1997

The Past, Tense: The History of Crisis - And the Crisis of History - In Constitutional Theory Book Review Essay

Paul Horwitz
University of Alabama - School of Law, phorwitz@law.ua.edu

BOOK REVIEW ESSAY

THE PAST, TENSE: THE HISTORY OF CRISIS—AND THE CRISIS OF HISTORY—IN CONSTITUTIONAL THEORY

THE STRANGE CAREER OF LEGAL LIBERALISM.
By Laura Kalman. New Haven: Yale University Press, 1996. Pp. viii, 375.

*Reviewed by Paul Horwitz**

[W]hen I most want to be contemporary the Past keeps pushing in, and when I long for the Past . . . the Present cannot be pushed away.
—Robertson Davies[1]

I. THE STRANGER AT THE PARTY

In the recent book *A Matter of Interpretation*,[2] Justice Antonin Scalia offers his latest gloss on the virtues of originalism and textualism in the interpretation of statutes and the Constitution.[3] Following the essay are the comments of three respected law professors—and a single non-lawyer, the historian Gordon S. Wood, whose

---

* LL.M., Columbia 1997; LL.B., Toronto 1995; M.S., Columbia 1991; B.A., McGill 1990. I would like to thank Michael Dorf, the members of his seminar on theories of constitutional interpretation, and Laura Kalman for their comments on previous drafts of this paper. Special thanks go also to Deirdre Dolan.

[1] ROBERTSON DAVIES, THE REBEL ANGELS 124 (1983).

[2] ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997).

[3] *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION, *supra* note 2, at 3. For an earlier extrajudicial statement of his position, see Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) [hereinafter *The Lesser Evil*].

remarks precede the law professors' commentary in the book.[4] At the beginning of his comment, Wood writes:

> This is very distinguished legal company, and I confess to wondering about my qualifications to be a commentator on Justice Scalia's paper. I do not seem to have too many of them. I have never been to law school . . . . I am not a jurist. I am not a legal philosopher. I am not a law professor. I am not even a legal or constitutional historian. I am just a plain eighteenth-century American historian who happens to have written something on the origins of the Constitution. I am not sure that this suffices. Be that as it may, I am pleased to be included among all these learned lawyers.[5]

For all its becoming modesty, Wood's humble protestation presents a fair question. What exactly was he doing there? In a slim volume dealing with the vagaries of constitutional and statutory interpretation, which is selective enough to offer commentary by constitutional scholars of the likes of Tribe and Dworkin but too small to include responses by statutory interpretation scholars such as Eskridge, why devote space to the remarks of one who himself questions (somewhat disingenuously, perhaps) whether he is qualified to comment on Scalia's paper? Of course, Wood might have been invited simply to evaluate specific historical claims raised in the course of Scalia's lecture or, more generally, to address issues in the field of constitutional history. But as he noted, Wood is not a constitutional historian, but simply a historian whose important work has included studies of the ideological background of the American Revolution.[6] In short, what did Wood offer that the legal academy could not provide?

Laura Kalman's engaging study of the state of constitutional theory, *The Strange Career of Legal Liberalism*,[7] suggests one answer to this question: Wood and other historians offer a way out—an escape from the crisis of legitimacy and authority that has held legal theory, and particularly Western constitutional theory, in a death-grip for the better part of a century. More generally, the turn to history in constitutional interpretation exemplifies the legal academy's continuing turn to other intellectual disciplines, both to provide

---

[4] *See* Gordon S. Wood, *Comment*, *in* A MATTER OF INTERPRETATION, *supra* note 2, at 49.

[5] *Id.*

[6] *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969); GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (1992).

[7] LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996).

authoritative answers that many concluded could never come from the study of law as a purely autonomous discipline,[8] and to seek a greater measure of legitimacy for the place of the law school within the academic community. In her "[m]andarin legal history,"[9] focusing largely on the experiences of the most important constitutional scholars and theorists at the most prestigious American law schools, Kalman suggests, perhaps more than she would be willing to concede, that the success of both goals has been decidedly mixed.

Part II of this review will offer a brief synopsis of Kalman's story of the crisis in constitutional theory and the turn to history. In subsequent sections, this Essay puts aside the question of crisis in the legal academy, and focuses on the benefits and snares of history in constitutional interpretation. The discussion is divided into two overlapping parts. Part III will discuss the theory of originalism in constitutional interpretation, as championed by writers such as Justice Scalia; this might be called a discussion of "law *as* history." Part III will also discuss more innovative forms of law as history, which purport to offer a more faithful method of preserving the original meaning of the Constitution while still allowing for changes in the context in which the Constitution is interpreted; the "translation" theory of constitutional interpretation advanced by Lawrence Lessig[10] is used as an example. Part IV will examine the role of history in constitutional theory for those "non-originalist originalists" or "moderate originalists" who argue that history may be a useful tool of constitutional interpretation, but who ultimately deem history more persuasive than authoritative; this can be called "history *in* law."[11] While many, if not most, constitutional scholars and jurists likely fall into this category, this Essay draws on the arguments of Cass Sunstein,[12] Michael Dorf,[13] and Kalman herself.

---

[8] *See generally* Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987).

[9] KALMAN, *supra* note 7, at 10.

[10] *See, e.g.*, Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365 (1997) [hereinafter *Fidelity and Constraint*] (espousing the view that since the Constitution was adopted in a radically different cultural context, "translations" of the Constitution are necessary to determine its original meaning in present contexts); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995).

[11] The phrase is also used by Mark Tushnet. *See* Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, 71 CHI.-KENT L. REV. 909, 918 (1996).

[12] *See, e.g.*, Cass R. Sunstein, *The Idea of a Useable Past*, 95 COLUM. L. REV. 601 (1995).

[13] *See, e.g.*, Michael C. Dorf, *A Nonoriginalist Perspective on the Lessons of History*, 19 HARV. J.L. & PUB. POL'Y 351 (1996) [hereinafter *Nonoriginalist Perspective*]; Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*,

Finally, Part V will draw on both of Kalman's twin themes—the crisis in legal scholarship and the turn to history. This Essay suggests that, in a sense, Kalman has done her work too well. *The Strange Career of Legal Liberalism* offers a persuasive discussion of the crisis in constitutional theory and an incisive view of history's frailties. While I tend to sympathize with her tentative conclusion that there is a role for responsible "public history" in legal argument,[14] Kalman's larger project successfully kicks out the support from under this conclusion, leaving those who would employ history in law with the sinking feeling that they have passed from one crisis to another. To the degree that history may nevertheless be a useful part of constitutional argument, it should be recognized that its value stems more from the questions we ask of the past than from the answers we receive. This suggests that Mark Tushnet's counter-intuitive assertion seems right: "[O]ne might think that legal scholars using history in law would perform badly if they got the facts wrong. One might think that, but one would be wrong."[15] Ultimately, however, I am forced reluctantly to conclude that even those methods of constitutional interpretation that I consider pragmatically useful, or personally attractive—such as the use of a stylized, mythical history to ask questions of ourselves, or a reliance on the older virtues of legal craft—have been rendered uncertain by the critiques described and developed in Kalman's fine and finally disturbing book.

Before proceeding to offer an outline of Kalman's narrative, it might be appropriate to offer a narrative admission of my own. Since Kalman's book inspires an awareness of the dangers of careless interdisciplinary borrowing, I ought to confess that I am only a legal scholar, and not a trained historian. In daring to critique Kalman's arguments about history, often relying on the very sources Kalman provides in her copious footnote citations, I might be accused of little more than what Brian Leiter has aptly called "intellectual voyeurism."[16] It may be a fair criticism. At the same

---

85 GEO. L.J. 1765 (1997) [hereinafter *Integrating Normative and Descriptive Constitutional Theory*].

[14] *See* KALMAN, *supra* note 7, at 202; *see also infra* Part IV (discussing various views of the value of history in constitutional interpretation).

[15] Tushnet, *supra* note 11, at 932.

[16] Brian Leiter, *Intellectual Voyeurism in Legal Scholarship*, 4 YALE J.L. & HUMAN. 79, 80 (1992) (referring to the "superficial and ill-formed treatment of serious ideas"); *see* Charles W. Collier, *Interdisciplinary Legal Scholarship in Search of a Paradigm*, 42 DUKE L.J. 840 (1993) (noting problems with interdisciplinary legal scholarship and offering a critical example).

time, since Kalman's book itself argues that even non-historian lawyers ought to dare to use history for their own ends, albeit often with the assistance of a professional historian, it is surely not unreasonable for a non-historian lawyer to attempt to evaluate the attractiveness of that argument. Moreover, since this Essay concludes that history in law ought to operate at a reasonably high level of generality, and is more important as a signpost of contemporary concerns than for the answers it provides, I am not convinced that my relative inexperience relegates me to the mere status of voyeur. Of course, that is ultimately for others to decide.

II. CRISIS

This Part offers a brief *precis* of Kalman's book. In particular, it offers a brief gloss of her discussion of the crisis in legal and especially constitutional theory, which dominates the first half of her book. Since this Essay takes the narrative she offers to be largely correct, and useful for present purposes mainly to set the stage for a discussion of the turn to history in constitutional law, this Part offers a summary rather than a more thoughtful discussion of this portion of her argument.

Though she surely recognizes that the pedigree of the crisis in legal theory arguably precedes this century,[17] and would likely agree that the ideas she discusses often interrelate in complex ways over time and at any given time, and so are not necessarily reducible to a simple historical pattern,[18] Kalman nevertheless tells an often straightforward story of the decline, rise, and subsequent renewed decline of consensus in constitutional theory in the twentieth century. She begins with the rise of Legal Realism, which she has chronicled so ably elsewhere.[19] In their exposure of "indeterminacy" and "idiosyncrasy" in judicial decision-making, and in their insistence on the value of empirically based legal reform, the Realists helped to shatter the once commonly held assumptions of the formalistic era of classical legal thought.[20] Importantly for her purposes, Kalman notes that while in superficial respects the "New Dealers' faith in progress clashed with the legal realists' critical vi-

---

[17] *See* KALMAN, *supra* note 7, at 13-14.

[18] For this kind of argument, see NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 2-3 (1995).

[19] *See* LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960 (1986).

[20] KALMAN, *supra* note 7, at 15 (describing the extent to which Realists argued that classical legal thought improperly separated legal theory from society).

sion,"[21] in fact most prominent Realists were liberals who supported the goals of the New Deal and served as key architects or officers of Roosevelt's revolution.[22] Hence, "[l]egal realism proved the jurisprudential analogue of reform liberalism, and the realists became midwives to the birth of the contemporary constitutional order."[23]

As Kalman notes, there was more than one branch of the Realist school.[24] Because the programs of both Legal Realism and the New Deal were forged against the background of the conservative Supreme Court of the Lochner[25] era, one element of Legal Realism was a concern about the anti-majoritarian nature of activist courts, and an argument for judicial deference to the legislative experiments of other branches of government.[26] In particular, those scholars who went on to form the "Legal Process" school, such as Justice Felix Frankfurter and Professors Henry Hart of Harvard Law School and Herbert Wechsler of Columbia, took from the legal war over the New Deal the belief that the great evil demonstrated by the Lochner era Court's jurisprudence was not so much the substantive goals it championed, as it was its abandonment of the restraint of neutral legal principles.[27]

Another branch of Realists, however, both inside and outside the legal academy, saw the Court's retreat in the face of the court-packing plan as further confirmation, if any was needed, of the Realist belief that the Court could not hide behind "the old incantations" of the formalist argument that "the Court was merely the passive mouthpiece of an unambiguous constitution."[28] Rather than seeking refuge in the idea of neutral principles, they contended that Realism and the events of the era laid bare the illusory nature of neutral principles. Many of these scholars and other observers simply thought that "the old Court had engaged in the wrong kind of

---

[21] *Id.*

[22] *See id.* at 17.

[23] *Id.*

[24] *See id.* at 19.

[25] *See* Lochner v. New York, 198 U.S. 45, 58 (1905) (limiting, on substantive due process grounds, the extent to which a state may regulate working conditions).

[26] *See* KALMAN, *supra* note 7, at 18-19 (noting that Hart and Frankfurter maintained that the Court should not undermine the will of the majority as manifest in the choices of democratically elected representatives).

[27] *See id.* at 19.

[28] *Id.* at 19 (quoting ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 207 (Sanford Levinson ed., 2d ed. 1994)).

activism," and argued instead for activism in the service of social change and individual rights.[29]

If Realism destroyed the late nineteenth-century consensus represented by the classical formalism of Langdell, the story of the postwar era until the late 1960s might be described as the rebuilding of consensus in constitutional theory behind the somewhat neoclassical, tamed Realist approach of the Legal Process school.[30] The rise of Process theory perhaps reflected a larger consensus among the relatively homogenous and affluent ruling and intellectual classes in America that the problems of the times were not ideological; rather, they simply called for technical answers.[31] The Process theorists exemplified such beliefs, as they revived concern for "process and precedent," "legal craft," and "cases decided according to law, regardless of who got what, when, and how."[32]

At about this point, a crucial problem intervened; the Court decided the landmark case of *Brown v. Board of Education*.[33] Recall that Realist responses to the old Court had split, with some favoring judicial deference to legislative majorities and others supporting activism in favor of individual rights.[34] With *Brown*, in a sense, the two schools of thought collided.[35] Despite criticisms of the reasoning in *Brown* from the likes of Judge Learned Hand[36] and Professor Wechsler,[37] "for *Brown* what stands out is the lengths to which process theorists went to justify it or to set out broader and more

---

[29] *Id.* at 20.

[30] For excellent additional discussions of the Legal Process school, see generally DUXBURY, *supra* note 18, at 205-99; Gary Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REFORM 561 (1988). For my own more modest discussion of the influence of Legal Process theory outside of the United States, drawing heavily on Duxbury and Peller, see Paul Horwitz, *Bora Laskin and the Legal Process School*, 59 SASK. L. REV. 77 (1995) (Can.).

[31] *See* KALMAN, *supra* note 7, at 26 (characterizing this age as "demand[ing] the technocrat").

[32] *Id.* at 27.

[33] 347 U.S. 483, 495 (1954) (holding that the racial segregation of public schools violates the Equal Protection Clause of the Fourteenth Amendment); *see* STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS 140 (1996) ("Although modern constitutional theory began with the critical reaction to Supreme Court decisions of the *Lochner* era, the starting point of contemporary constitutional theory is *Brown v. Board of Education*.").

[34] *See, e.g.*, KALMAN, *supra* note 7, at 19-20.

[35] *See id.* at 48 ("In the 1960s, then, two groups of law professors bickered, but theirs was a family quarrel between Warren Court activists and process theorists, two wings of the realist tradition.").

[36] *See* LEARNED HAND, THE BILL OF RIGHTS 54-55 (1958) (questioning the basis upon which the Court acted).

[37] *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

consistent grounds on which it could have rested."[38] Quoting Louis Seidman, Kalman suggests that the acceptance of *Brown* became "an 'admission ticket for entry into mainstream constitutional dialogue.'"[39] Indeed, that need to find a place for *Brown* within any acceptable theory of constitutional interpretation still animates debates today, forcing originalists into scholarly contortions in an effort to show that the judgment will survive their doctrine.[40]

In any event, even if *Brown* became something of a sacred cow for most scholars of the period, that case merely marked the beginning of an era of activism. The Warren Court pressed forward in advancing the goals of what Kalman calls "legal liberalism"—defined as "trust in the potential of courts, particularly the Supreme Court, to bring about 'those specific social reforms that affect large groups of people such as blacks, or workers, or women, or partisans of a particular persuasion; in other words, *policy change with nationwide impact.*'"[41] It was in this context that Frankfurter's protégé, Alexander Bickel, disregarding the praise that contemporary political scientists were according the Constitution for its useful role in mediating among the different interests of a pluralist society, formulated his definitive statement of one of the classic problems of American constitutional theory: the counter-majoritarian difficulty, or the concern with courts exercising their power of judicial review to deny the will of an elected majority.[42] Though Bickel himself supported at least limited judicial review, and though the problem had been noticed by scholars before Bickel, his was an influential

---

[38] KALMAN, *supra* note 7, at 31.

[39] *Id.* (quoting Louis Michael Seidman, Brown *and* Miranda, 80 CAL. L. REV. 673, 675 (1992)); *see* Steven D. Smith, *Idolatry in Constitutional Interpretation*, 79 VA. L. REV. 583 (1993) (arguing that the great challenge of constitutional scholars was to explain why *Brown* was correctly decided).

[40] *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 81-82 (1990) (arguing that *Brown* was correct because it rested on the "original understanding of the equal protection clause of the fourteenth amendment"); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1140 (1995) [hereinafter *Desegregation Decisions*] (concluding that the holding in *Brown* was consistent with the original understanding of the Fourteenth Amendment because, during Reconstruction, school segregation was understood as violative of principles of equality); Michael W. McConnell, *The Originalist Case for* Brown v. Board of Education, 19 HARV. J.L. & PUB. POL'Y 457 (1996) [hereinafter *The Originalist Case*] (offering a brief summary of his argument). *But see* Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1883 (1995) (contending that the crux of Professor McConnell's argument is "unpersuasive"); Tushnet, *supra* note 11, at 918 (characterizing McConnell's position as "revisionist").

[41] KALMAN, *supra* note 7, at 2 (quoting GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 4 (1991)).

[42] *See id.* at 37-38 (describing Bickel's position as reviving the 'majoritarian paradigm').

statement of the problem. Kalman writes, "[H]enceforward, the hypothesis that constitutionalism was antithetical to both justice and democracy haunted constitutional law."[43]

Still the Warren Court pressed on with its agenda. It is here that some tension enters Kalman's story. On the one hand, she writes that "[t]he Warren Court made the 1960s a good time for the law schools."[44] Even as liberalism came under fire in the face of the political radicalism brewing elsewhere in the academy, "the Warren Court shone"[45] in the eyes of its defenders in the law schools. Law students of the era, who would preside over the breakdown of consensus in the law schools in the 1970s and 1980s, were relatively united in their praise of the Warren Court as the spearhead of "'a unique and wonderful age of judicial activism, where the courts have often been ahead of other governmental agencies in attempting to solve the pervasive problems of our society.'"[46]

At the same time, a central thrust of Kalman's book is that, "[i]n retrospect, the Warren Court came at a bad time for liberal law professors,"[47] for whom the problem of the legitimacy of the antidemocratic courts was still an underlying concern. A case like *Roe v. Wade*,[48] whose weak grounding in a specific provision of the constitutional text made it into a "'Wandering Jew of constitutional law,'"[49] only strengthened concerns about how to justify some liberal decisions and criticize others. Thus, as Kalman has it, "the countermajoritarian difficulty loomed larger than ever. *Roe* plunged constitutional theory into 'epistemological crisis,' rekindling interest in judicial review and in the alleged conflict between judicial review and democracy."[50]

At this point in Kalman's story, lawyers began grasping for other disciplines. One important reason for this shift had to do with insti-

---

[43] *Id.* at 41; *see* Laura Kalman, *The Wonder of the Warren Court*, 70 N.Y.U. L. REV. 780, 780-81 (1995) ("The explanation for the fascination with judicial activism versus judicial restraint [in scholarship and biographies concerning the Warren Court] is simple: It is Alexander Bickel's fault.").

[44] KALMAN, *supra* note 7, at 49.

[45] *Id.* at 56 (noting the adoration with which many law professors and students of the era regarded Warren and his brethren).

[46] *Id.* at 51 (quoting editorials of the period from the *Harvard Law Record*).

[47] *Id.* at 5.

[48] 410 U.S. 113, 164 (1973) (holding that the Due Process Clause is violated when a state effectively prohibits abortion at all stages of pregnancy).

[49] KALMAN, *supra* note 7, at 58 (quoting RICHARD A. POSNER, OVERCOMING LAW 180 (1995)).

[50] *Id.* at 59. *Cf.* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (*fin de siècle*) 113-15 (1997).

tutional factors rather than the crisis in theory. As Kalman notes, academics who once would have sought employment in other sectors of the university found that the only faculties offering jobs were the rapidly expanding law schools.[51] This trend has, if anything, accelerated; Kalman has noted recently that "[o]f the 8,231 people listed in the 1994-95 Association of American Law Schools directory, 562 held Ph.D.s. An additional 1,089 recorded M.A.s."[52] Thus, more and more scholars with strong backgrounds in other fields and weak allegiances to the autonomous enterprise of law were joining the ranks of law teachers.[53] Even for those trained solely in law, however, scholarship trends—and the continuing doubts about the legitimacy of law[54]—made it both "fashionable"[55] and imperative to mine disciplines such as philosophy, economics, and history for insight.

While legal liberals could draw on philosophers such as Rawls and Dworkin in an effort to put the Warren Court's activism on more solid footing, the project of liberalism itself was increasingly under siege. On the right, law and economics and offshoots such as public choice theory offered a critique of law with distinct ties to conservatism, grounded in a mix of empirical research and neoclassical theorizing.[56] On the left, critical legal studies offered "'a politi-

---

[51] *See* KALMAN, *supra* note 7, at 60.

[52] Laura Kalman, *Garbage-Mouth*, 21 L. & SOC. INQUIRY 1001, 1003 (1996). Kalman notes that this information is "'soft' data," since, among other weaknesses, it includes librarians and instructors. *Id.*; *see* KALMAN, *supra* note 7, at 60-61 (discussing the growing appeal of a career as a law professor).

[53] *See* Posner, *supra* note 8, at 778 (recognizing that "the law is increasingly an interdisciplinary field" and discussing the resulting implications). Kalman ponders whether these interdisciplinarily trained academics may "take those [non-legal] disciplines more seriously than did their predecessors." Kalman, *Garbage-Mouth*, *supra* note 52, at 1003. Though Posner and Kalman may be right in their analysis of the interdisciplinary trend and its implications, one might wonder, as a matter of speculation, whether the results of the inrush of scholars from other fields into the law schools may not be overstated. Some of these scholars surely enter law school simply for the lucrative professional opportunities it offers and will thus enter practice, rather than pursue teaching positions. Others may be refugees who have come to law school from other sectors of the academy out of disillusionment, fleeing the intellectual crisis that grips the academy in favor of what they perceive to be the rigor and objectivity of law. These individuals, if they become teachers, may come to be even more loyal to an autonomous vision of law than other legal academics. Even these academics would, however, still be effective at evaluating the interdisciplinary efforts of others. All this would still leave a committed number of interdisciplinary scholars.

[54] *See, e.g.*, KALMAN, *supra* note 7, at 79 (noting Arthur Leff's suggestion that the popularity of law and economics in the early 1970s was an example of the general quest in the legal academy for "objective foundations of justice").

[55] *Id.* at 62 (emphasis omitted).

[56] Like much else in current legal scholarship, the trend was presaged by Holmes, who wrote—somewhat ironically, given the subject of this review—that he "look[ed] forward to a

cal location for a group of people on the Left who share[d] in the project of supporting and extending the domain of the Left in the legal academy.'"[57] Unlike interdisciplinary scholars such as the legal economists, critical legal studies scholars such as Duncan Kennedy used doctrinal analysis. But like the Realists, they employed legal doctrine only to delegitimate itself, by demonstrating that legal doctrine was indeterminate and simply concealed a struggle for political power.[58] Not only did critical legal studies deride the legal liberals' faith in law and due process, but its attack on the American culture of legalism and rights talk threatened law professors' very "reason for being."[59] Despite the varied efforts of legal liberals such as John Hart Ely,[60] Jesse Choper,[61] and Laurence Tribe[62] to preserve faith in some form of liberal constitutional theory, by the end of the 1970s everything was "'up for grabs.'"[63]

In Kalman's story, things got worse rather than better for legal liberals, as the vogue for theory about interpretation—and often theory about theory itself—swept from the rest of the university through the law schools. Under the influence of literary theorists

---

time when the part played by history in the explanation of dogma shall be very small," and "the man of the future [would be] the man of statistics and the master of economics." Oliver Wendell Holmes, *The Path of the Law*, 110 HARV. L. REV. 991, 1005, 1001 (1997), *reprinted from* 10 HARV. L. REV. 457 (1896-1897). Given the sentiment voiced in the article, one might conclude that the reprinting of the article a century later suggests that Holmes's hope remains unrealized.

[57] KALMAN, *supra* note 7, at 82 (quoting Mark V. Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1516 (1991)).

[58] *See id.* at 84 (discussing the belief of critical legal scholars that the law was ideological and could not be separated from politics).

[59] *Id.* at 86.

[60] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

[61] *See* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980).

[62] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (1st ed. 1978).

[63] KALMAN, *supra* note 7, at 92 (quoting Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1249). Another important response to critical legal studies which came somewhat later was critical race theory, which Kalman depicts as having "proved far more sympathetic to legal liberalism than critical legal studies was," largely out of its desire to preserve rights talk. *Id.* at 177-78. But though it may be more sympathetic to legal liberalism than was critical legal studies, critical race theory is also critical of liberal constitutional thought. Given its generally critical stance toward legal liberalism, and its propensity to draw on the insights and tools of post-modernism and other interdisciplinary intellectual theories, critical race theory is thus another example of the collapse of liberal consensus in the legal academy and the search for (or denial of the possibility of) alternatives, though its response to legal liberalism differed from that of critical legal studies. For a general introduction to critical race theory, and a discussion of its criticism of both critical legal studies and legal liberalism, see CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiii (Kimberle Crenshaw et al. eds., 1995). The same might be said for feminist legal jurisprudence.

such as Stanley Fish, anthropologists such as Clifford Geertz and philosophers such as Richard Rorty, legal academics took the "interpretive turn," denying the possibility of foundational theories of law in favor of a hermeneutic "conversation" in and among multi-disciplinary "interpretive communities."[64] For many constitutional theorists, "the focus shifted from interpretation of the Constitution to the act and practice of reading and interpretation."[65] In law as in the rest of the university community, "the boundaries of disciplines had been 'irreparably sundered.'"[66]

Ultimately, the "anxieties that called forth the concern about interpretation in the first place"[67] may have paled in comparison to the anxieties produced by the interpretive turn in law. Stanley Fish claimed to spot "a general sense in the legal profession of a new crisis in which its authority—internal and external—is being put into question as never before."[68] Classic legal liberals like Owen Fiss decried the loss of consensus and the lack of a "belief in public values" that had sustained the Warren Court and its liberal disciples.[69] But his call for a return to the liberal public values and belief in law that animated the Warren Court seemed to find little support among post-Warren Court, post-modern legal academics. Perhaps the most poignant moment in *The Strange Career of Legal Liberalism* presents the late Robert Cover, in the course of criticizing Fiss for romanticizing the political violence of law, declaring, "I can't remember six words in a row of *Brown*," while Fiss mutters in response, "I can."[70] Kalman concludes that by the middle of the 1980s, legal liberalism seemed "dead, a historical relic."[71]

It was at this point, Kalman suggests, that "history came to the rescue" of legal liberalism.[72] The "turn to history"[73] may be traced

---

[64] KALMAN, *supra* note 7, at 105-06, 112-14.

[65] *Id.* at 112-13. For representative work along these lines, see for example, *Symposium: Law and Literature*, 60 TEX. L. REV. 373-586 (1982); INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER (Sanford Levinson & Steven Mailloux eds., 1988) [hereinafter INTERPRETING LAW AND LITERATURE].

[66] PETER NOVICK, THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION 585-86 (1988) (quoting the sociologist Donald Levine (unpublished draft manuscript)).

[67] INTERPRETING LAW AND LITERATURE, *supra* note 65, at xiii.

[68] KALMAN, *supra* note 7, at 120-21 (quoting Stanley Fish, *Don't Know Much About the Middle Ages: Posner on Law and Literature*, 97 YALE L.J. 777, 790 (1988)).

[69] *Id.* at 128 (quoting Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1 (1986)).

[70] *Id.* at 130 (quoting Robert Cover and Owen Fiss (remarks made at an American Association of Law Schools panel on constitutional interpretation entitled "Law and Humanities")).

[71] *Id.* at 131.

[72] *Id.*

[73] *Id.* at 132.

to a number of motivating factors. First, in the mid-1980s originalism took on special importance as the Reagan administration argued for its primacy as a mode of constitutional interpretation and appointed greater numbers of judges who, whether or not they truly merited the description, labeled themselves originalists.[74] The hangover of the counter-majoritarian difficulty gave extra force to originalism, which argued that the Constitution should reflect the will of those who participated in the democratic process of ratifying the document.[75] In keeping with the interdisciplinary nature of the enterprise, the turn to history also took support from two extra-legal sources. First, theorists of interpretation were drawn to the "new historicism," the study of the "historicity of texts and the textuality of histories,"[76] and saw the possibility "of a dialogue between past and present."[77] Second, historians and political scientists were becoming interested in alternatives to, or re-readings of, the liberal tradition, such as communitarianism and republicanism, which mined history for political arguments that legal liberals would find appealing.[78] For all these reasons, then, "[s]ome legal liberals determined to appropriate originalism for themselves. They would meet the proponents of original intent on the battleground of history. They would advance alternative interpretations of the Founding to justify legal liberalism."[79]

This, then, is the project of the first half of Kalman's book: evoking the sense of unresolvable crisis that gripped constitutional theory and legal liberalism, and setting the stage for the attempt to revive law through history. Rather than follow the path of Kalman's discussion of the use of history in the second part of her book, this Essay will examine two approaches to the use of history in law: that of originalism, or law as history, and the more fluid use of history in law that characterizes nonoriginalists including Kalman herself.

---

[74] *See id.* at 132-39.

[75] *See id.* at 136.

[76] *Id.* at 140 (quoting Louis Montrose, *New Historicisms*, *in* REDRAWING THE BOUNDARIES: THE TRANSFORMATION OF ENGLISH AND AMERICAN LITERARY STUDIES 392, 410, 394 (Stephen Greenblatt & Giles Gunn eds., 1992)).

[77] *See id.* at 143.

[78] *See id.* at 143-55.

[79] *Id.* at 139.

III. THE GRIP OF THE DEAD HAND

> Mr. *Bass* . . . observed that gentlemen of the law and men of learning did not concur in the explanation or meaning of this Constitution. For his part, he said, he could not understand it, although he took great pains to find out its meaning, and although he flattered himself with the possession of common sense and reason. . . . From the contrariety of opinions, he thought the thing was either uncommonly difficult, or absolutely unintelligible.[80]

It has become a commonplace assertion that, to some degree, most or all constitutional lawyers are originalists now; we all accept that the original meaning of the Constitution has at least *some* relevance to its present meaning.[81] Nevertheless, there are important differences between the use of moderate originalism as a useful, but not mandatory, interpretive tool, and the adherence to originalism, strict or not, as a theory about what constitutes legitimate constitutional interpretation. For the serious proponent of originalism as an interpretive theory,[82] "original intent is not only relevant but authoritative."[83]

---

[80] 2 THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 897 (Bernard Bailyn ed., 1993) (Statement of Andrew Bass, an opponent of ratification, at the North Carolina Ratifying Convention, July 29, 1788). For a biographical sketch describing Bass as an opponent of ratification, see *id.* at 968-69.

[81] *See, e.g.*, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204-05 (1980) (discussing "originalism" as the "familiar approach" to constitutional interpretation); Dorf, *Integrating Normative and Descriptive Constitutional Theory*, *supra* note 13, at 1766 ("Most, if not all, of us are what Paul Brest has called moderate originalists; we are interested in the framers' intent on a relatively abstract level of generality." (internal quotation marks and citations omitted) (quoting Brest, *supra*, at 205, 214)); Jonathan R. Macey, *Originalism as an "Ism,"* 19 HARV. J.L. & PUB. POL'Y 301, 306 (1996) ("[W]e are all originalists, at least to some extent."); Jeffrey Rosen, *Originalist Sin: The Achievement of Antonin Scalia, and its Intellectual Incoherence*, NEW REPUBLIC, May 5, 1997, at 26 ("We are all originalists now.").

[82] Hereafter, in this Part, reference will simply be made to "originalism" and "originalists." As the text indicates, "originalists" means those who follow originalism as an interpretive theory or ideology, rather than those who rely on other interpretive theories but accord *some* weight to original intent; such thinkers are discussed in Part IV. I make this clear here because I do not want to suggest that the divide is between "strict" and "moderate" originalists. Some "strict" originalists will sometimes deviate from originalism to serve values such as *stare decisis*, while some "moderate" originalists, such as republican revivalists, may at times invoke the Framers' ideas to advocate an abandonment of prevailing precedent. Thus, the true dividing line between them should be seen as whether they view originalism as a command or as a mere tool, rather than how strictly they actually adhere to original intent.

[83] Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1086 (1989); *see* Tushnet, *supra* note 11, at 913 ("For [originalists], the very fact that the

Kalman writes that the Reagan administration's push for originalist interpretation "seemed ridiculous to historians inside and outside the law schools."[84] The doctrine is still important enough, however, that differences of historical interpretation may divide the positions of even those Supreme Court Justices who share the same view of the importance of history.[85] It is thus worth asking what originalism is, what its weaknesses are, and why, if it is so weak, it should nevertheless continue to draw the attention of judges and scholars. This Part will examine both the classic originalist approach, exemplified by jurists such as Justice Scalia, and more modern originalist approaches, of which Lawrence Lessig's translation theory of constitutional interpretation is used as an important example.

I should note before proceeding that for the most part, I put aside here one obvious reason that originalism should continue to draw the attention of the legal community, especially those lawyers who seek appointment to the federal bench: that as long as Republicans control either the White House or the Senate Judiciary Committee, it pays to be an originalist. This explanation goes a long way toward accounting for how much of the modern originalism debate began.[86] But it is insufficient by itself as an account of the ongoing interest in originalism, for a number of reasons. First, it is easy enough to identify oneself as an originalist for the sake of judicial appointment without paying serious attention to the debate over originalism, so the political expediency of originalism alone cannot explain the continued heat of the debate over this subject. Second, those scholars who are involved in efforts either to discredit originalism or to use it for liberal ends must know that they are unlikely under any circumstances to win over political conservatives who also happen to profess a belief in originalism. Third and more generally, this explanation does not capture the extent to which the originalism debate has become its own academic cottage industry, with only a loose connection to the politics of judicial appointment.

Framers and ratifiers of the Constitution and its amendments understood the document's provisions in a specified way is authoritative.").

[84] KALMAN, *supra* note 7, at 134.

[85] See for example, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), in which Justices Thomas and Scalia divided on the question of the constitutionality of restrictions on the distribution of campaign literature, disagreeing about the evidence of both the Framers' understanding and their subsequent practice. *See id.* at 358 (Thomas, J., concurring); *id.* at 371 (Scalia, J., dissenting).

[86] For one relevant account, see ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA (1989).

A. The Standard Originalist Approach and its Problems

As Jack Rakove has noted, originalist inquiries often consist of a distinct number of tasks, which are discussed as if they were synonymous but are in fact quite different. Thus, different originalists may seek the original *meaning* of the Constitution according to the language of the text at the time of its creation, the original *intention* of its writers, or the original *understanding* of the Constitution by those who ratified it.[87] For weak or moderate originalists who are simply trying to capture a general sense of what a term meant, it may be reasonable to treat these terms loosely. If originalists seek "something more than an informed point of departure for a contemporary decision,"[88] however, they must be more careful in their understanding of what they are looking for.

The difficulties of recreating the intention of multi-member legislative bodies, let alone those located in the distant past, have been well described.[89] Accordingly, more sophisticated, or at least resilient, originalists have adopted as their standard the original understanding of the text.[90] Moving from original *intent* to original *understanding* provides originalists with the justification they need to consult heavily sources like the originalist's other authoritative text, *The Federalist*, though Jay was not a Framer,[91] and to call on the wisdom of Thomas Jefferson despite his absence from the country at

---

[87] *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 7-8 (1996) (discussing the differences among these three types of inquiries).

[88] *Id.* at 9.

[89] *See, e.g.*, Brest, *supra* note 81, at 209-17 (discussing the process and challenges of intentionalism); RONALD DWORKIN, LAW'S EMPIRE 314-15 (1986) (explaining that, under one approach to ascertaining legislative intent, questions relating to what actually constitutes legislative intent frequently arise).

[90] *See e.g.*, SCALIA, *supra* note 2, at 38 (maintaining that consideration should be given to "how the text of the Constitution was originally understood"); U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POLICY, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 10 (1987) [hereinafter ORIGINAL MEANING SOURCEBOOK] ("The goal is to determine the meaning of the constitutional language at issue to the society that adopted it"). For a discussion of an Australian High Court case concerning the use of historical references in constitutional interpretation in that country, and which advocates a contemporary understanding approach rather than a subjective intent approach, see Paul Schoff, *The High Court and History: It Still Hasn't Found(ed) What It's Looking for*, 5 PUB. L. REV. 253 (1994) (discussing Cole v. Whitfield (1988) 165 C.L.R. 360 (Austl.)). *See also* Jeffrey Goldsworthy, *Originalism in Constitutional Interpretation*, 25 FED. L. REV. 1 (1997).

[91] But see Jack N. Rakove, *Fidelity Through History (or to It)*, 65 FORDHAM L. REV. 1587, 1597 (1997), for criticism of over-reliance on *The Federalist* as an authoritative source of contemporary understanding. For recent disagreement in the Court about the meaning of *The Federalist*, see *Printz v. United States*, 117 S. Ct. 2365 (1997), in which Justices Scalia and Souter disagree in their interpretations of *The Federalist* in assessing the constitutionality of the Brady Bill.

the time of the framing and ratification of the Constitution.[92] Despite the latitude that this position affords, originalism is still supposed to be required as a matter of both history and reason, and to be a valuable source of both reasonably determinable answers and interpretive legitimacy. These are important suppositions, for the coherence of the originalist position rests less on whether any answers are possible under originalism than on whether its weaknesses undermine the very virtues it is said to promote.

Almost immediately, originalism raises a number of significant problems. One significant question concerns whether originalism is required as a matter of history.[93] Thus, H. Jefferson Powell, in an influential early response to the mid-1980s resurgence of originalism, argued that the Framers themselves could not have intended that their progeny sift through the historical record in order to interpret the Constitution.[94] When the Framers discussed the importance of seeking the intention of a document's creators, Powell argued, they simply meant to refer to the meaning discoverable through a reading of the text, aided by standard methods or canons of interpretation; since they avoided the use of legislative history, they would have disdained the present-day originalists' employment of the historical record of the framing and ratification of the Constitution.[95] Powell's argument has been subjected to criticism on the ground that its treatment of the historical evidence is weak, and that whatever views the Framers themselves held of constitutional

---

[92] *See* SCALIA, *supra* note 2, at 38 (giving weight to writings of both Jay and Jefferson, though acknowledging that neither was a Framer). Curiously, neither originalists of Scalia's variety nor the heroic originalists discussed in Part IV make much use of another central figure of the period, George Washington. He may not have been an original constitutional thinker, but Washington *was* a Framer—and a vital, widely respected player in the constitutional and national politics of the day. *See, e.g.*, DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801, 297 (1997) (referring to Washington as "the indispensable focal point" of the formulation of the Constitution). Larry Kramer notes the value of drawing on the records of the early years of Washington's Presidency. *See* Larry Kramer, *Fidelity to History—and Through It*, 65 FORDHAM L. REV. 1627, 1654 (1997).

[93] *See, e.g.*, ORIGINAL MEANING SOURCEBOOK, *supra* note 90, at 2-3 (noting that original meaning jurisprudence "predominated in constitutional adjudication for the first 150 years of our Nation's history"); Morton J. Horwitz, *The Supreme Court, 1992 Term—Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 44 (1993) ("Originalism has been the dominant interpretive paradigm for most of American constitutional history.").

[94] *See* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 948 (1985).

[95] *See id.* at 948; *see also* RAKOVE, *supra* note 87, at 341 (presenting Powell's conclusions); Paul Finkelman, *Intentionalism, the Founders, and Constitutional Interpretation*, 75 TEX. L. REV. 435 (1996) (reviewing JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996)).

interpretation, the *ratifiers* believed that their understandings and intentions would constrain the future treatment of the Constitution.[96] Moreover, as long as *contemporary* originalists have their own reasons for believing in the correctness of their approach, their position should not rise or fall according to the interpretive approach the Framers might have favored.[97] Still, Powell's argument at least begins to illuminate the degree to which originalism may be a contemporary ideology rather than a historical necessity.[98]

A further problem is the degree to which originalism can actually provide reasonably determinable answers, a requirement which might be thought to be a *sine qua non* for originalism.[99] For one thing, there are questions about the reliability of the available documentary record of the framing and ratification period.[100] Of course, all history requires some careful detective work and informed deductions based on spotty or unreliable records. But once professional judgments of that sort enter into originalist research, particularly given the large amount of evidence available, reasonable and unresolvable disagreements about the original understanding of constitutional language are bound to arise.

Even where the historical record is fairly complete, however, difficult problems of interpretation often remain. This is particularly true of some of the most important and thorny sections of the Constitution. Many provisions that are not difficult for *any* theory of

---

[96] *See generally* Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENTARY 77 (1988).

[97] *Cf.* Kramer, *supra* note 92, at 1630 n.8 (discussing the relevance of historical evidence and its importance regardless of the Framers' view of this approach).

[98] *See* CURRIE, *supra* note 92, at 117 and accompanying notes (noting that the First Congress employed a number of tools of constitutional interpretation, including reference to "text, structure, history, purpose [and] practice," and noting disagreements over the use of recollections of the events at the Constitutional Convention).

[99] *See* Rakove, *supra* note 91, at 1588 ("Originalism makes little sense if we lack confidence in our capacity to produce reasonably authoritative conclusions about the original meanings, intentions, and understandings underlying particular provisions of the Constitution."). A common originalist response to this sort of suggestion argues that alternative methods of constitutional interpretation are even more indeterminate. *See, e.g.*, Thomas B. McAffee, *Originalism and Indeterminacy*, 19 HARV. J.L. & PUB. POL'Y 429, 429 (1996) (addressing the indeterminacy issue). A number of nonoriginalist theories do not hold themselves out as offering determinacy, however, whereas that is one of the purported virtues (though certainly not the only one) of originalism.

[100] *See* Farber, *supra* note 83, at 1088-89 (discussing, among other things, possible post-ratification alteration of Madison's notes); Finkelman, *supra* note 95, at 441-42 (commenting on gaps in the historical record); James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1 (1986); Walter F. Murphy, *Constitutional Interpretation: The Art of the Historian, Magician, or Statesman?*, 87 YALE L.J. 1752, 1765, 1768 (1978) (book review).

constitutional thought to interpret are also relatively easy for originalists to interpret. As for provisions such as the Fourteenth Amendment, however, whose meaning is often highly contested among nonoriginalists, it is often the case that the historical record also yields a number of reasonable interpretations that are diametrically opposed to one another.[101] Given the sheer volume of historical documents available, ample room for conflicting interpretations of our constitutional text will often be available.[102] Thus, on some of the most important and difficult issues of constitutional interpretation, originalists may disagree among themselves, just as nonoriginalists do.[103] Even if the originalists all arrive at the same answer now, advances in archival research or shifts in historical interpretation may eventually lead to an equally widely-accepted but entirely different interpretation of the same provision.[104] In history, as in any other discipline, even some of the most apparently unanimously held conclusions may shift over time. History may provide some determinable answers, but it cannot guarantee their permanence.[105]

In sum, originalism is certainly not a short cut to the finding of easy answers for hard cases of constitutional interpretation. Its proponents admit that it can be time-consuming, painstaking work when done right.[106] So why use it? One important reason for many originalists is that it is an essential source of *legitimacy* for constitutional interpretation, a way out of the crisis of constitutional the-

---

[101] *See generally* Horwitz, *supra* note 93, at 68 (discussing the debate over the meaning of the Fourteenth Amendment); H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 696 (1987) (stating that "[t]he provisions that demand interpretation are precisely those that seem most subject to change of meaning"); Suzanna Sherry, *The Indeterminacy of Historical Evidence*, 19 HARV. J.L. & PUB. POL'Y 437 (1996) (citing examples). David Lowenthal comments that "any past worth pursuing is bound to arouse historians' passions." DAVID LOWENTHAL, POSSESSED BY THE PAST: THE HERITAGE CRUSADE AND THE SPOILS OF HISTORY 108 (1996).

[102] *Cf.* PAUL VALERY, *De l'histoire*, *in* REGARDS SUR LE MONDE ACTUEL (1931), *and quoted in* THE INTERNATIONAL THESAURUS OF QUOTATIONS 281 (Rhoda Thomas Tripp ed., 1970) ("History justifies whatever we want it to. It teaches absolutely nothing, for it contains everything and gives examples of everything.").

[103] Jack Rakove is correct, however, to point out that historians *can* narrow the available range of plausible interpretations of the original understanding of Constitutional provisions and reject some outright. *See* Rakove, *supra* note 91, at 1589 (stating that not "all interpretations of the past [are] equally plausible or valid").

[104] *See generally* Martin S. Flaherty, *The Practice of Faith*, 65 FORDHAM L. REV. 1565, 1578 (1997) (noting the turnover in historians' views).

[105] *See* GREGORY BASSHAM, ORIGINAL INTENT AND THE CONSTITUTION: A PHILOSOPHICAL STUDY 97 (1992) ("[O]riginalism, consistently applied, is a prescription for a shifting, unpredictable, and incoherent constitutional jurisprudence.").

[106] *See, e.g.*, Scalia, *The Lesser Evil*, *supra* note 3, at 856-57 (describing originalism's greatest defect as "the difficulty of applying it correctly").

ory that is a focus of Kalman's book. This justification runs into an important difficulty, however: even those originalists who are explicit in citing legitimacy concerns in defending originalism frequently abandon originalism for the sake of other values in the legal system. Most prominent among these values is *stare decisis*, which will lead some scholars and jurists to deviate from original understandings of the Constitution in the interests of legal stability.[107] Beyond this fundamental legal value, though, originalists exhibit a marked tendency to break character now and then in order to argue that originalism will not, after all, result in absurd or outrageous results. Thus, Justice Scalia hastens to assure his audience that originalist judges faced with an Eighth Amendment challenge to a public flogging law will be appropriately "faint-hearted" and strike down the law, history notwithstanding,[108] and Robert Bork "continually reassures the reader that originalism does not yield ghastly results, while at the same time denounc[es] judges who are 'result-oriented.'"[109]

If originalism must often take a back seat to other, potentially less legitimate interpretive approaches, or if it is simply shoved aside when a poor result is feared, then the argument from legitimacy is not enough to justify this approach. What, then, is left? There is finally the argument from *authority*, the argument that whether or not other legitimate modes of constitutional interpretation exist, the nation's constitutional past has authority over its present.[110] This argument is subject to political and practical criticisms. From a political standpoint, this is a democracy based on popular sovereignty, not ancestor worship. Unless one subscribes to the view that real popular sovereignty only occurs in Ackermanian moments of higher lawmaking, when the people are sufficiently aroused to focus on a constitutional problem and craft a lasting so-

---

[107] *See, e.g.*, SCALIA, *supra* note 2, at 138-39 ("Originalism, like any other theory of interpretation put into practice in an ongoing system of law, must accommodate the doctrine of *stare decisis*; it cannot remake the world anew . . . . Where originalism will make a difference is not in the rolling back of accepted old principles of constitutional law but in the rejection of usurpatious new ones."); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988) (explaining that some precedents will be adhered to, despite inconsistencies with original intent); Rakove, *supra* note 91, at 1591 (noting that *stare decisis* "operates in some tension with originalism").

[108] Scalia, *The Lesser Evil*, *supra* note 3, at 862.

[109] RICHARD A. POSNER, OVERCOMING LAW 245 (1995) (discussing BORK, *supra* note 40).

[110] *See, e.g.*, RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN 18-19 (1987) (arguing that "what the Constitution meant when it left the hands of the Founders it means today").

lution,[111] then popular sovereignty counsels against the view that we ought to be ruled entirely by the intentions and understandings of the long-dead generation of the Framers.[112] This is the classic "dead hand" problem: why should we, the living, be ruled by the dead hand of the past?[113] From a practical standpoint, the problems with originalism detailed above suggest that even if voices from the past still carry authority, it will often be impossible to decipher exactly what they are saying.

Perhaps the strongest criticisms of this line of thinking, however, are not political or practical, but historical. Authority-based arguments for originalism tend to assume a relatively static view of the past, in which our heroic ancestors arrived at opinions and maintained them long enough to constitute a nation based on those principles. In J.M. Balkin's words, they envision "a Golden Age of constitutional understanding . . . a magical moment in 1787 that represents the true source of all constitutional wisdom."[114] But historians understand the past as a process, not as a matter of discrete events.[115] Even if a dynamic moment could (let alone *should*) be captured in time as if in a freeze-frame, moments such as the framing and ratification of the Constitution and its amendments are singularly unsuitable for such an effort.[116] As Jack Rakove notes,

---

[111] *See generally* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991) (discussing the concept of "higher lawmaking").

[112] *See, e.g.*, Frank I. Michelman, *Constitutional Fidelity/Democratic Agency*, 65 FORDHAM L. REV. 1537 (1997). It is true that we retain the ability to amend the constitutional text, through Article V or, as some have argued, through extra-constitutional measures or simple majority vote. *Compare* ACKERMAN, *supra* note 111 (extra-constitutional measures); *and* Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994) (majority vote), *with* David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1 (1990) (Article V). But while that may show that we have an obligation to obey the constitutional text as it is until we amend it, it does not adequately demonstrate that we are bound to accept a past generation's *interpretation* of the existing text and are not free to arrive at our own interpretation of the text.

[113] *See, e.g.*, Christopher L. Eisgruber, *The Living Hand of the Past: History and Constitutional Justice*, 65 FORDHAM L. REV. 1611, 1613-14 (1997).

[114] J.M. Balkin, *Constitutional Interpretation and the Problem of History*, 63 N.Y.U. L. REV. 911, 952-53 (1988) (review essay of RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987)).

[115] *See* CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 27-28 (1969) (discussing approvingly the dissent of Justice Curtis in *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857)).

[116] *See, e.g.*, JOYCE APPLEBY ET AL., TELLING THE TRUTH ABOUT HISTORY 158 (1994).

> The documented differences between the worldview of America's revolutionary generation and that of the present generation have made it difficult to believe that the Founding Fathers existed to bring forth the American nation of the twentieth century. Like ourselves, eighteenth-century men and women now appear to have responded to contingent events as they moved into an unknown future.

the "moment" of framing and ratification "involved processes of collective decision-making whose outcomes necessarily reflected a bewildering array of intentions and expectations, hopes and fears, genuine compromises and agreements to disagree."[117]

Moreover, the argument from authority suffers from the fact that even sophisticated originalism more or less deliberately wipes smooth many of the wrinkles, or ambiguities, of the past, by focusing on specific questions, narrow time periods and circumscribed sources of documentary history. This increases the illusion of authoritative statements and events at the cost of losing the true richness of historical study.[118] The focus on a few individuals and documents, such as the *Federalist*, instead of a more broad-based, dynamic and nuanced approach to history, increases the likelihood that the nuances of the materials one *does* consult will be overlooked. Originalists may arrive at a knowledge of the past that is "'*almost* as right as possible for the 'period' . . . and yet so intimately and secretly wrong.'"[119]

B. "Two-Step" Originalism

If the standard brand of originalism ultimately cannot justify its bid for supremacy as a method of constitutional interpretation, what of more sophisticated versions of originalism? Recent theorists, such as Jed Rubenfeld[120] and Lawrence Lessig,[121] have offered new accounts of how to keep faith with earlier understandings of the Constitution while still allowing our understanding of the document to change over time. Lessig, in particular, offers an interesting account of constitutional interpretation that, like the originalists, stresses the need to keep faith with the Framers but, unlike them,

---

Id. For a more pungently worded but similar sentiment, see John Henry Schlegel, *Talkin' Dirty: Twining's* Tower *and Kalman's* Strange Career, 21 L. & SOC. INQUIRY 981, 993 n.20 (1996) ("Why no one responded [to the originalists] that it was simply stupid to attempt to govern an imperial power by the understandings of appropriateness derived from a sleepy, largely agricultural, though nascently commercial colonial outpost is unclear to me.").

[117] RAKOVE, *supra* note 87, at 6.

[118] *See, e.g.*, William E. Nelson, *1978*, *in* WILLIAM E. NELSON AND JOHN PHILLIP REID, THE LITERATURE OF AMERICAN LEGAL HISTORY 219, 232 (1985); MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 37 (1988).

[119] DAVID LOWENTHAL, THE PAST IS A FOREIGN COUNTRY 30 (1985) (quoting HENRY JAMES, *Notes for* THE SENSE OF THE PAST 295-96 (1917)).

[120] *See, e.g.*, Jed Rubenfeld, *On Fidelity in Constitutional Law*, 65 FORDHAM L. REV. 1469 (1997); Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119 (1995). Rubenfeld probably would not consider himself an originalist, and this Essay does not treat him as one.

[121] See the Articles cited *supra* note 10.

places great emphasis on the need to account for legitimate changed readings of the Constitution.[122] He might thus be seen as occupying the ground between the traditional originalist approach discussed above and the history-using nonoriginalists treated in Part IV.

In fairness, I should acknowledge that where to place Lessig on the spectrum of constitutional theorists presently writing about the role of history is unclear.[123] Certainly Lessig arrays himself against mechanical or "mindless" originalism.[124] Moreover, he has written that his concern with fidelity and translation is only one part of his project;[125] he is also concerned with the related role of social and legal contestation as a constraint on the ability of courts to "translate founding commitments."[126] Nevertheless, despite his recent focus on the possible constraints to translation, the emphasis in Lessig's work remains on *fidelity* to the past, and particularly to our "founding commitments." Accordingly, I will treat him here as more closely allied to the originalist school, despite his creative reinterpretation of originalism, than to those scholars who use historical arguments because they are compelling and not because they carry any intrinsic authority.[127]

Lessig's basic theory holds that what he calls "one-step originalism"[128]—the brand of originalism discussed thus far—is unfaithful to the original meaning of the Constitution. The Framers used words to respond to the context in which they lived, but the context in which we live has changed. One-step originalism fails to respond

---

[122] *See, e.g.*, Rosen, *supra* note 81, at 34 (praising Lessig for making "interesting advances in originalist theory" and comparing him with Justice Scalia).

[123] Compare, for example, Flaherty, *supra* note 104, at 1565 (describing Lessig as a scholar concerned with fidelity to "a given principle set down at a given point in our constitutional history to be given life today through intelligent 'translation'"), with *id.* at 1569 (lumping Lessig with scholars, including Cass Sunstein, who view historical accounts of the Founding or Reconstruction as authoritative or highly probative, but not ultimately dispositive).

[124] *See, e.g.*, Lawrence Lessig, *The Puzzling Persistence of Bellbottom Theory: What a Constitutional Theory Should Be*, 85 GEO. L.J. 1837, 1837 (1997).

[125] *See, e.g.*, Lessig, *Fidelity and Constraint*, *supra* note 10, at 1432; *see also id.* at 1367-68 (noting several reasons, besides translation, why readings of the Constitution may change).

[126] *See* Lessig, *Fidelity and Constraint*, *supra* note 10, at 1432; Lessig, *supra* note 124, at 1842. *See generally* Lessig, *Fidelity and Constraint*, *supra* note 10; Lawrence Lessig, Erie-*Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785 (1997).

[127] *See* Dorf, *Integrating Normative and Descriptive Constitutional Theory*, *supra* note 13, at 1785 ("Notice that Lessig, like Ackerman, defends his view of an evolving Constitution in starkly intentionalist terms. Change is permissible, but only because it preserves the translated intentions of the authors."); Michael C. Dorf, *Recipe for Trouble: Some Thoughts on Meaning, Translation and Normative Theory*, 85 GEO. L.J. 1857, 1863 (1997).

[128] Lessig, *Fidelity and Constraint*, *supra* note 10, at 1368.

to this change in context, and is therefore "a method that changes the Constitution's meaning."[129] Lessig proposes instead that we adopt the "model of translation."[130] Under this model, the translator aims "to find a reading that neutralizes the change in context."[131] She does so by interpreting the Constitution in *two* steps. First, she attempts to discover the meaning in its original context; second, she decides how to translate that meaning into present-day terms in order to "preserve [its] significance as much as possible."[132] For example, we read the First Amendment to include television and other media that did not exist when the Bill of Rights was ratified.[133]

Lessig's approach may avoid a good deal of the unsatisfyingly mechanical nature of "one-step" originalism. Nevertheless, his more sophisticated version of originalism is vulnerable to many of the same criticisms that apply to the classic brand of originalism. A number of his arguments are highly question-begging in nature. To begin with, he suggests rather casually that one-step originalism "can't be fidelity in any meaningful sense."[134] It is unfaithful because it persists in the original meaning of a provision despite changed circumstances, and thus "changes the Constitution's meaning."[135] However, what if the intent of the Framers was not to provide the same relative result despite changing circumstances, but to freeze their posterity in something like the Framers' context? That is to say, what if the Constitution were meant to be a conservative document, not a consistent one? The Framers might have insisted that the whole purpose of a constitution "is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away."[136] If so, a truly faithful interpreter of the Constitution might not want the Constitution to change to remain consistent in light of changing circumstances, but would prefer to retard change and require the legislature and the people to respond to new contexts. After all, there *is* an amending

---

[129] *Id.* at 1370 (emphasis omitted).

[130] *Id.* at 1371.

[131] *Id.* at 1370.

[132] *Id.* at 1376.

[133] *See, e.g.*, Denver Area Educational Telecommunications Consortium, Inc. v. FCC, 116 S. Ct. 2374 (1996) (construing First Amendment protections in the context of censorship of "patently offensive" cable television programming).

[134] Lessig, *Fidelity and Constraint*, *supra* note 10, at 1369-70.

[135] *Id.* at 1370 (emphasis omitted).

[136] SCALIA, *supra* note 2, at 40; *see* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 426 (Melville M. Bigelow ed., William S. Hein & Co. 1994) (1833).

process that allows us to reshape the document when our understanding of our world renders amendment appropriate, as the Nineteenth Amendment, among others, demonstrates.[137]

Conversely, if we *could* ask the Framers how they would respond to the conditions of the modern world, they might abandon the positions we now believe they held.[138] We might assume, for example, that a faithful translator would conclude that the Framers would have wanted the First Amendment to apply to the Internet.[139] But if they had seen the kind of material that is available there, or been confronted by the anarchic and immediate exchange of views that is possible on the World Wide Web, perhaps they would respond by narrowing their views concerning freedom of speech. Whether the Framers would see the Constitution as freezing their particular opinions for all time, or would simply abandon them if faced with contemporary problems is irrelevant here. What matters is that it quickly becomes apparent that Lessig assumes a great deal about what constitutes a faithful reading of the Constitution.

In any event, even if Lessig is successful in presenting translation-based interpretation as a more faithful interpretive method than one-step originalism, this still leaves unanswered the same question that classic originalism presents: Why be faithful? As long as fidelity to a past understanding of the Constitution is the bellwether of an interpretive method, however sophisticated that method may be, the same troubling questions about the legitimacy and authority of staying obedient to a dead generation remain.[140] Thus, though Lessig's account of constitutional interpretation is clearly more sensitive to changed conditions than is the standard brand of originalism, the new and improved brand of originalism shares the same fundamental flaws, the same unanswerable questions, as the traditional kind. One may share with Judge Posner the feeling that even if Lessig demonstrates that liberals can outfight Justice Scalia on his own originalist turf, it is a shame that this "rhetorical bandwagon" ever got started in the first place.[141]

---

[137] *See* U.S. CONST. amend. XIX (giving women the right to vote).

[138] *See* Alfred Hill, *The Political Dimension of Constitutional Adjudication*, 63 S. CAL. L. REV. 1239, 1245 (1990); Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 395 (1997).

[139] *See, e.g.*, Reno v. ACLU, 117 S. Ct. 2329 (1997).

[140] *See* Klarman, *supra* note 138, at 395.

[141] POSNER, *supra* note 109, at 497.

C. Conclusion

Ultimately, then, the more or less sophisticated brands of originalism fail to live up to many of the arguments raised to justify the onerous work of historical archaeology they require. In particular, it is questionable whether originalism provides the levels of determinacy, legitimacy or authority necessary to respond to the crisis in theory so ably presented in the first part of *The Strange Career of Legal Liberalism*.

This discussion of originalism's theoretical frailties leaves out some further, more practical difficulties that are worth mentioning. First, at present neither law students nor judges are trained in historiography, and so may lack the technical skills and broader perspective on historical interpretation needed to do an adequate job of mining our constitutional past. [142] Indeed, they are not generally even well-versed in the history of the particular relevant periods that are the concern of originalism.[143] Finally, it is important to remember that originalism operates within an adversarial system in which lawyers (and, often, judges) are simply looking for a winning argument, rather than seeking to provide all relevant historical evidence.[144]

In short, originalist methods of interpretation come with significant theoretical and practical concerns. But if history may not serve as an adequate *substitute* for constitutional interpretation, will it suffice as an *adjunct* to constitutional interpretation? That is the concern of Part IV.

IV. My Hero

Despite their criticisms of originalism, Kalman writes, "[m]ost law professors considered originalism too valuable to surrender it to Bork. Recognizing the value of preserving it as a form of constitutional adjudication, they wanted to hang onto moderate originalism."[145] The legal historian John Phillip Reid agrees that "[w]e have

---

[142] *See* Theodore Y. Blumoff, *The Third Best Choice: An Essay on Law and History*, 41 HASTINGS L.J. 537, 574 (1990).

[143] *See* Finkelman, *supra* note 95, at 437. This includes key originalists such as Scalia, *see* Rosen, *supra* note 81, at 27, though he is of course free to select clerks who are trained in history.

[144] *See* Sanford Levinson, *The Limited Relevance of Originalism in the Actual Performance of Legal Roles*, 19 HARV. J.L. & PUB. POL'Y 495 (1996); John Phillip Reid, *Law and History*, 27 LOY. L.A. L. REV. 193, 196 (1993).

[145] KALMAN, *supra* note 7, at 138; *see* Kramer, *supra* note 92, at 1627.

to learn to harass historical jurisprudence, not reject it . . . . Historical adjudication is too convenient to be banished from decision writing."[146] Still others have argued that the use of history in law is unavoidable; the resemblance between historians' work and the task of deciding cases according to precedent compels it,[147] as do our own deeper psychological needs.[148] Thus, many constitutional scholars, including the "legal liberals" who are the particular concern of Kalman's book, continue to argue that there is a valid role for history in law, if not the same role that originalists would accord it. If they do not believe they are "'bound by the chains of the past,'" they at least want to *appear* to be.[149]

This had long been the case. Despite its activism, the Warren Court frequently buttressed its claims on the grounds of history, using history to cloak its creative work.[150] Even before the Warren Court, the Court in the nineteenth century used history in a similar way, as a "precedent-breaking instrument" that allowed the Justices to shred traditional doctrines while claiming that they were constrained by the original purpose or meaning of the Constitution itself.[151] The Court's creative, sometimes abusive, use of history has met with frequent criticism,[152] including Alfred Kelly's now classic put-down of the Court's use of "'law-office' history"[153] that "fails to stand up under the most superficial scrutiny by a scholar possessing some knowledge of American constitutional development."[154]

---

[146] Reid, *supra* note 144, at 204-05.

[147] *See* Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 121 (noting that an historian might describe a court's examination of a stream of judicial precedent as going to the "primary sources").

[148] *See* Blumoff, *supra* note 142, at 572; *see also* William M. Wiecek, *Clio as Hostage: The United States Supreme Court and the Uses of History*, 24 CAL. W. L. REV. 227, 268 (1988) ("[H]istory is often intrinsic to constitutional adjudication, providing the initial assumptions, the thought structure, the terms of discourse, the backdrop of human experience, or all of these, for many instances of constitutional adjudication.").

[149] KALMAN, *supra* note 7, at 286 n.37 (quoting Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 378 (1981)).

[150] *See id.* at 69-70.

[151] Kelly, *supra* note 147, at 125.

[152] *See* MILLER, *supra* note 115, at 28; Kelly, *supra* note 147, at 125-26; Wiecek, *supra* note 148, at 266-68; John G. Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502, 528 (1964).

[153] Kelly, *supra* note 147, at 122 n.13 (defining the term as "the selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered").

[154] *Id.* at 132; *see* Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1709-10 (1996) (reviewing William John Cuddihy, The Fourth Amendment: Origins and Original Meaning (1990) (unpublished Ph.D. dissertation) (available through

Nevertheless, the use of history by nonoriginalists or weak originalists has become, if anything, more popular. The most notable development for the "history in law" camp in recent years, and a principal subject of the second half of *The Strange Career of Legal Liberalism*, has been the use of history to ground the arguments of neorepublicans, such as Cass Sunstein and Frank Michelman, or neo-Federalists, such as Bruce Ackerman or Akhil Amar.

Though republicanism has been accurately depicted as an alternative to the "'liberal,' individualistic, 'capitalist' messages of political orthodoxy in the 1980s,"[155] these scholars may generally be viewed as having sought an historical basis to preserve the gains in liberty and equality made under the Warren Court, while extending their concerns to more communitarian political values. In short, though the neorepublicans opposed themselves to classical liberalism, they still formed a broad liberal alternative to the generally conservative position of the originalists.[156] Thus, Cass Sunstein would come to characterize his position as "liberal republicanism."[157]

Just as the Warren Court came under fire for its misuse of history, so the neorepublicans were criticized for *their* use of history. Once historians became aware that the republican revival in American historiography sparked in the 1960s and 1970s by writers such as Bailyn,[158] Wood,[159] and J.G.A. Pocock[160] had spread to the legal academy, they "entered the fray to police their territory."[161] Kalman concludes that the dispute between neorepublicans and historians is one that historians "can easily win on the merits,"[162] and she is not alone in this judgment. Even some legal historians who initially expressed enthusiasm about the republican project would come to warn about the "dangers of a certain kind of lawyer's history, which

---

UMI)) (commenting on the propensity of lawyers to "condense the complexity and ambiguity of life into something 'made to seem simple'").

[155] G. Edward White, *Reflections on the "Republican Revival": Interdisciplinary Scholarship in the Legal Academy*, 6 YALE J.L. & HUMAN. 1, 12 (1994).

[156] *See, e.g.*, Schlegel, *supra* note 116, at 993-94.

[157] CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 134 (1993).

[158] *See, e.g.*, BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1992).

[159] *See, e.g.*, WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, *supra* note 6.

[160] *See, e.g.*, J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975).

[161] KALMAN, *supra* note 7, at 163.

[162] *Id.* at 179.

involves roaming through history looking for one's friends."[163] Republicanism was criticized for its tendency to drain the period of Framing and Ratification of its complexity,[164] and for its tendency to "disentangle the currently attractive strands" of republicanism, such as its belief in community and civic virtue, "from the currently unattractive ones," such as its elitism and its relative lack of concern for rights.[165] More generally, historians charged that neorepublicans adopted a "presentist" view of the past, ignoring "the irretrievability and differentness of the eighteenth-century world."[166] In their search for a "pedigree" for their values, neorepublicans "encouraged mischaracterization of the past" and "permitted the present to overwhelm the past."[167]

Despite the problems encountered by neorepublicanism, liberal legal scholars continue to defend the use of history in law. This Part briefly discusses three such scholars in order to evaluate the merits of history in law—Sunstein and Kalman, who adopt essentially pragmatic arguments for the use of history, and Michael Dorf, who argues that history may be a tool in the arsenal of non-social contractarian eclectic constitutional theorists.

Sunstein has recently defended his use of history to buttress his arguments for republicanism. In his response to a critical article by Martin Flaherty,[168] Sunstein argues that historians who criticize constitutional lawyers' use of history must recognize that their respective roles are "properly and unembarrassingly distinctive."[169] While he acknowledges that "the constitutional lawyer owes certain

---

[163] Morton J. Horwitz, *Republican Origins of Constitutionalism*, *in* TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS 148 (Paul Finkelman & Stephen E. Gottlieb eds., 1991) (warning of the danger of "simple-minded search[es] for historical precedent, which becomes increasingly present-minded about the issues of the past and thereby presents an unsubtle, uncomplex, and partial picture of the past that will no longer convince any serious student of the past"). *Cf.* Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57 (1987) (describing the "debate over the roles of republicanism and liberalism in early American political and constitutional thought" as being "[o]ne of the most promising bodies of recent historical scholarship that offers . . . real hope of illumination"). The changes in Horwitz's views are discussed in White, *supra* note 155, at 17-22.

[164] *See* Tushnet, *supra* note 11, at 926-28. He added, "I believe the reason [it does so] is that modern civic republicans are not truly interested in history as such." *Id.* at 927.

[165] Mark Tushnet, *The Concept of Tradition in Constitutional Historiography*, 29 WM. & MARY L. REV. 93, 96 (1987).

[166] WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, *supra* note 6, at viii, *quoted in* KALMAN, *supra* note 7, at 176.

[167] KALMAN, *supra* note 7, at 181.

[168] Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995).

[169] Sunstein, *supra* note 12, at 602.

duties of fidelity to the past,"[170] he argues that there is a place for the idea of a "*useable past*,"[171] the search for "elements in history that can be brought fruitfully to bear on current problems."[172] In using history, Sunstein argues, the constitutional lawyer should seek to "contribute to the legal culture's repertoire of arguments and political/legal narratives that place a (stylized) past and present into a trajectory leading to a desired future."[173] Central to Sunstein's argument is the belief that constitutional history will provide "a way of constraining legal judgments, invoking a set of provisions with at least some kind of democratic pedigree, and providing a shared set of materials from which judicial reasoning can proceed."[174] This invocation of history-as-constraint must be read as somewhat half-hearted, because in a footnote he admits that there are some questions about the level of generality at which to read history, and about the enterprise of history itself.[175] To this he offers the pragmatic response that "[f]or better or for worse, the lawyer participates in a culture in which historical arguments are important, and it is therefore unhelpful to throw up one's hands."[176]

Kalman, too, advances a pragmatic position for the use of history in law. Like Sunstein, she believes that there is a place for a kind of "public history" that differs in its nature and goals from scholarly history, but which still meets basic standards of professionalism.[177] Her book makes clear that she is well aware of the problems of lawyers' legal history, or history in law, while concluding that it is not illegitimate merely because its goals differ from those of professional history.[178] Ultimately, she writes, "[b]ecause we are stuck with originalism, the pragmatist would accept it on occasion. Pragmatism would emphasize, however, that history is only one potential tool among many."[179]

---

[170] *Id.*

[171] *Id.* at 603.

[172] *Id.*

[173] *Id.* at 605. Thinking back to the stylized history and national mythology offered up in typical high school civics classes, we might label the advocacy of this sort of "useable," "stylized" history "civics republicanism."

[174] *Id.* at 604.

[175] *See id.* at 604 n.17.

[176] *Id.*

[177] KALMAN, *supra* note 7, at 202-04 (expecting scholars to "assume" a different "voice" for an "academic audience" as opposed to a public audience).

[178] *Id.* (reciting H. Jefferson Powell's fourteen rules for originalist interpretation, and adding that effort should be made to avoid giving "public history" a reputation analogous to "junk science").

[179] *Id.* at 238.

In particular, Kalman's qualified pragmatist support for history in law must be related back to her loyalty to the goals of legal liberalism, as expressed in the decisions of the Warren Court. "[P]lacing one's historical training at the service of lawyers," she writes, "may allow the historian opportunities to be objective and to do good, as he or she sees it";[180] she frets that legal academics have begun using historians' terms to criticize one another's work, just as historians have shown signs of wanting to help them in their work.[181] While she is quite careful in the way and extent to which she supports history in law, there is in the later chapters of *The Strange Career of Legal Liberalism* a certain sense that she has come to believe, in the words of another writer, that "liberals must now learn to win the game by playing according to conservative rules, because that is the rulebook that will remain in use for potentially the next thirty years."[182]

Dorf writes in quite different terms but reaches a number of interesting conclusions which are not entirely dissimilar to those reached by Sunstein and Kalman. Dorf denies that we should adopt originalism because of the binding force of the "dead hand" of the Framers, since he concludes that the Constitution binds us because the vast majority of the *present* population believes it does.[183] But he argues that simply asking what the Constitution means to us today would be "oddly ahistorical."[184] For Dorf, the use of history allows nonoriginalists to "root normative arguments in values that derive from the Constitution's text" and traditions.[185]

Having rejected the idea of the original contract as the force behind originalist arguments, Dorf adopts as his non-contractarian model what he terms *ancestral* and *heroic* originalism.[186] Ancestral originalism holds that "we care about what the Framers thought because, whether we like it or not, our own understanding has been shaped against the backdrop of theirs."[187] This form of originalism simply advocates studying the Framers' vision because it is prudent to do so, given their influence on our present system of constitu-

---

[180] *Id.* at 197-98.

[181] *See id.* at 228-29, 246; *see also* Kalman, *Garbage-Mouth*, *supra* note 52, at 1005.

[182] L. Benjamin Young, Jr., Note, *Justice Scalia's History and Tradition: The Chief Nightmare in Professor Tribe's Anxiety Closet*, 78 VA. L. REV. 581, 587-88 (1992).

[183] *See* Dorf, *Integrating Normative and Descriptive Constitutional Theory*, *supra* note 13, at 1796.

[184] *Id.* at 1797.

[185] *Id.* at 1799-1800.

[186] *See id.* at 1800.

[187] *Id.* at 1801.

tional law.[188] Heroic originalism goes beyond this, arguing that we should study the Framers because "they were wise and farsighted. To a significant degree, they are our heroes."[189]

These forms of originalism allow us to slight the ratifiers in favor of more influential figures like Jefferson and the authors of *The Federalist*, and to consult post-enactment history. Moreover, where the Framers' values "conflict with the values of contemporary society," the Framers are *not* our heroes, and their words will carry less persuasive force.[190] But despite the significant differences between this brand of originalism and standard originalism, Dorf asserts that this form, too, offers some legitimacy to constitutional interpretation, grounded in the "moral authority and expertise" of the Framers.[191] Unlike strong-form originalists, however, Dorf accepts the possibility of other legitimate methods of constitutional interpretation. As an eclectic constitutional interpreter, Dorf can treat heroic and ancestral originalism as just two arrows in his quiver, helpful tools in constitutional interpretation but not the only tools.[192]

As acknowledged in Part I, I am sympathetic to arguments in favor of the use of history in constitutional interpretation, especially the kind of weak-form, self-consciously romanticized history to which Sunstein, Kalman, and Dorf's arguments would often lead us. As Blumoff posited, we are drawn to the use of history as a way of offering some kind of transition between our past and future, so that the present act of constitutional decisionmaking takes on an air of being justified, as much for the decisionmaker as for his or her audience.[193] History also offers judges a useful way to employ persuasive rhetoric and moral example without turning to abstract discussions of moral philosophy or inappropriately personal value statements. History also is a natural element of constitutional in-

---

[188] *See id.*

[189] *Id.* at 1803. For similar arguments, see Randy E. Barnett, *The Relevance of the Framers' Intent*, 19 HARV. J.L. & PUB. POL'Y 403 (1996).

[190] Dorf, *Integrating Normative and Descriptive Constitutional Theory*, *supra* note 13, at 1804.

[191] *Id.* at 1810.

[192] *See, e.g., id.* at 1821-22. One problem with this approach, as argued below, is that an eclectic interpreter who employs historical arguments because they are useful or illustrative may become embroiled in difficult and time-consuming disputes with strong-form originalists over these arguments from history, to the neglect of the other arrows in his or her quiver. *See infra* notes 232-35 and accompanying text. There are other problems with the fair-weather, eclectic use of history. *See generally infra* notes 198-249 and accompanying text.

[193] *See* Blumoff, *supra* note 142, at 540, 572; *see also* Eisgruber, *supra* note 113, at 1622.

terpretation because of the vital nature of the Constitution as a document that causes and exists in the flow of United States history. Its creation, existence, and evolution all ring with historical overtones; its language has become the language of American literature, culture, and politics; it is both a source and a site of the collective memory of the American polity. To use the French historian Pierre Nora's term, it is a *lieu de memoire*, a realm of memory: a place where the American collective heritage is crystallized and its memory rooted,[194] a totemic object whose historical meaning changes as we change.[195] It is, in a very real sense, a constituting document of the American people *as* a people,[196] and as they change and their understanding of their own history changes, so their understanding of their constituting document and the constitutive moment in which it was created changes.[197] Citizens of other countries, whose sense of themselves as a nation or a people stems from other sources, such as language or religion, may treat their constitutions as bland positivistic tracts; for Americans, who are a people because of their constitution (or at least who tell themselves that this is so), history will inevitably play a part in the interpretation of the Constitution.

Still, a number of potential weaknesses in the position of those arguing for a place for history in law deserve to be explored. To begin with, while Sunstein and Kalman argue that history in law should meet basic standards of historical accuracy and integrity,[198] the separate goals of "public history" and professional history suggest that it will be difficult, if not impossible, to maintain this standard. To be sure, many questions of small-scale factual accuracy, debates about who said what and when, will be capable of fairly de-

---

[194] *See* Pierre Nora, *From Lieux de memoire to Realms of Memory*, *in* 1 REALMS OF MEMORY: CONFLICTS AND DIVISIONS xv, xvii (Lawrence D. Kritzman ed. & Arthur Goldhammer trans., 1996).

[195] *See* Lawrence D. Kritzman, *In Remembrance of Things French*, *in* 1 REALMS OF MEMORY: CONFLICTS AND DIVISION, *supra* note 194, at ix, xiii ("In becoming a synonym for national identity, a 'realm of memory' enables successive generations to mediate their cultural myths by inculcating them with their desires.").

[196] *Cf.* Mark V. Tushnet, *The Hardest Question in Constitutional Law*, 81 MINN. L. REV. 1, 25 (1996) (describing the view of some political scientists that "the people of the United States are, in some fundamental sense, constituted by our commitment to the Constitution and the principles of the Declaration of Independence. At the level of national self-definition, a commitment to constitutional principles—not race, religion, nor ethnicity—defines the people of the United States.").

[197] *Cf.* Katharine T. Bartlett, *Tradition, Change, and the Idea of Progress in Feminist Legal Thought*, 1995 WIS. L. REV. 303, 330.

[198] *See* KALMAN, *supra* note 7, at 202-04; Sunstein, *supra* note 12, at 602.

finitive resolution. But historical accuracy is more than just a matter of ascertaining facts, as difficult as that alone can be. Even the simplest documents or the most basic facts, unless used for the most elemental purposes, demand an account of their meaning.[199] Historical accuracy is thus a matter of the accuracy of one's interpretation of a set of facts.[200] The difficulty of practicing history in law at a level of skill and attention sufficient to maintain standards of accuracy and integrity is further compounded by the simple time pressures of the litigation process, or even the time pressures of the publication process in the legal academy, to say nothing of the level of skill of the lawyers engaged in acts of historical interpretation in court.[201]

Moreover, the goals of those who practice history in law are likely to have a negative effect on their ability to interpret the past accurately. The account they seek of past events will be strongly colored by their need to resolve a contemporary legal problem,[202] particularly given the importance of the issues that are under dispute in constitutional litigation.[203] As Kalman writes, for those who practice history in law, "presentism may be a virtue."[204] Indeed, since present concerns (such as the historical question at issue in a par-

---

[199] *See, e.g.*, WILLIAM H. MCNEILL, MYTHISTORY AND OTHER ESSAYS 5 (1986) ("A catalogue of undoubted and indubitable information, even if arranged chronologically, remains a catalogue. To become a history, facts have to be put together into a pattern that is understandable and credible . . . .").

[200] The point is put well in TELLING THE TRUTH ABOUT HISTORY:

> [H]istorians must deal with a vanished past that has left most of its traces in written documents. The translation of these words from the documents into a story that seeks to be faithful to the past constitutes the historians' particular struggle with truth. It requires a rigorous attention to the details of the archival records *as well as imaginative casting of narrative and interpretation.* The realist never denies that the very act of representing the past makes the historian (values, warts, and all) an agent who actively molds how the past is to be seen. Most even delight in the task.

APPLEBY ET AL., *supra* note 116, at 249 (emphasis added); *see also* Cloud, *supra* note 154, at 1707.

> "If history could be told in all its complexity and detail it would provide us with something as chaotic and baffling as life itself; but because it can be condensed there is nothing that cannot be made to seem simple, and the chaos acquires form by virtue of what we choose to omit."

Id. (quoting HERBERT BUTTERFIELD, THE WHIG INTERPRETATION OF HISTORY 97 (1968)).

[201] *See* Flaherty, *supra* note 104, at 1571, 1575.

[202] *See, e.g.*, Rakove, *supra* note 91, at 1593.

[203] *See* Flaherty, *supra* note 104, at 1571 (noting that the "high stakes" involved in constitutional law may tempt some scholars or jurists to "cook[ ] the record").

[204] KALMAN, *supra* note 7, at 184.

ticular case) will guide the kind of questions we ask of the past,[205] presentism is a necessity of constitutional law.[206]

The question of what standards of integrity or accuracy must be met by the use of history in law gives rise to another difficulty, this one stemming from the uneasy marriage of the disciplines of history and law, and the expectations each may have of the other. As I have noted, Kalman argues that, at the same time as legal academics have become fixated on professional historical debate, professional historians have become more comfortable with the practice of "public history," the activity of putting their talents to use in the service of liberal social goals by offering testimony or amicus briefs dealing with historical questions.[207] She carefully notes the problems that may arise when historians are enlisted in such struggles, and cautions that "the public historian's conclusion should not diverge from the scholar's";[208] still, her overall tone is relatively optimistic and encouraging.

I am less sanguine that this project will prove fruitful for either law or history. For historians, the danger is that their historical conclusions may contradict their political leanings, leaving them with the choice of betraying one set of principles or another; they can either provide historical support for arguments that they find wrong or even repugnant, or they can refuse to aid such arguments, and through their silence allow the courts to rely on what they know to be bad history. In either case, their entry into contemporary political debates may do little more than stir anger and resentment within the historical community.[209]

---

[205] *See, e.g.*, APPLEBY ET AL., *supra* note 116, at 271 ("Given the immediacy of human passion, the present is always implicated in the study of the past.").

[206] In one sense, as G. Edward White points out, *all* historians' choices of what to study may reflect presentist concerns. *See* G. EDWARD WHITE, INTERVENTION AND DETACHMENT: ESSAYS IN LEGAL HISTORY AND JURISPRUDENCE 3 (1994). But while historians have time and skill enough to broaden the scope of their surrounding reading and research, and may by virtue of professional training and background make decisions about what to study that are less targeted toward short-term political concerns, the case-oriented nature of law and the lack of expertise in history of the participants in the legal system magnifies concerns about presentism.

[207] *See* KALMAN, *supra* note 7, at 195-208, 228-29; Kalman, *Garbage-Mouth*, *supra* note 52, at 1004-05.

[208] KALMAN, supra note 7, at 205.

[209] This is the lesson suggested by the debates within the community of feminist historians over the litigation in *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988). In this case, which concerned whether Sears had discriminated against women in handing out more lucrative sales positions that awarded commissions to men, one women's historian testified on behalf of Sears that historically women preferred not to take certain jobs, and thus the disparity in the composition of Sears's workforce might not

But the problem public history presents for lawyers, as opposed to historians, is even more interesting and perhaps more unresolvable. That is that most strong-form originalists, and even most nonoriginalist originalists, rely on history precisely for its air of authority and impartiality. Misguided though they may be, lawyers turn to history because they believe it offers some definite answers. When they turn to historians, they expect experts, not advocates. Consider the case of *Patterson v. McLean Credit Union*,[210] in which a historians' amicus brief, whose signatories included the historian Eric Foner, argued that the Civil Rights Act of 1866 applied to both public and private actors.[211] As scholars and Justices noted, this appeared to contradict conclusions reached by Foner in his scholarly work on the Reconstruction era.[212] A judge facing such conflicts might be forgiven for wondering whether she should listen to Foner the historian or Foner the public historian. The danger here is that eventually he or she may just stop listening. Thus, if historians turn to more overt advocacy, judges may either be misled by their arguments, taking an assertion as historical fact, or they may eventually become leery of historians' contributions to legal argument altogether. Nor do I think it sufficient to conclude that the problem will be solved if the public historian simply pledges to keep his or her standards consistent. Since, as I have suggested, a good deal of the historian's task is that of the interpretation of facts, the pull of presentist concerns may simply prove too strong for the public historian.

A public historian might argue in response that, while he or she cares about historical accuracy and professionalism in other contexts, his or her prime concern with the law is that the right result is reached, so the possibility of a judge relying on bad or misleading

---

indicate discrimination. The result was her ostracism and condemnation by women's historians. Another women's historian testified on behalf of the EEOC, but her reward was "professional humiliation," since her own writing was used to rebut her testimony. *See* KALMAN, *supra* note 7, at 197. For discussion of this case, see *id.* at 196-97; NOVICK, *supra* note 66, at 502-10.

[210] 491 U.S. 164 (1989).

[211] *See* Brief *Amicus Curiae* of Eric Foner et al. at 11, Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (No. 87-107).

[212] *See* KALMAN, *supra* note 7, at 205-06 (citing ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 243-45 (1988)); Randall Kennedy, *Reconstruction and the Politics of Scholarship*, 98 YALE L.J. 521, 537-39 (1989)); *see also* JAMES F. SIMON, THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT 54-55 (1995) (recounting Justice Kennedy's remarks on the inconsistencies between Foner's brief and his scholarly work).

historical argument is not of undue concern. The public historian would therefore not find the first half of the dilemma I have suggested in the text—that a judge may be misled by public historians—especially problematic. But I believe he or she would still be caught on the other horn of the dilemma: that judges may simply treat all historians' evidence, or at least all historical evidence that clearly comes from public historians, as presumptively tainted. So even a historian who takes a strictly instrumental view of the place of history in the courts should be wary of the risks presented by a program of advocacy-oriented public history.[213]

Turning to Dorf's views, even if the goal of history in law is the more modest one of learning from the "moral authority and expertise" of the Framers,[214] that, too, suggests a number of interesting problems. First, the goal presupposes that the Framers had moral authority and expertise. In part, that attitude simply partakes of our general reverence for the distant past, our belief that old things are wise because they are old.[215] But if the Framers were wise to create the document they did (even supposing that that document was wise, as opposed to the document as we now understand it),[216] "[h]ow could those who wrote the Constitution possibly understand its meaning better than those who had the experience of observing and participating in its operation" down to ourselves?[217]

---

[213] Beyond these practical concerns, I am also of the view that there must be some fit between one's methods and one's ideals. Since the constitutional struggles that engage the passions of legal liberals such as Kalman are about constitutional and political *ideals*, such as integrity and fairness, as well as particular results, it would be wrong to advocate the use of public history if one does believe it may be misleading. *See infra* notes 257-59 and accompanying text.

[214] *See* Dorf, *Nonoriginalist Perspective*, *supra* note 13, at 351 (noting the originalist's tendency to prefer the normative views of the Framers).

[215] David Lowenthal quotes Peter Tate, a "chronicler of England's New Forest": "These trees are older than I am and can't help feeling that makes them wiser." LOWENTHAL, *supra* note 117, at 53 (quoting PETER TATE, THE NEW FOREST: 900 YEARS AFTER 14 (1979)).

[216] *See, e.g.*, Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987).

> [The government devised by the revolutionary generation] was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, that we hold as fundamental today. When contemporary Americans cite 'The Constitution,' they invoke a concept that is vastly different from what the framers barely began to construct two centuries ago.

Id.; *see* Klarman, *supra* note 138, at 385-87 (noting various mistaken assumptions made by the Framers in drafting the Constitution that might have affected the resulting document, such as that presidential selection would generally occur in the House of Representatives).

[217] RAKOVE, *supra* note 87, at 367.

Beyond this tendency to imagine the dead as wise, our heroic view of the Framers also stems from our ability to edit our understanding of their lives, to prune prickly personalities until they resemble serene sages. This exhibits the same flaw as that shown by the neo-republicans: it enhances the appearance of the Framers' wisdom by disentangling the inextricable strands of their deeds and personalities, thus creating a legal fiction of an individual. The problems of mythologizing an individual like Jefferson have recently been noted,[218] but that is arguably nothing as compared to the respect we now accord a mixed bag of a man such as Alexander Hamilton. Occasionally our reverential view of these individuals and the world in which they lived is shattered and the spell broken. This brings to mind Justice Thurgood Marshall's caustic remark, on the occasion of a proposal to mark the bicentennial of the Constitution by holding a session of the Court in Philadelphia: "Well, if you're gonna do what you did two hundred years ago, somebody's going to give me short pants and a tray so I can serve coffee."[219] This point cannot be rebutted simply by saying that one ought to distinguish between the Framers as public figures and the Framers as private individuals, as Marshall's remark suggests. Even if that line could clearly be drawn,[220] some of the Framers' public acts, such as their constitutionalization of the three-fifths compromise, reflected the private iniquities in which they were participants. Nor is it effectively rebutted by the more careful argument that we can lionize the Framers' *received public personae*, the burnished legends and cherished public myths about them, while recognizing the real complexity of their deeds and characters. As long as these complex realities threaten to unmask the facade of public myths we have constructed, then something will ring false about our continuing efforts to lionize the Framers. The heroic depiction of our forebears which was

---

[218] *See* JOSEPH J. ELLIS, AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON (1997).

[219] CARL T. ROWAN, DREAM MAKERS, DREAM BREAKERS: THE WORLD OF JUSTICE THURGOOD MARSHALL 390 (1993); *see also* Deborah L. Rhode, *Letting the Law Catch Up*, 44 STAN. L. REV. 1259 (1992). For other skeptical remarks, asking whether African-Americans and other historically excluded and disfavored groups owe a duty of fidelity to the Framers and their handiwork, see Catharine A. MacKinnon, *"Freedom from Unreal Loyalties": On Fidelity in Constitutional Interpretation*, 65 FORDHAM L. REV. 1773 (1997); Dorothy E. Roberts, *The Meaning of Blacks' Fidelity to the Constitution*, 65 FORDHAM L. REV. 1761 (1997).

[220] And I am not sure that it could. For every individual willing to overlook Jefferson's slaveholding for the sake of his drafting of the Declaration of Independence, someone else would surely, and not unreasonably, see the private act as dwarfing or beclouding the public achievement.

meant to inspire loyalty and unity to our constitutional ideals will instead breed cynicism and a sense of disenfranchisement. A truly useful past must be more than just the stuff of heroes and legends; it must present a full account of our origins even when they shame us.[221]

Even assuming that these men do have much to offer,[222] other problems arise. First, we must always recognize the contingent circumstances that lead us to look at *these men*, at the same small cast of characters. Simply accepting these few individuals as authorities on pragmatic grounds may conceal or defer deeper struggles about who should be recognized as forming the *dramatis personae* of our constitutional past, and about who gets to decide who is recognized.[223]

Second, the tendency to think that our ancestors should be consulted because they "confront[ed] and . . . can offer a fresh perspective on problems that still challenge their modern heirs"[224] may lead us to a skewed understanding of modern problems.[225] Any analogy can be stretched to a breaking point, and it may be that we have reached ours in some cases. There may come a time, for instance, when new technologies such as the Internet cry out for fresh insights, not stories about eighteenth-century media of expression. Far from offering a fresh perspective, the memory of the Framers

---

[221] *See* Mark Tushnet, *Constituting We the People*, 65 FORDHAM L. REV. 1557, 1561-62 (1997).

> A celebratory account is wrong, as well, because it does not take our history seriously enough. A real constitutional narrative must treat racism, sexism, nativism, and all those other 'aberrations' as deep commitments of the people of the United States. . . . Perhaps our national self-understanding should not treat racism, sexism, and nativism as commitments running as deep as our commitment to the [Declaration of Independence's] principles, but it must not treat them as aberrations that everyone knew all along were inconsistent with who we were. Everyone did not know that. Many people were—and remain—entirely comfortable with the privileges that racism, sexism, and nativism confer on them. It demeans our national experience to read those people out of the narrative. Building the underside of United States constitutional history into our narrative gives it a richness and complexity that in the end makes the story more attractive than the purely celebratory account.

Id.

[222] *But see* Klarman, *supra* note 138, at 383 ("[I]n most ways the Framers do not even remotely resemble us, and it is not clear that they have a great deal of relevance to say about how we should govern ourselves today.").

[223] *See, e.g.*, MARITA STURKEN, TANGLED MEMORIES: THE VIETNAM WAR, THE AIDS EPIDEMIC, AND THE POLITICS OF REMEMBERING 12 (1997) ("The debates over what counts as cultural memory are also debates about who gets to participate in creating national meaning.").

[224] Flaherty, *supra* note 168, at 590.

[225] *See, e.g.*, APPLEBY ET AL., *supra* note 116, at 158-59.

may sometimes simply induce us to try to apply stale perspectives to novel situations.

Third, appealing to the example of the "heroic past" may arguably weaken our capacity to discover heroic qualities of our own. "A glorious heritage may . . . overwhelm, its superiority extinguishing even the will to rival it."[226] Thus, it is no surprise that the American reverence for the past has long co-existed with a tension occasioned by the need to assert the greatness of one's own time.[227] In this respect, we may find yet another interesting feature in Bruce Ackerman's selection of the Revolution, the Civil War and Reconstruction, and the New Deal as the three key moments in his initial efforts to craft his dualist theory of the Constitution.[228] The Revolution is, of course, the ur-heroic moment in American history. But it has also been suggested that an important feature of the Civil War was that it freed Americans of that era from "burdensome father-worship" by allowing the Union to match "paternal deeds and valour."[229] So, too, may the great events of the New Deal and World War II have freed its members from "preservative filio-piety"[230] and allowed them to shape their own destiny. It may be that our own generation of citizens and scholars, rather than following the deeds of the past, needs crises of its own—and solutions of its own—in order to assert its authority to interpret the constitutional text with confidence that it is an equal partner with past generations.[231]

---

[226] LOWENTHAL, *supra* note 119, at xx.

[227] *See* LOWENTHAL, *supra* note 101, at 55 (noting the tendency among Americans earlier in the nineteenth century to "boast[ ] of being the architects of their own fortunes"); *id.* at 189 (noting Emerson's view that "[r]everence for the deeds of our ancestors is a treacherous sentiment"); Rakove, *supra* note 91, at 1592 ("Americans, after all, are not a people known for their worship of ancestral wisdom.").

[228] *See* ACKERMAN, *supra* note 111.

[229] LOWENTHAL, *supra* note 119, at 120-21.

[230] *Id.* at 120 (referring to the Civil War).

[231] See the telling quote by Robert Fagles: "*Heroes exist to dwarf us*; they're models we aspire to." Robert Fagles, *Noble Visions*, LIFE, Collector's Edition, 1997, at 4, 6 (emphasis added). Bruce Ackerman has recently spoken to something of the same point. *See* Bruce Ackerman, *A Generation of Betrayal?*, 65 FORDHAM L. REV. 1519, 1528 (1997) (calling the present generation of leaders a "generation of midgets"); *Fidelity as Synthesis: Colloquy*, 65 FORDHAM L. REV. 1581, 1585 (1997) (similar remarks). He apparently also raises this claim in his forthcoming book, WE THE PEOPLE: TRANSFORMATIONS. *Cf.* Tushnet, *supra* note 221, at 1557 n.4 and accompanying text. Ackerman argues that since we cannot compare our own generation of leaders, and the failed or halting solutions they have offered to constitutional problems, to those solutions crafted in the "Constitutional moment" of the New Deal, we ought to obey the authority of the constitutional changes effected in that moment. *See Fidelity as Synthesis: Colloquy*, *supra*. I am suggesting here that in order to become a generation of giants rather than midgets, we must become the heroes of our own tale, rather than simply humbling ourselves before the heroes of a bygone era. *See id.* at 1585 ("It seems to me that one could say

Two other problems are shared by both Dorf's ancestral and heroic originalism and Kalman and Sunstein's pragmatic justification for qualified originalism. First, since all of these thinkers assert some confidence in the rightness of interpretive sources other than the past—whether that source is Dorf's liberal eclecticism or pragmatism, Kalman's legal liberalism, or Sunstein's liberal republicanism—each must take care that arguments from history, which can be so rhetorically persuasive and logically slippery, do not paper over weaknesses in their principal arguments. History is still only one aspect of law; craft, logic, skillful reasoning, and careful argument all play central parts, too. If history is an aid to nonoriginalist constitutional interpreters, it may easily become a crutch.

Second, if this Essay correctly states the "snares" and pitfalls of employing history in law,[232] those snares are particularly grave in the practical realm of constitutional argument. Nonoriginalist constitutional theorists who advocate the use of law in history honor the Constitution for its substantive commitments as well as for its history, and should take care that they do not allow the courts to be sidetracked by archival research and historical dispute. Constitutional litigation is difficult, time-consuming, and expensive enough, both for lawyers and judges, without encouraging detours. In his classic work on the use of history in the Supreme Court, Charles Miller noted:

> [O]nce one justice makes an historical assertion in a draft opinion, it may be challenged in detail by another justice, forcing an equally detailed, though originally unintended, reply. What might have gone unnoticed in its initial form

---

that what constitutes us as a people, from the standpoint of democracy, is the tradition of each generation's assuming interpretative responsibility for itself. So, it is the intimation of an obligation to acceptance of the earlier generation's interpretation that is sticking in my craw." (remarks of Frank Michelman)); JAROSLAV PELIKAN, THE VINDICATION OF TRADITION 53 (1984) ("Coming to terms with the presence of the traditions from which we are derived is, or should be, a fundamental part of the process of growing up.") (*quoted in* Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177, 181 (1993)). Mark Tushnet notes that one reason Ackerman may be critical of "efforts to detach ourselves from the narratives that have heretofore constituted us and to make independent legal judgments" is that he seeks to create an American polity that exists across generations. *See* Tushnet, *supra* note 221, at 1557. But Ackerman must still confront the fact that the "repudiation of the past" is a longstanding American tradition, as constitutive of the American polity as any other quality. *See, e.g.*, Stephen Vaughn, *History: Is It Relevant?*, *in* THE VITAL PAST: WRITINGS ON THE USES OF HISTORY 1, 2 (Stephen Vaughn ed., 1985).

[232] *See* Reid, *supra* note 144, at 193 (describing the "mixture" of law and history as being more dangerous than rewarding).

> becomes a central point of contention. What looks irrelevant from outside the Court has a human logic inside the Court that will not be halted by the advice of critics.[233]

Thus, a nonoriginalist who invokes a heroic Framer in support of his or her views may find that a mere historical reference has opened Pandora's box. That is why pragmatic arguments that liberals must learn to play by the conservatives' originalist "rulebook,"[234] though they may have some operative truth,[235] are flawed. Ultimately, there must be at least some connection between one's substantive values and one's interpretive strategy, or one's values may be submerged or neglected.

If we are to continue to exist as nonoriginalist originalists, then invoking history as a persuasive aid rather than a controlling authority, we cannot have any illusions about the frailties and dangers inherent in this kind of invocation of history. Even the most successful uses of this kind of history in law raise significant doubts about their authority and integrity. Two especially prominent examples will suffice to suggest this.

First, take Justice Brandeis's justly celebrated concurrence in *Whitney v. California*,[236] with its rhetorically rich evocation of the beliefs of "[t]hose who won our independence."[237] Both Dorf and Sunstein have referred approvingly to Brandeis's "heroic,"[238] "romantic"[239] account of the values of the Revolutionary period. But however successful a rhetorician Brandeis may have been in *Whitney*, he was a less able historian. Critics of the Court's use of history have singled out the *Whitney* concurrence as "a prime example of history by a combination of essay, fiat, and revelation,"[240] and pointed out that its historical assertions, while they may be true, are at least controverted. While the concurrence is immensely

---

233 MILLER, *supra* note 115, at 197.

234 *See* Young, *supra* note 182, at 587-88.

235 *See* Levinson, *supra* note 144, at 506.

236 274 U.S. 357 (1927).

237 *Id.* at 375. For approving analyses of the opinion, see Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in* Whitney v. California, 29 WM. & MARY L. REV. 653 (1988); Robert M. Cover, *The Left, the Right and the First Amendment: 1918-1928*, 40 MD. L. REV. 349 (1981). *See also* Paul Horwitz, *Citizenship and Speech*, pt. V, 43 MCGILL L.J. (forthcoming 1998) (discussing the opinion approvingly in a review of recent books by Owen Fiss).

238 Dorf, *Integrating Normative and Descriptive Constitutional Theory*, *supra* note 13, at 1806-07.

239 CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 27 (1993).

240 Kelly, *supra* note 147, at 131 n.50; *see* Wiecek, *supra* note 148, at 238 (discussing Brandeis's "history-by-judicial fiat").

moving and must be counted as a successful example of eloquent judicial argument, it is not clear that it is history so much as Brandeis "voic[ing] a contemporary philosophy of free expression through the mouths of the Founding Fathers."[241]

Similarly, to take an example of non-legal historical argument that has nevertheless had a significant influence in changing the modern understanding of the Constitution,[242] consider Lincoln's Gettysburg Address, with its heroic invocation of "our fathers" and their conception of a nation "dedicated to the proposition that all men are created equal."[243] In the few short words of the Address, Lincoln did more than commit a brilliant work of historical revisionism. To a nation riven by war, he advanced the proposition that the country was united by an *idea*, a *proposition*.[244] Moreover, that proposition was said to be that the nation was dedicated to a value—equality—nowhere mentioned in the nation's organizing document. In portraying the country this way, he further suggested that the Confederacy could not secede, and thus was not a legal belligerent;[245] rather, the Civil War was simply a "testing" of whether a nation "so conceived and so dedicated" could endure.[246] By injecting the value of equality into the nation's ancestral past, he could give it an authority and pedigree it might not otherwise possess. Though the Address is not strictly faithful to constitutional history, its abiding faithfulness to certain enduring political values helped transform the nation's understanding of its own past, and of the Constitution itself.[247] In Garry Wills' account, the Address was an act of sleight of hand or intellectual pocket-picking that helped give the American people "a new past to live with that would change their future indefinitely."[248]

---

[241] MILLER, *supra* note 115, at 194. Miller intends this as a compliment, however, citing Brandeis as an example of a successful user of "[o]ngoing history," the "means of relating past to future and legal values to social values." *Id.*

[242] *Cf.* Dorf, *Integrating Normative and Descriptive Constitutional Theory*, *supra* note 13, at 1812 (citing the invocation of historical events, such as Jim Crow and the Great Depression, by the Supreme Court in landmark decisions).

[243] For the text of the address, see, for example, GARRY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA 263 (1992).

[244] *See id.* at 86 ("Americans are intellectually autochthonous, having no pedigree except that of the idea.").

[245] *See id.* at 133 (stating that Lincoln believed that "[t]he states *had* not seceded since they *could* not").

[246] THE GETTYSBURG ADDRESS (1863), *reprinted in* WILLS, *supra* note 243, at 263.

[247] *Cf.* William Michael Treanor, *Learning From Lincoln*, 65 FORDHAM L. REV. 1781 (1997); George P. Fletcher, *Unsound Constitution*, NEW REPUBLIC, June 23, 1997, at 14, 17-18 (noting the "transformation" of the definition of our citizenry).

[248] WILLS, *supra* note 243, at 38.

That, this Essay contends, is the ultimate goal of nonoriginalist originalism—to give us a past, whether new or old, accurate or otherwise, in order to change our future, and to invoke the authority of the past to add extra heft to ideas that should be their own authority; in short, to use the past in order to talk to ourselves about the Constitution. That is not always such a terrible thing, though this Essay suggests the dangers of relying on history in law rather than on other forms of argument. But it is wrong to label as history, or even hero worship, what is often actually ventriloquism. [249]

V. THE DARKNESS AT THE END OF THE TUNNEL

What are we left with, then?

In detailed, richly footnoted, sometimes pleasantly gossipy stages,[250] Kalman leads us over the last sixty-five years of constitutional theory, and demonstrates convincingly that we have been and likely still are in the grip of a crisis in legal theory, particularly constitutional theory.[251] For what seems like far too long a time, we have struggled with the counter-majoritarian difficulty, and with the search for approaches to constitutional theory and interpretation that offer some kind of protection against indeterminacy. It has been the legal liberals' special destiny to rise to their greatest achievements in the post-1937 era through the Warren and early Burger Courts in part because of Legal Realism's ability to shatter the earlier consensus of formalism. But in doing so, the Warren Court inherited the taint of Realism; those of us who have grown to adulthood with reverence for that Court's invocations of principles of justice have also grown up with the Realists' and Process theorists' skepticism about the Warren Court's methods. In our at-

---

[249] Lest it seem as if I think Kalman does not realize this, let me hasten to add that her prologue and epigraph refer to the Episcopalian hymn "Faith of Our Fathers," in part because just as the hymn was written to create a "'Catholic' past for the Church of England, so originalism may prove a useful fiction." *See* KALMAN, *supra* note 7, at 1, 9. "Faith of Our Fathers" was apparently an early title for *The Strange Career of Legal Liberalism*. *See* RAKOVE, *supra* note 87, at 372 n.11. An equally apt title to capture the way originalism tends to allow contemporary constitutional interpreters to use the past to talk to themselves about the present might have employed the name of another song, one that is less dignified but is at least authentically American: the old novelty tune that concludes, "I'm my own grampaw." *See, e.g.*, *Ask the Globe*, BOSTON GLOBE, Sept. 7, 1992, at 26 (identifying Dwight Latham and Joe Jaffe as the writers of the 1947 song of the same name).

[250] Complimenting Kalman on the gossipy *frisson* one gets from her work should not surprise her. *See* Laura Kalman, *Bleak House*, 84 GEO. L.J. 2245, 2255 (1996) (book review) (noting that her "'scholarship' must at times seem overly gossipy").

[251] *See supra* Part II (chronicling the interpretive crisis which had developed in constitutional theory).

tempts to escape the confines of a legal doctrine rendered horribly uncertain, we have turned to other disciplines, only to find greater uncertainty.

Accordingly, both legal conservatives and legal liberals (in the broadest sense) have turned to history, hoping for some greater assurance of right answers. But as we have seen, originalism, on the right, is fraught with historical problems;[252] it can offer a reasonable method of resolving some cases, but its promises of legitimacy and authority are overstated and do not sit well with our respect for precedent and sound results. Similarly, the milder form of history in law offered by generally liberal legal theorists often ends up as another means of making normative arguments through the vehicle of an imaginatively rendered but dubious past.[253] We are thus left with the same old problems of indeterminacy and uncertain legitimacy. The use of history in law, after all, is at bottom a question of legal theory,[254] and just as this method of constitutional interpretation is demonstrably flawed as a matter of practice, so it may also be a weak candidate as a matter of theory.

We might nevertheless accept the use of history in law in the pragmatic manner in which one may read Kalman to accept its use—as a potentially useful tool in the preservation and enhancement of the values of legal liberalism. We might, with her, accept that neorepublicans who use a "civics republican" version of history, seeking to create a pedigree for their political values in order to pit them against the conservative values favored by classical originalists, are simply "fight[ing] fire with fire."[255] Lawyers and legal academics, after all, are ultimately problem-solvers who possess "a reformist sense of purpose."[256] They ought not to wait around forever insisting on theoretical purity or nothing.

---

[252] *See supra* Part III (discussing originalists' "law as history" approach as interpretive method).

[253] *See supra* Part IV (discussing nonoriginalists' or "weak originalists'" "law in history" approach).

[254] *See, e.g.*, EARL M. MALTZ, RETHINKING CONSTITUTIONAL LAW: ORIGINALISM, INTERVENTIONISM, AND THE POLITICS OF JUDICIAL REVIEW 16 (1994) ("[P]olitical theory . . . serves as the appropriate benchmark against which any method of constitutional interpretation must be tested."); MILLER, *supra* note 115, at 1 ("The problem of the Supreme Court's use of history as a principle of adjudication in constitutional law is, in formal terms, a problem of legal theory."); Flaherty, *supra* note 168, at 558 ("Whether to look into history at all is properly a matter of theory and is not a matter that history itself can determine."); Powell, *supra* note 101, at 691 ("History never obviates the necessity of choice.").

[255] KALMAN, *supra* note 7, at 211.

[256] Kalman, *supra* note 250, at 2260.

But despite the short-term gains that might be made by enlisting history in the cause of legal liberalism in order to enlist the "conservatives' rulebook" against its own authors, I have argued that fighting fire with fire is an unsatisfactory approach. It runs the risk of impoverishing our powers of reason in favor of the seductive rhetoric of history. It impairs our willingness to assert our own heroic status as interpreters of the Constitution rather than as mere vassals of our forefathers. And it leaves lawyers and legal scholars laboriously "mining the past and turning to historical figures as a pretext for talking about themselves,"[257] when they could be confronting the same issues more directly.

Moreover, legal liberalism must embrace more than the substantive results reached by the Warren Court or other jurists. Its ideals should include some measure of respect for the processes of law and reasoned argument that the Court at least purported to use in achieving those results, and some faith in the rule of law generally. Thus, we cannot simply adopt an appeal to history on pragmatist grounds. We must adopt a theory of constitutional interpretation that speaks to these other values. I have argued that the weak form of originalism, with all its malleability and imprecision, does not adequately do so.

Taking a page from the recent writings of some historians, we could simply acknowledge that the legal world is less concerned with history *tout simple*, and more concerned with a hybrid that contains elements of both history, as reflected in the documentary record and standard interpretations thereof, and the myths and legends that have found their way into our collective impression of American constitutional history. This kind of quasi-history has been usefully described in a number of different ways. Thus, William McNeill notes the value of what he calls "mythistory"—a mixture of history and myth which results whenever historians attempt to provide an account of the past that is "credible as well as intelligible to an audience that shares enough of their particular outlook and assumptions to accept what they say."[258] Noting the problems

---

[257] KALMAN, *supra* note 7, at 190.

[258] MCNEILL, *supra* note 199, at 19. McNeill and Michael Kammen, *see infra* note 259, are discussed in KALMAN, *supra* note 7, at 194-95. The barrister and author John Mortimer, suggesting that the process of mythologization is inevitable, puts the matter well:

> [O]nce you decide what to leave out, or how you feel about an event that happened, or how you would like the reader to see it, you are on your way to inventing a myth. Politicians describing the economy, lawyers and judges describing a crime, every one of us re-

that arise when myths are broken without new and better ones replacing them, McNeill calls for the "[c]are and [r]epair of [p]ublic [m]yth[s]" that, in Michael Kammen's words, "give meaning to a culture and express its values."[259] The national culture, in the United States as elsewhere, is replete with such mythistories, and as storytellers such as Brandeis and Lincoln indicate, they are still being crafted. Their powerful mythistories also indicate that, as McNeill points out, even stories that are not entirely true may *become* true, to a certain degree; they may establish a model of behavior for future generations, based on a somewhat mythical version of our predecessors, that tells us how to act and demands that we measure up to what we imagine to be our ancestors' ideals.[260]

Similarly, Paul Cohen has argued that myth is just one of several ways of organizing and understanding the past.[261] We *experience* history in one way—as a set of individualized sensations and emotions which we tie into our own mini-narrative, limited in context, and with no knowledge of the ultimate outcome of the events we are experiencing.[262] We get history as "history" in the usual sense of the word when, with knowledge of the outcome of the events we describe, we tie these disparate individual experiences into a coherent, streamlined, narrativized effort to explain what happened.[263] But we can understand the past as myth, too.[264] We do so when we "draw on [the past] to serve the political, ideological, rhetorical, and/or emotional needs of the present."[265] As did McNeill, Cohen

---

inventing our pasts, are myth-makers to a greater or lesser degree. Fiction is what comes naturally to us.

JOHN MORTIMER, MURDERERS AND OTHER FRIENDS: ANOTHER PART OF LIFE 260 (1994).

[259] MCNEILL, *supra* note 199, at 23-42; MICHAEL KAMMEN, MYSTIC CHORDS OF MEMORY: THE TRANSFORMATION OF TRADITION IN AMERICAN CULTURE 482 (1991).

[260] *See* MCNEILL, *supra* note 199, at 13-14 (stating that "an appropriately idealized version of the past may also allow a group of human beings to come closer to living up to its noblest ideals").

[261] *See generally* PAUL A. COHEN, HISTORY IN THREE KEYS: THE BOXERS AS EVENT, EXPERIENCE, AND MYTH (1997).

[262] *See id.* at 59-68.

[263] *See id.* at 3-13, 64. Recalling Lessig's translation theory of interpretation, Cohen notes that the historian, like a translator, attempts to act as a faithful "mediator[] between past and present." *Id.* at 297.

[264] *See id.* at 211-22 (noting that once assertions about the past are deeply impressed on people's minds, they evolve into a truth of their own which does not necessarily parallel what actually happened).

[265] *Id.* at 213.

notes that deeply felt myths take on a truth of their own, and may influence the actions of people in the present.[266]

Alternatively, we might embrace a distinction drawn by David Lowenthal between history and heritage.[267] In this scheme, "[h]istory explores and explains pasts grown ever more opaque over time; heritage clarifies pasts so as to infuse them with present purposes."[268] Put differently, the role of history is "to explain through critical inquiry, heritage to celebrate and congratulate."[269] In short, heritage consists of the moving and powerful stories we tell ourselves about our history, whether or not it matches our actual history. Lowenthal argues that we may make productive use of heritage without necessarily harming the study of history itself.[270]

Whether this brand of mythologized history is dubbed myth, mythistory or heritage, each of these terms suggests the same possibility. We could simply abandon the belief that we are doing meaningful conventional "history" when we incorporate our past into constitutional interpretation, and admit that we have become legal mythologers. We might then follow Robert Gordon's suggestion that we critique lawyers' "mythic uses of the past" not according to whether they meet conventional historians' standards, but according to whether or not they constitute "bad mythmaking."[271] Mark Tushnet would arguably be right to assert that "one might think that legal scholars using history in law would perform badly if they got the facts wrong. One might think that, but one would be wrong."[272] As advocates of mythistory, we might not ask of the concurrence in *Whitney v. California* or the Gettysburg Address, "Is it true?" Instead, we could ask, "Is it reasonably true?" or "Does it have me sufficiently convinced?" or even "Does it dream to life the kind of past we require to guarantee the kind of future we seek?"[273]

---

[266] *See id.* at 212 (describing the past as having "the potential to live on as myth in the present").

[267] *See* LOWENTHAL, *supra* note 101.

[268] *Id.* at xi.

[269] *Id.* at 168.

[270] *See id.* at 250; *see also id.* at 105 (stating that "criticisms of heritage as 'bad history' [are] null and void").

[271] Robert W. Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017, 1055 (1981).

[272] Tushnet, *supra* note 11, at 932 (citation omitted); *see id.* at 934 ("[I]t would seem that the least demanding requirement a historian would impose on a legal scholar's use of history is that the legal scholar get the facts right. The practice of history-in-law apparently can go on even when that requirement is not met.").

[273] *Cf.* STURKEN, *supra* note 223, at 2 ("We need to ask not whether a memory is true but rather what its telling reveals about how the past affects the present.").

Though legal mythistory would share historical inaccuracies with the other branches of history as law or history in law, it would differ in some important respects from these other approaches, and so it might be consistent to value mythistory *despite* its departures from the facts, while critiquing the other approaches for their own historical errors. The strict originalists discussed in Part III, in particular, claim authority on the basis of the "factual" evidence of the contemporary public understanding of the Constitution; if that claim fails, much of the legitimacy of this approach goes with it. Dorf's brand of ancestral and heroic originalism suggests that our predecessors have wisdom and expertise to offer us. If, as I have suggested, we typically use idealized versions of the Framers to talk to ourselves, then they are deprived of their wisdom and become mere rhetorical devices. While Kalman and Sunstein might be comfortable with a mythistorical approach to the past in constitutional interpretation, one senses in their writings some ultimate concern with the performance of good historical work. By contrast, while the legal mythistorian would likely demand that the picture of the past he or she draws be sufficiently accurate to be compelling and credible,[274] he or she would have relatively little interest in accuracy beyond that threshold concern.[275] Echoing Tushnet, it would be possible to get the facts wrong and the mythistory right. Thus, while the mythistorical approach is certainly similar to the soft originalist approach, and would shade into it in particular cases, there are some distinctions between this view of history in law and the views discussed above.

Despite the criticisms voiced with respect to the strong and weak forms of originalism discussed in Parts III and IV, and despite the necessarily open-ended nature of an approach that does not demand adherence to historical accuracy but accepts that there is some value to mythmaking, I find the argument for mythistory attractive, if not ultimately sufficient. It is certainly the case that while lawyers purport to demand a certain level of accuracy from history, many invocations of history tend to take on a persuasive force and a life of their own that has little to do with their accuracy. It was not Justice Brandeis's historical acumen, but the rhetorical force of his

---

[274] *See* COHEN, *supra* note 261, at 214 ("The mythologized past need not be historically accurate. But if it is to be effective in persuading or mobilizing people in the present, it must be bound by at least a loose conception of 'truthfulness.'").

[275] *See id.* at xiv ("Experiencers of the past are *incapable* of knowing the past that historians know, and mythologizers of the past . . . are *uninterested* in knowing the past as its makers have experienced it.").

argument, that gave his concurrence in *Whitney* the "momentum" later Justices could ride to craft the great decisions of the First Amendment later in the century.[276] Similarly, we cannot choose between the competing visions of our past treatment of religious liberty and establishment offered by cases such as *Everson v. Board of Education*[277] and *Wallace v. Jaffree*[278] purely through historical research. We must also ask ourselves which narrative rings the most true for *us*, as we go about constructing our own narrative about religious freedom.[279] More generally, if we avoid the hard issues of history, favoring a more abstract mythistory, the broad principles we might draw from this more abstract vision of our past may serve as useful reminders about the core values that have always been part of the fabric of our constitutional history.[280]

I am sympathetic. But I am not convinced. Though successful mythistory certainly carries enormously powerful persuasive force even after its historical dubiety has been exposed, much mythistory would carry neither the rhetorical force to make it persuasive nor the historical weight to buttress its claims. A nation fed a diet of myths can grow cynical and angry.[281] That is another lesson learned during the era spanning the Warren and Burger Courts. Moreover, though we may escape some of the problems of history in law by acknowledging that we are actually engaging in mythistory, some important difficulties would continue to plague us. Mythistory carries with it all the problems of heroic and ancestral originalism; it can be "oppressive" and "defeatist,"[282] subordinating us to our ancestors and preventing us from shouldering our own burdens squarely. Strong-form originalists will either reject it or pretend that it is history, which "cedes it a credence it neither asks nor de-

---

[276] *See* Wiecek, *supra* note 148, at 239 (noting Justice Brennan's use of *Whitney* in *New York Times v. Sullivan*, 376 U.S. 254 (1964), and *Garrison v. Louisiana*, 379 U.S. 64 (1964)).

[277] 330 U.S. 1 (1947) (Black, J.).

[278] 472 U.S. 38 (1985) (Rehnquist, J., dissenting).

[279] *See* Reid, *supra* note 144, at 220-21.

[280] *Cf.* Cloud, *supra* note 154, at 1747 ("Even complex histories can guide us if we are willing to deal with them on an appropriate level of abstraction.").

[281] *Cf.* Pauline Maier, *Jefferson, Real and Imagined*, N.Y. TIMES, July 4, 1997, at A19 ("Mythologizing the revolutionary 'fathers' sets an impossible standard for subsequent generations, feeding a self-destructive disillusionment with contemporary politics and politicians."). In light of his recent comments about our "generation of midgets," Bruce Ackerman might heed the words that follow in Maier's editorial: "Because John Adams understood that, he kept telling young Americans that his generation was no better than theirs. By comparison with the 1820's, our reservoir of talent is enormous." *Id.*

[282] LOWENTHAL, *supra* note 101, at ix.

serves."[283] Whether we call it myth, mythistory or heritage, we cannot find relief in the telling of tales.

We might, then, seek the aid of other disciplined approaches to legal and constitutional interpretation in order to constrain us in useful ways without returning to the chimerical search for certainty in the past. We could seek a revival of reasoned argument, pride in craft, renewed interest in the basics of the legal process, awareness of the web of background understandings and practices that make up legal methodology, and the judicious use of more definite empirical methods of fact-finding and analysis where appropriate. Before we were philosophers, theoreticians, Saussurians, postmodernists, new historicists, or other wanderers in the interdisciplinary desert, we were lawyers; and before any need to articulate or resolve abstract questions of legal theory, judges must decide cases.[284] After a steady diet of "law and," we might try plain old law again.[285]

Unfortunately, the genie can't be put back in the bottle that easily. Though we inevitably will—and should—turn to all of these traditional constraints, the story of the crisis in theory told in the first part of *The Strange Career of Legal Liberalism* makes it clear that no easy, confident return to the old standards is possible,[286] just as the issues canvassed in its second half suggest that we will find no refuge in the use of history either.

Like Kalman, and like most lawyers and legal academics, I will continue using history, mythistory, moderate originalism, old-fashioned legal craft, and any other tool that allows me to do law while retaining some measure of faith in the rightness and coherence of the enterprise. I may continue to find these approaches useful and attractive. But with the vision of law in crisis compassionately but implacably set out in *The Strange Career of Legal Liberalism*, it will be no easier to escape the queasy feeling that the

---

[283] *Id.* at 250.

[284] *See* POSNER, *supra* note 109, at 194 (viewing the need to decide cases as "primary").

[285] *See* KALMAN, *supra* note 7, at 60-62. Kalman notes a current backlash against interdisciplinarity. *See id.* at 239-40; *see also* Farber, *supra* note 83, at 1103 ("[W]e might do better to abandon the attempt to create a theory of constitutional interpretation, and get on with the business of actually interpreting the Constitution.").

[286] Kalman's story also makes clear that the "old standards" themselves have been cast into doubt; the very idea of legal craft has been subjected to withering attack over the century, from the Realists through the Crits. The longing to return to "plain old law" may be a longing for a past that either never existed or cannot exist again. But it is still possible to find comfort in legal craft even if one believes its deeper premises are in doubt, if one believes we can at least agree to get on with the basic business of law while deferring difficult theoretical or political questions. *See, e.g.*, CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT (1996). This is also the position staked out by some modern legal pragmatists.

enterprise has been permanently undermined, that one's chosen tools of interpretation may be as illegitimate as they are attractive. Kalman demonstrates in the first half of her book that the old criticisms of legal craft still carry a bite; but even as she convinces us that the use of history in law may be a useful alternative, she leaves us equally worried about the legitimacy of *this* approach. Her tale shines a light that illuminates our progress through a dark tunnel but cannot show the way out. Crisis is all there is.[287]

[287] With apologies to Mark Tushnet. *See* TUSHNET, *supra* note 118, at 318.