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OUTSOURCING THE LAW: HISTORY AND THE DISCIPLINARY LIMITS OF CONSTITUTIONAL REASONING

*Helen Irving**

INTRODUCTION

Debates about the use of history in constitutional interpretation find their primary nourishment in the originalism debate. This has generated a vast amount of literature,¹ but also narrowed the terms of the debate. Originalism is a normative commitment wrapped in a questionable methodological confidence. Regardless of the multiple forms originalism takes,² originalists are confident that the meaning (in the sense of intention) that animated the framing of the Constitution can be ascertained and, indeed, that they can ascertain it. The debate has largely focused, then, on whether modern-day scholars and jurists can ascertain original historical meaning or, alternatively, whether they have gotten the history right in attempting to do so.

This debate has not been static. Some originalists have conceded that the original intent of the Constitution's Framers cannot be known, and they have embraced the new alternative, "public meaning" originalism, which seeks constitutional meaning in what would have generally been understood as the meaning of the text at the time of the Constitution's framing.³ The scope of the relevant historical inquiry has accordingly widened. Further debate has emerged, including over whether the new originalism offers a real alternative to the old.⁴

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1. In 2013, Jack Balkin observed that there is "by now a large literature on the proper use of history in constitutional argument." Jack M. Balkin, *The New Originalism and the Uses of History*, 82 *FORDHAM L. REV.* 641, 644 (2013). The footnote supporting this claim, *see id.* at 644 n.1, references multiple publications, many of which are concerned with "interpretive debates about originalism." *Id.* at 644. The symposium in which Balkin's Article appears, *New Originalism in Constitutional Law*, expands the list, but it is notable that only Balkin and two others, including Saul Cornell, *see infra* note 5, discuss historical methodology.

2. Mitchell Berman has identified more than seventy iterations. *See* Mitchell N. Berman, *Originalism Is Bunk*, 84 *N.Y.U. L. REV.* 1, 14 (2009).

3. *See, e.g.*, Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 *NW. U. L. REV.* 923, 933 (2009).

4. *See, e.g.*, Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 *NW. U. L. REV.* 703, 704–09 (2009).

For all this, as Saul Cornell points out, there remains a serious lacuna in most contributions to the originalism debate: “Far less attention has been devoted to analyzing the flaws in the underlying historical theory associated with originalism.”⁵ This observation is well placed. It applies not only in the United States, but also in other constitutional systems where judges have attempted to use (what they take to be) history in reaching interpretative conclusions.⁶ However, the objection to the use of history in constitutional interpretation, I suggest, is more fundamental. It also applies to constitutional interpretation generally and is not confined to a particular jurisdiction or constitutional culture. As a non-American, I explore this objection at a general level: it concerns whether judges should be using history at all.

I. CAN JUDGES DO HISTORY?

The first dimension of the objection to the use of history in constitutional interpretation, it might be thought, is that judges are not equipped to deal with history or to assess alternative historical accounts because they lack the disciplinary training.⁷ This objection maintains that judges do not know how to access or assess primary sources and must rely, inexpertly, on secondary sources written by historians who have been trained, but whose competence they cannot judge. As William Novak writes (of lawyers who write history), “if one does not have any previous independent experience with a substantial range of primary sources in a given [historical] field,” how does one know which of the secondary sources offers the most “accurate, convincing, and authoritative account[?]”⁸

But this objection misconstrues the issue when it comes to judges. Disciplinary competence is important, but the question of competence is not one of capacity. Rather, it is one of discipline. History and judging operate in different fields; they belong to different disciplines. Historians and judges are not just people with different titles; they are people with different jobs. This does not mean that professional historians alone can write history. Nor does it mean that originalist judges on constitutional courts should be “trained” in history if they are to engage satisfactorily in constitutional interpretation.

If we conclude that judges cannot use history because they are untrained, we are imagining history as a closed field, only open to initiates. This is

5. Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 FORDHAM L. REV. 721, 722 (2013).

6. See Helen Irving, *Constitutional Interpretation, the High Court, and the Discipline of History*, 41 FED. L. REV. 95, 108–20 (2013) (discussing the High Court of Australia and the unrigorous (and growing) use of history in constitutional interpretation).

7. H. Jefferson Powell made this point early in the originalism debate. He also acknowledged that judges will “continue to invoke the past” and with this in mind set out rules for the “responsible” use of history. H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 661 (1987).

8. William J. Novak, *Constitutional Theology: The Revival of Whig History in American Public Law*, 2010 MICH. ST. L. REV. 623, 642.

both elitist and inaccurate. Historians become historians by researching and writing history. Their formation may be guided by others or self-guided, but the doing and the formation are interdependent.⁹ Certainly, there are rules of practice, and these are conveyed by, or in, the work of experienced historians.¹⁰ But historians also disagree about the rules: whether primary sources must be the exclusive focus of research, whether oral accounts of the past are the equivalent of written records, what constitutes an anachronism, and so on. Historians disagree, too, about the purpose of writing history. Lines drawn around these disagreements frame the work of individual historians and the subfields of history. There are, nevertheless, shared disciplinary parameters and common ways of practicing the craft, but there are no accreditation tests.

Of course, judges *can* do history. Some may indeed have studied it on their path to legal training. Some may have trained themselves. There is nothing about being a historian that is beyond the capacity of a judge. (This also means that judges are not incapable of recognizing their own limitations in using history and cannot claim disciplinary naivety.) Doing work that counts as writing history is open to anyone who wants to practice it.¹¹ Judging, in contrast, is not open to anyone who wants to do it. A person may claim that he or she is competent to judge. He or she may even write “judgments.” But only a real judge can do the real job of judging. Judges are legally trained persons who are authorized to work as judges. Historians are persons who research and write convincingly enough to get published.

Unsatisfactory histories get published, but no one is disbarred for writing one. Probably most histories, even those of the great and celebrated, contain factual errors. No historian loses her (nonexistent) license for getting the odd fact wrong. Guidance as to the reliability of a historical account lies in the evidence of thorough research and the persuasiveness of the interpretation, supplemented by reviews written by other historians in the field or the perspectives of later works. Of course it matters to the reputation of the individual historian and the relevant publishing house if poorly sourced or erroneous or absurd conclusions are drawn in a published historical work, but (unlike in law) no other consequences follow.

But this is just the background to the main disciplinary issue. Whether judges have the right to apply history in resolving legal disputes is not a question of competence but of disciplinary legitimacy. Judges are not

9. Barry Friedman’s account of how he, a law professor, became a historian in the course of researching his book, BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (1st ed. 2009), illustrates this well. *See also generally* Barry Friedman, *Discipline and Method: The Making of the Will of the People*, 2010 MICH. ST. L. REV. 877.

10. My observations about the methodological principles of historical research are drawn from the classic account, MARC BLOCH, *THE HISTORIAN’S CRAFT* (Peter Putnam trans., 1953), as well as from my own training as a historian.

11. Novak makes the same point: “[T]he [historian’s] door is open to almost anyone who wants to try their hand at the art or craft.” Novak, *supra* note 8, at 624.

“qualified” to act as historians. If they act as historians, they cease to be judges. If they work as judges, they are not historians. The reasons lie in the difference between law and history, in the answer to the celebrated question, “what is history?”¹²

II. WHAT IS HISTORY?

The noun “history” carries its own ambiguities. It refers both to the past and to accounts written about the past. It is the latter that is of concern in understanding why judges should not use history. Of course, there are unmediated records of the past, including of laws and judgments, upon which judges routinely and legitimately draw. This use of the historical record is not, in itself, controversial. But judges need to understand the difference between the record and history itself. History is not a matter of collecting or recording data from the past, nor is it a catalogue of events. History is an *epistemology*. It is a particular type of understanding, a way of knowing the world. It is a matter of explanation, of interpretation. Historical interpretation is not constitutional interpretation. The interpretive differences are not merely differences in object.

While it may be true that history “is written in the present and for the present . . . [and] inevitably reflects the concerns of the moment,”¹³ the concerns and the inquiry are radically different from those of law. If historians’ inquiries are animated by current concerns (or, alternatively, publishers’ choices are animated by what they believe will attract readers in the present), historians still explore and explain how the past is different from the present. Judges deal with legal disputes of the present. In F.W. Maitland’s words, “What the lawyer wants is authority and the newer the better; what the historian wants is evidence and the older the better.”¹⁴ Judges do not choose their subject or the questions they wish to pursue, and they cannot rest their decisions on their own historical research. The questions asked by historians are historical questions; the questions shape the understanding. Regardless of the multiple subfields of history, historians ask common questions; they seek to understand dissimilarities, to describe a world that is no longer intact. They cannot say whether a law passed in 2015 is constitutionally valid or invalid. That is not a historical question.

History, furthermore, is not instrumental. History that lends itself to a particular purpose—the purpose of deciding whether a law is constitutionally valid—ceases to be history. As Jack Rakove has written,

12. See generally E.H. CARR, *WHAT IS HISTORY?* (R.W. Davies ed., 2d ed. 1987).

13. James T. Kloppenberg, *Thinking Historically: A Manifesto of Pragmatic Hermeneutics*, 9 *MOD. INTEL. HIST.* 201, 201 (2012).

14. F. W. Maitland, *Why the History of English Law Is Not Written: An Inaugural Lecture 14* (Oct. 13, 1888), in F. W. MAITLAND, *WHY THE HISTORY OF ENGLISH LAW IS NOT WRITTEN: AN INAUGURAL LECTURE* (Cambridge Univ. Press 1888).

“It is not the province of the historian to decide questions of law.”¹⁵ Rakove observes, however, that historical knowledge can give constitutional interpretation the “rigor it often lacks.”¹⁶ One would hope that history, if used by courts, would be used rigorously, although the record tends to suggest otherwise.¹⁷ The amateur or tendentious use of “law office history” has attracted much criticism,¹⁸ as have the flawed historical conclusions reached by judges. But the point remains: however well or poorly they use history, judges should not outsource their legal decisions to historians. This is, effectively, what happens when judges draw on secondary histories to reach constitutional conclusions in particular legal disputes.

Importantly, history is a skeptical discipline. Historical research must be done skeptically, without reaching conclusions until multiple sources have been studied, multiple perspectives considered, and the record has been thoroughly crossexamined and corroborated.¹⁹ Historians (at least those who do their work properly) should not rely on the accounts of others. They must be on the alert for tendentiousness and particularly wary of any historical claims of which politically interested parties, either in the past or the present, have made use. The instrumental use of history is entirely at odds with the skeptical discipline required of historians.

In addition, and for all these reasons, doing history takes a lot of time. It requires years of work, meticulousness, and diligence. It may, indeed, demand a lifetime’s dedication. Judges, in contrast, must resolve legal disputes as expeditiously as possible. They cannot take time off to research the history of a constitutional provision before applying the findings and conclusions of their research to a real life dispute. This would be incompatible with the legitimate expectations of the parties, not to mention the judicial task.

III. THE INDETERMINACY BARRIER

It is often observed that history is “disputed”—that historical accounts rest on shifting ground and that the historical jury is always “out.” The indeterminacy of history is, perhaps, the claim most commonly made by those who caution against its use in legal reasoning.²⁰ This objection also

15. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 11 (1997).

16. *Id.*

17. See generally Irving, *supra* note 6.

18. See generally Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119.

19. In Bloch’s words, “[F]rom the moment when we are no longer resigned to purely and simply recording the words of our [historical] witnesses . . . cross-examination becomes more necessary than ever. Indeed it is the prime necessity of well-conducted historical research.” BLOCH, *supra* note 10, at 64.

20. See, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 237 (1980).

misconstrues the reason courts should not use history. It suggests that historians and their histories are essentially unreliable. Of course historical accounts are routinely challenged and sometimes superseded, even discredited. But historians who do their job well (as most do) can be confident that there is evidence for their claims about the past, including what people thought or are likely to have thought, and they are entitled to confidence that their interpretation is sound. The fact that alternative historical interpretations are, or may become, available does not render all interpretations questionable. It may merely indicate that there are alternative perspectives.

The fact of conflicting historical interpretations does not mean that no distinction can be drawn between persuasive and unpersuasive historical accounts. As Novak writes, competing histories notwithstanding, it should not be concluded that “all historical arguments are created equal or that there is no historical basis to distinguish divergent accounts”; there are historical standards, professional methods, “and coherent, contestable reasons for choosing or preferring one version of the past to another.”²¹ But in rejecting the conclusion that history, being indeterminate, is always unreliable, we should not reach the alternative conclusion that judges may validly use history so long as they learn to distinguish the sound historical account from the unsound one and are committed to relying only on the former. History, whether reliable or not, cannot be conflated with law.

IV. THE “ORIGINAL PUBLIC MEANING” ALTERNATIVE

New public meaning originalism has, it seems, displaced “old” original intent originalism largely because old originalists have conceded to critics that the (subjective or collective) intentions of the Framers of the Constitution cannot be known or cannot account for the Constitution’s meaning.²² Certainly, the idea that constitutional meaning lies simply in the minds of the individuals who framed a constitution (if this is what anyone believes) is simplistic to the point of banal.

The distinction between the two forms of originalism has, however, been exaggerated. No “old” originalist can seriously propose seeking the subjective intentions of the Constitution’s Framers in the sense of reading their minds. That sort of intention is unrecoverable and also meaningless. Even if we could access their thoughts (imagine, for example, that all of the Constitution’s Framers had kept private diaries in which they recorded their intimate personal views of the meaning of each provision of the Constitution and all these diaries were later published), the sort of information that would be gained, by itself, would not resolve historical interpretation. It would be enormously interesting information, of course, but only as part of a much larger body of historical material, relevant to the

21. See Novak, *supra* note 8, at 628.

22. See Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 605 (2004).

story of the Constitution's framing but, on its own, conclusive of nothing. The more serious objection to old originalism is that historical meaning cannot reside in the record left by a tiny handful of individuals.²³

The problem, however, is not the difficulty in amassing information about the intentions of all the Framers. Richard Elkins and Jeffrey Goldsworthy note that skepticism about the possibility of identifying a single legislative intention invokes "implausible accounts that take legislative intention to be the aggregate of the intentions of each individual legislator."²⁴ Such accounts also appear to animate the rejection of old originalism, involving (at their simplest) a caricature of the way in which history would need to work, if it were to offer an unambiguous meaning of a constitution or any of its provisions. The problem with public meaning originalism does not lie, alternatively, in the impossibility of describing all the objective circumstances of those members of the public who can be thought of as the repositories of original public meaning. No history could ever be written if the circumstances of every single historical subgroup, let alone every actor, had to be taken into account. Group intentions, as Elkins and Goldsworthy suggest, can be identified, and they are not the same as aggregated individual intentions; collective social and institutional intentions arise out of actions directed toward a common end.²⁵ The reason for questioning the application of history to constitutional law does not lie in the elusiveness of collective intention. Indeed, historians commonly identify collective or dominant ideas, including intentions, in their subject era. But, the historical identification of collective intentions (including those that animated the project of uniting previously separate polities or peoples under a national constitution) will tell us nothing specifically about the legal meaning of a constitutional provision.

Even if we concluded that the words of a constitution directly revealed the intentions of its authors, as do the words of any other form of written communication,²⁶ the resolution of a legal dispute would not be assisted. For a dispute to be resolved, a second level of communication is required: what the author of the words intended them to mean in the context of resolving the particular dispute. We do not have that information. Larry Alexander draws a "simple-minded" analogy between the words of (among

23. Justice Antonin Scalia explains that while he rejects recourse to the Framers' intent, he is happy to rely on the writings of "some men who happened to be delegates to the Constitutional Convention," as well as other contemporary leaders, "because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood." ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 38 (1997). It hardly needs stating that no historian would get away with deciding, in advance, that a limited range of sources, identified by the prominence of their authors, would reveal historical meaning.

24. Richard Elkins & Jeffrey Goldsworthy, *The Reality and Indispensability of Legislative Intentions*, 36 SYDNEY L. REV. 39, 63 (2014).

25. *Id.* at 64; see also Kay, *supra* note 4, at 707–08 (arguing that collective, shared meaning can be identified).

26. See generally Lawrence B. Solum, *Intellectual History As Constitutional Theory*, 101 VA. L. REV. 1111 (2015).

other things) a shopping list and the words of a constitution.²⁷ Both convey communicative meaning. But, if the author, or authors, of the list is not the person doing the shopping, and if a brand-specific item on the list is unavailable, how do we know what the author intends the shopper to do? Should he buy an alternative brand or buy nothing? The author might have an answer, but the words on the list will not reveal it.²⁸ The historian can reconstruct the likely universe of answers (taking into account, for example, the availability of other brands at the relevant time and contemporary cultural norms or practices regarding consumer choices), but these will only provide possible alternatives, not the answer.

What people are plausibly likely to have thought (or not to have thought) will be found in “the range of possible meanings” at a particular moment in history.²⁹ This range can be known with a reasonable degree of confidence, at least for the historical eras in which modern constitutions were written. But it is a range, not a single meaning. The range of meanings for which the historian looks will embrace the meanings relevant to the law, but the significance of these meanings for the choices available in the past are not the meanings for which the judge looks. Notwithstanding that multiple conclusions about the meaning of a constitutional provision may find expression in the differing or dissenting opinions of judges, the resolution of a constitutional dispute must be conclusive; it must produce an enforceable conclusion. That conclusion is not merely different from a historical conclusion because it is enforceable; it is epistemologically different. It belongs to a different field of understanding.

Is the solution that historians should write history specifically tailored to the meanings relevant to the law? Novak calls on practitioners of constitutional history to “think seriously about what they are doing and not doing, to be explicit about what they are doing and especially *how they are doing it*, and to try to raise the bar generally for the practice of history in law.”³⁰ Who can object? But if such an admonition were taken seriously, it would generate a type of specialized narrative voice, speaking instrumentally to judges, anticipating legal disputes. It would, effectively, be preemptive opinion writing. It would not be history. It is the judges, rather, who should think seriously about what they are doing in using history, about their own *qualification* for judging history (no matter how historically “trained” they may be), and about whether they should be

27. Larry Alexander, *Simple-Minded Originalism*, in *THE CHALLENGE OF ORIGINALISM* 87 (Grant Huscroft & Bradley W. Miller eds., 2011).

28. A range of binary distinctions for reconciling a constitution’s original intended meaning with its later application meaning can be found in the literature; these include constitutional “interpretation” versus constitutional “construction,” see Solum, *supra* note 26, at 1118–23, and “enactment intentions” versus “application intentions,” see Jeffrey Goldsworthy, *Originalism in Constitutional Interpretation*, 25 *FED. L. REV.* 1, 20 (1997). They do not assist in finding the original meaning, however, nor do they explain the role of history in interpretation.

29. Cornell, *supra* note 5, at 728.

30. Novak, *supra* note 8, at 630.

outsourcing the job of constitutional interpretation to those whose work explains other things.

None of this means that legal history should not be written, that historians should avoid constitutional history, or that constitutional lawyers cannot be historians.³¹ At the very least, however, if judges are to use historical accounts to reach their legal conclusions, they should do so carefully and circumspectly. They should say why they have chosen particular historians over others and on what basis they have found a particular historical account more persuasive than others. If the (unlikely) reason is that the judge has read and compared all the alternative historical accounts, and has been persuaded by the scholarship, the thoroughness, or the mastery of one over the other, the judge should reveal this. But, even scrupulous judges should not allow historians to settle the law.

V. THE “HISTORICAL” CONSTITUTION

History, *as* history, is and should be outside of the hands of judges. The job of judges is to interpret the law, not history. What makes history so tempting for constitutional law, however—apart from normative undertakings to follow only what was agreed in the past, which have their own difficulties, but are a different matter—is that constitutions are instruments of precommitment. They are not the equivalent of statutes that may be altered by the ordinary legislative process. Constitutions are meant to be entrenched and to endure and, *for* this reason, to be anchored in the past. The weight of the anchor, the details of the precommitment, and the levels of generality or specificity by which the constitution’s endurance is to be measured remain open to debate. That debate cannot be resolved by history. History may appear to offer guidance, but this is an illusion.

Historians can reconstruct the context in which a constitution emerged. They can identify the range of possible meanings. But they cannot resolve, or even enlighten, a legal dispute. It is not a historical question to ask, for example, whether people in the 1780s would have wanted a state to be free to establish a bottle-recycling scheme.³² Such a question involves a fundamental anachronism and goes beyond even intelligible counterfactualism. A constitution’s silence on the matter may be interpretively relevant, but no historian would reach the conclusion that silence on a proposition at a particular moment in history indicated either contemporary approval or disapproval of that proposition. The best the historian could say is that silence may indicate that the matter fell outside

31. Nor does it mean that history is not relevant to legal theory or the evolution of legal concepts. Legal theory and history are, Nicola Lacey argues, “in dialogue.” Nicola Lacey, *Jurisprudence, History, and the Institutional Quality of Law*, 101 VA. L. REV. 919, 945 (2015).

32. This is an issue that has confronted more than one country’s constitutional court. *See, e.g.*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981); *Castlemaine Tooheys Ltd v S Austl* (1990) 169 CLR 436 (Austl.).

the range of possible meanings. That observation could have no relevance to a determination of constitutional meaning.

None of this is to say that reference to historical legal sources is prohibited. The history (in the sense of record) of marriage laws, for example, will reveal that “marriage” has not had a static legal meaning over time or even a single definition across the common-law world, and this record may usefully assist a court in its reasoning about whether the legal meaning of marriage may continue to evolve and may be relevant to determining whether a constitution “permits” same-sex marriage. But the *history* of marriage is a large and highly complex subject, going well beyond the law, involving multiple cultural, social, and personal practices. To draw a legal conclusion from the historical record is not to do or even to use history any more than relying on the words of one or more of a constitution’s framers is using history. It is merely to make a heuristic choice: whatever the legal record reveals will stand for the “meaning” of this provision. This approach may provide some certainty (although it will not resolve normative questions about whether intention expressed in the past should be followed). But the record of past law is not history.

CONCLUSION

No doubt, there can be great satisfaction on the part of a judge in reading works by historians and learning something about the contemporary public understanding of a constitutional provision in the era of its adoption. And a historical account that supports the legal conclusion to which the judge was already tending must be irresistible. But, the idea that the use of such an account amounts to using history in constitutional interpretation is illusory. At most, it amounts to using a fragment of a historical account, decontextualized and detached from the historical explanation and the historian’s purpose. History is not merely a jigsaw puzzle from which individual pieces or fragments can be lifted. History is the full canvas; it is a way of understanding human life. Law is a way of applying particular rules in the organization of human life. History is no more relevant to law than, for example, theology.

In the end, however, it is unlikely that at least some judges will be deterred from recourse to secondary historical sources (which they may allow themselves to think of as applying history), especially where the meaning of a constitutional provision is highly controversial, has proven evasive, or has undergone multiple alternative interpretations over time in the case law.³³ If so, the judge has a duty to know something about the discipline of history. The admonition against the use of history in constitutional interpretation should not inhibit exposure and criticism of the flawed or tendentious use of history by judges. Nor should it suggest that judges need not reflect seriously upon what they are doing when they use

33. I discuss a particular case of history as an interpretative last resort in Irving, *supra* note 6, at 124.

history. Judges should know that history and law are different disciplinary fields. They should learn, if they do not already know, that there is no single historical methodology and no single object of historical research. If they purport to rely on history, they should make principled decisions about the methodology they employ. They should understand that cherry-picking from historical “facts” or the utterances of individuals is not doing history (and they should know that a fact only becomes a “historical fact” “when the historian calls upon [it]”³⁴). They should recognize anachronisms and discipline themselves to avoid them, no matter how convenient these may be. They should also avoid reliance on what I elsewhere have described as “endogenous corroboration”—namely, drawing meaning from what members of a dedicated purposive community (such as a constitutional convention) said about each other’s propositions.³⁵ They must never assume that they know what the historical research will reveal and should be skeptical about historical claims based on limited research or limited sources. H. Jefferson Powell wrote that “wise constitutional interpreters do not rest absolute positions on the shifting sands of historical opinion.”³⁶ Wise constitutional interpreters, in other words, avoid using history.

34. CARR, *supra* note 12, at 10–121. As should scholars engaged in the originalism debate. For example, Richard Kay, challenging Powell’s historical conclusions about the Framers’ interpretive intentions, *see generally* Powell, *supra* note 7, bluntly states: “The content of the constitution-makers’ intentions . . . is itself a historical fact.” Kay, *supra* note 4, at 709. He then sets out an alternative conclusion to Powell’s (that of Robert G. Natelson) which Kay claims to have “more or less settle[d] the case.” *Id.* But the very existence of differing historical accounts of the “content” of the Framers’ intentions indicates that it is not a “fact” in the sense Kay appears to mean; rather, it is a “historical fact” in Carr’s sense, one for which the interpretive case cannot be “settled.”

35. Irving, *supra* note 6, at 105; *see also* Walter F. Murphy, *Constitutional Interpretation: The Art of the Historian, Magician or Statesman?*, 87 YALE L.J. 1752, 1764–68 (1978) (book review).

36. Powell, *supra* note 7, at 680.