead for a grand and glorious jurisprudence of civil liberties. Hamilton’s argument is an archaic curiosity good only for teasing law students and showing that even the Framers sometimes got it wrong.

In fact, Hamilton was quite right and this Symposium is proof of his insight. The Bill of Rights has combined with the Dead Hand Fallacy and the Aesthetic Fallacy to spawn the peculiar notion that “fidelity” to the Constitution compels us to insist upon something less than fair measure when we assess the government’s constitutional obligation to liberty, equality, or justice. “Fidelity,” in other words, has become a shorthand for the idea that government can excuse its failure to protect rights by pointing to loopholes in the Constitution.

Not surprisingly, efforts to give exact definition to this concept of fidelity have been politically charged and conceptually unsatisfactory. That is not because the answers have been poor but because the question is wrong. We should give up thinking that fidelity to the Constitution comes at the expense of justice; rather, we should realize that fidelity to the Constitution, if defensible at all, means fidelity to justice, and history matters to constitutional interpretation only as the servant of justice.


39. I say fair measure, not full measure, in order to take into account institutional constraints and other practical concerns that might legitimately dissuade a judiciary from enforcing perfect compliance with moral principles. See Lawrence G. Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1212 (1978). As I have already noted, some conceptions of political justice may recommend a very limited role for the judiciary. See supra note 22.

40. See Barber, On What the Constitution Means, supra note 19, at 11 (arguing that “difficult constitutional questions should be resolved in ways that contribute to some picture or notion of the just and good society”).