

HISTORY, THEORY, AND THE CONSTITUTION

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On the occasion of this journal's tenth anniversary, readers may find profit in recalling two seminal essays on the American Constitution that may be thought of as providing an intellectual provenance for the kind of scholarship that *Constitutional Commentary* seeks to encourage. In 1934, in the midst of the Great Depression, Karl Llewellyn and Edward S. Corwin, two leading representatives of legal liberalism, assayed the nature and tendency of American constitutionalism. Llewellyn, writing with the explicit intent of laying "the foundation for an intelligent reconstruction of our constitutional law theory," offered an empirical description of the Constitution that can be regarded as a possible model for the study of constitutional history.¹ Corwin, writing as a historian of the Supreme Court and constitutional law, relied on theory to explain the significance of the New Deal for the constitutional order. Although approaching their subject from the differing standpoints of theory and history respectively, each scholar's account implicated the other's discipline.

The purpose of the present essay is to consider historical and theoretical perspectives in writing about the Constitution. It is intended to be exploratory and suggestive, continuing in a modest way a scholarly inquiry begun over two decades ago by Charles A. Miller in his illuminating study, *The Supreme Court and the Uses of History*.² To rely on history in constitutional adjudication raises a question about historiographical method. As Miller noted, it also poses a problem in legal theory.³ Miller's interest in the problem was provoked in part by changes in race relations in the 1960s, which constituted a chasm in history and required major revision in constitutional law and theory.⁴ Since

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1. Karl Llewellyn, *The Constitution As An Institution*, 34 Colum. L. Rev. 1, 3 (1934).

2. Charles A. Miller, *The Supreme Court and the Uses of History* (Harv. U. Press, 1969).

3. *Id.* at 1-2.

4. *Id.* at 115-16.

then a revival of interest in original intent jurisprudence has occurred that has stimulated further consideration of the role of history in constitutional and legal theory. At the same time, the historical profession has responded to political and social change, including specific developments in constitutional law, by becoming increasingly sensitive to normative and theoretical concerns.⁵

Part I of this essay will briefly review Llewellyn's and Corwin's analyses of the Constitution, which have intrinsic historical importance and are worthy of reflection and contemplation. Parts II and III of the essay will then examine some recent writing in constitutional history and theory, illustrating the tendency toward reciprocal involvement of each field in the other's disciplinary metier. While the inquiry seeks to clarify the nature of the knowledge and understanding of the Constitution which Americans require to carry on their political life, its approach is mainly that of historical description.

I

Rejecting the orthodox view that written and unwritten constitutions were fundamentally different in nature, Karl Llewellyn argued that the United States Constitution was "in essence not a document, but a living institution built (historically, genetically) in first instance *around* a particular Document."⁶ The United States, he said, had "the sort of constitution loosely designated as 'unwritten.'"⁷ It consisted of existing political, governmental, and legal institutions and practices, and operated through the agency of "specialists in governing," "interested groups," and the "general public."⁸ Llewellyn acknowledged that the constitutional text had "a little influence," but only "[w]here it makes no important difference which way the decision goes."⁹ The "first principle of a sane theory of our constitutional law," he asserted, was that "[w]herever there are today established practices 'under' or 'in accordance with' the Document, *it is only the prac-*

5. Michael Kammen, ed., *The Past Before Us: Contemporary Historical Writing in the United States 19-46* (Cornell U. Press, 1980), and Peter Novick, *That Noble Dream: The "Objectivity Question" and the American Historical Profession* (Cambridge U. Press, 1988).

6. Llewellyn, 34 Colum. L. Rev. at 3 (cited in note 1).

7. Id. at 2 n.5. Llewellyn acknowledged earlier writers who questioned the theory of the written Constitution, including Arthur F. Bentley and Howard L. McBain. For discussion, see Herman Belz, *The Realist Critique of Constitutionalism in the Era of Reform*, 15 Am. J. Legal Hist. 288 (1971).

8. Llewellyn, 34 Colum. L. Rev. at 19 (cited in note 1).

9. Id. at 39 (emphasis in original).

practice which can legitimize the words as still being part of our going Constitution. It is not the words which legitimize the practice."¹⁰

If governmental practice without reference to the document was the standard of constitutional legitimacy, what then became of the Constitution as a fundamental law limiting government? Where was the line to be drawn defining principles and institutions basic to the whole? Llewellyn recognized the problem, but it is hard to see how he provided a satisfactory answer. Neither in his empirical description nor in his theory were there clear lines, limits or boundaries distinguishing the "working constitution" from "mere working government." Llewellyn wrote: "[w]hatever one takes as being this working Constitution, he will find the edges of his chosen material not sharp, but penumbra-like. And the penumbra will of necessity be in constant flux."¹¹ When questions arose in "the penumbra-border of the Constitution" as to whether a change should be approved, recourse could not be had to a definite institution because none was definite on the point at issue. "The appeal must therefore be . . . to a normative *ideal* of what the institution in question *should* be and do," Llewellyn reasoned.¹² In like manner, explaining how the Constitution restrained the power of government officials, he said it was "the job of the [Supreme] Court . . . to *control* the course of governmental practice by reference to an ideal not found in that practice, but in the nature of what our government should be."¹³ To rely on "the language of the Document and its 'intent'" as a standard for constitutional interpretation, Llewellyn concluded, in contrast to the "development-tendency of existing and formative practice," was to "offer a basis utterly self-inconsistent, unworkable, and heavy with the fragrance of a charnel-house."¹⁴

Edward S. Corwin presented a similar assessment of the tendency of American constitutionalism. Analyzing the National Industrial Recovery Act as the cynosure of the New Deal, Corwin described the Act as "declaratory . . . of certain legal principles which it is hoped will prove to be adapted to the present economic situation of the United States." But the principles in this "declaratory statute" were not in the Constitution, or at least they received little illumination from the twenty or so words in the text that Corwin said had any bearing on the subject. "The

10. Id. at 12 (emphasis in original).

11. Id. at 26.

12. Id. at 28 (emphasis in original).

13. Id. at 39 (emphasis in original).

14. Id. at 28.

problem," he observed, "is one rather of Constitutional law and theory."¹⁵

Corwin stated that the N.I.R.A. rested on the theory of "the solidarity of American business" and the power of Congress to regulate "the whole business structure." It was not based on the Commerce Clause, which limited congressional power to commerce among the states, nor on the traditional theory that the national government had only the powers clearly delegated to it. To justify the statute in constitutional theory, Corwin invoked history. He argued that the commerce power in fact had never been confined to regulating acts of commerce among the states, but extended to noncommercial matters insofar as it included the safeguarding of commerce. A major effect of the N.I.R.A., a form of centralized economic regulation, was to destroy the federal system by driving the states from the field of economic regulation or subordinating their powers to the supreme power of Congress. Again Corwin's justification of this doctrinal development was historical: "in the field of business relations state power has long been moribund, so that the N.I.R.A. simply recognizes and gives effect to a Constitutional theory which is the counterpart of a condition already long established in the facts of our everyday economic life."¹⁶

In Corwin's view, the New Deal signified a revolution in the understanding of the basic constitutional principles of federalism, judicial review, and the separation of powers.¹⁷ Underlying these theoretical changes, and linking his analysis both to Llewellyn's assessment and to constitutional theory a half century later, was Corwin's untroubled assumption that "the Constitution of the United States can accommodate itself to the revolution which the N.I.R.A. undoubtedly does spell." Ultimately Corwin perceived "a change in the character of the Constitution itself." In this he saw a historical parallel between English and American constitutionalism. In 1400 Magna Charta was the English Constitution in great part, yet by 1700 that document "had been absorbed into a vast complexus of environing institutions." The same thing was now happening to the American Constitution. The Constitution,

15. Edward S. Corwin, *Some Probable Repercussions of "Nira" on Our Constitutional System*, 172 *Annals Am. Acad. Pol. & Soc. Sci.* 139, 139-40 (1934).

16. *Id.* at 140-41.

17. Corwin said that although the end of the federal-state balance removed a major rationale for judicial intervention in national policy making, judicial review would continue "in behalf of the helpless and oppressed against local injustice and prejudice." He also predicted that fusion of powers and cooperation among the branches of government would supersede the ideas of separation and competition on which the constitutional system was originally based. *Id.* at 142.

Corwin reasoned, would become absorbed into the governmental revolution that the New Deal augured, and Americans' attitude toward the Constitution "will consequently become less legalistic and more political. We shall value it for the aid it lends to considered social purpose, not as a lawyers' document." Corwin thus described a transforming historical development with far-reaching theoretical consequences.¹⁸

Corwin and Llewellyn implicate history in the broadest sense in their view of momentous political and social change signaling the decline of legal-formalist constitutionalism and the advent of the unwritten constitution as a conceptual framework of American government. Consisting of existing governmental institutions and practices shaped by social forces, the unwritten constitution represented the historicization of the constitutional text. As a theoretical construct, it explained what happens to a charter of fundamental law under the ravages of time. The Constitution becomes, in the characterization later employed by Supreme Court Justice Felix Frankfurter, "a stream of history."¹⁹ To know and understand what the constitution is, therefore, requires historical inquiry, and a different type of inquiry from that associated with a written constitution. The latter entails an understanding of history as discrete events and the objective, immanent meaning and intent of specific actions and decisions. Unwritten, political constitutionalism, in contrast, depends upon a concept of history as ongoing process, growth, and development.²⁰

As constitutional theory implicates history, so any account of constitutional history rests on certain theoretical assumptions. In order to decide what kind of evidence to consult, it is necessary to have in mind an idea of the nature and scope of the Constitution, or what constitutes it. Furthermore, the purpose of constitutional history, like any other historical inquiry, may involve normative concerns raising questions of political theory and moral philosophy. Concerned as it is with knowledge of past decisions and actions that may have a direct bearing on questions of policy, constitutional history may be more subject to normative-theoretical demands than scholarship in fields that have less immediate practical import.

18. *Id.* at 144.

19. Quoted in Sanford Levinson, *Constitutional Faith* 33 (Princeton U. Press, 1988).

20. Miller, *The Supreme Court and the Uses of History* at 25-26, 191-92 (cited in note 2).

Rereading the essays of Llewellyn and Corwin half a century later naturally invites reflection on the accuracy of their assessment of American constitutionalism. Do they offer, in essence, a prolegomenon to contemporary constitutional scholarship?

In many respects Corwin and Llewellyn appear as far-sighted, perspicacious observers. A generation after they described the triumph of political constitutionalism over declaratory jurisprudence and legal formalism, public law scholars generally accepted political jurisprudence in theoretical and empirical terms.²¹ Even the process jurisprudence of the 1940s and 1950s, which was a reaction to legal realism, conceded the substantially political nature of constitutional adjudication.²² Since Corwin and Llewellyn wrote, moreover, several scholars have elaborated the concept of an unwritten constitution in explaining the nature of American constitutionalism.²³ And it seems unnecessary to add that the project of reconstructing constitutional theory, initiated especially by Llewellyn with his prescient reference to penumbras in constant flux, has flourished in recent years as legal commentators try to rationalize the expansion of judicial policy-making.²⁴

Yet there is evidence that legal-formalist constitutionalism, which Llewellyn and Corwin considered to be historically exhausted, has not only persisted in the post-New Deal era, but has experienced something of a revival.²⁵ Perhaps the clearest indication of formalist survival is the aggrandizement of constitutional law as an instrument of judicial governance. One can assume of course that despite formal appearances all constitutional adjudication is politically willful and subjective. But then it becomes necessary to ask why legal-juridical forms must be

21. Sotirios A. Barber, *Normative Theory, the 'New Institutionalism,' and the Future of Public Law*, 3 *Stud. Amer. Pol. Dev.* 56, 57 (1989).

22. G. Edward White, *The American Judicial Tradition* (Oxford U. Press, 1976).

23. Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 *Stan. L. Rev.* 703 (1975); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 *Stan. L. Rev.* 843 (1978); Stephen R. Munzer and James W. Nickel, *Does the Constitution Mean What It Always Meant?*, 77 *Colum. L. Rev.* 1029 (1977); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 *U. Chi. L. Rev.* 1127 (1987); Michael Zuckert, *Epistemology and Hermeneutics in the Constitutional Jurisprudence of John Marshall*, in Thomas C. Shevory, ed., *John Marshall's Achievement: Law, Politics, and Constitutional Interpretations* 202-15 (Greenwood Press, 1989); Robert F. Nagel, *Constitutional Cultures: The Mentality and Consequences of Judicial Review* 1-26 (U. of Cal. Press, 1989) ("Constitutional Cultures").

24. See, for example, Philip Bobbitt, *Constitutional Fate* (Oxford U. Press, 1982); Sotirios A. Barber, *On What The Constitution Means* (Johns Hopkins U. Press, 1984); Ronald Dworkin, *Law's Empire* (Belknap Press, 1986); Cass R. Sunstein, *The Partial Constitution* (Harv. U. Press, 1993).

25. See Nagel, *Constitutional Cultures* at 121-55 (cited in note 23).

maintained. Why does not the Supreme Court candidly acknowledge, for example, that its decisions are based on an unwritten constitution and laws when, in the opinion of many scholars, this is so obviously the case?²⁶ Perhaps the reason is that principles, forms and procedures are essential elements of constitutionalism. Accordingly the formal, written Constitution continues to have great practical importance in shaping the course of American political life.²⁷

The resuscitation of original intent thinking, which began in the 1970s, occurred *when* it did because of substantive objections in the society to many Supreme Court decisions in the previous decade. The reasons *why* it occurred, however, concern the very nature of constitutional government in the United States. In the deepest sense the concept of Framers' intent as an approach to constitutional adjudication, and the corollary interpretive method of textualism, reflects the fact that the American Constitution is not simply or primarily an ongoing historical process. It is a written document, adopted at a particular point in history (and subsequently amended), that signifies political action and purpose of the most fundamental sort, namely, the founding of a regime. Critics of original intent, citing epistemological and other difficulties, labor mightily to discount if not dismiss the solid grounding in empirical fact on which this approach to constitutional decision-making rests. They labor in vain, however, because the history of the making of the Constitution, abundantly documented despite inevitable lacunae, prevents it from being dissolved into some immemorial past—or transformed into an assemblage of existing political institutions and practices.

Writing before the revival of original intent jurisprudence, Charles Miller observed:

Neither the clinical destruction of the Court's use of history through legal scholarship nor outright advocacy of forward-looking decisions has been able to tear up traditions of constitutional and judicial thinking deeply rooted in the American political culture. The ties of the Constitution are to the past, and when history calls the justices strain to listen.²⁸

26. Leslie Friedman Goldstein, *In Defense of the Text: Democracy and Constitutional Theory* 67 (Rowman & Littlefield, 1991) ("In Defense of the Text").

27. Harvey C. Mansfield, Jr., *America's Constitutional Soul* (Johns Hopkins U. Press, 1991).

28. Miller, *The Supreme Court and the Uses of History* at 51 (cited in note 2). Miller's reference to an attempted destruction of judicial reliance on history is a reference to Jacobus ten Broek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 26 and 27 Cal. L. Rev. 437, 664 (1938) and 157, 399 (1939).

A generation later Paul Kahn, surveying the history of constitutional theory, made the same point in stating that constitutional law is a historical enterprise: "In recognizing its authority, citizens recognize the continuity of the past with the present. In respecting the Constitution as law, they respect the authority of past political acts over present community preferences."²⁹

If Llewellyn and Corwin failed to appreciate the necessity and enduring appeal of legal-formalist elements in the regime, their analyses are nevertheless instructive for the reflection they provoke on history and theory in constitutional interpretation. Both historical knowledge of the purpose of the Constitution, and theoretical understanding of basic constitutional principles, are essential to maintaining the American regime as a lawful system of government. History and theory as separate disciplines contribute to constitutional maintenance. Yet the question of the scope and precise limits of the two fields warrants further investigation. A review of some recent writings on the Constitution suggests a more complicated interdisciplinary tendency in which practitioners in each field employ the methods and engage some of the concerns of the other.

II

History is usually thought of as a nontheoretical inquiry, in comparison with philosophy, law, and political science, all of which it is allied with in constitutional scholarship. Historians like to talk about evidence and methods; they regard theory as speculative and hypothetical. This restraint is warranted, for theory is difficult to define and hard to know how to use in a disciplined way. Theory can refer to systematically organized knowledge that is applicable in a variety of circumstances, to a set of assumptions, principles, and rules of procedure devised to analyze, predict, or explain the nature or behavior of a set of phenomena, or simply to abstract reasoning and speculation. As used in public law scholarship, theory has a decidedly normative connotation. It expresses opinion and belief about what the Constitution and the laws ought to be, rather than empirical description of what they are or were in the past. Indeed, contemporary legal commentary has been described as pervasively

29. Paul W. Kahn, *Legitimacy and History: Self-Government in American Constitutional Theory* 189 (Yale U. Press, 1992) ("*Legitimacy and History*").

normative in the sense of being grounded in various conceptions of justice.³⁰

History that aims at an objective factual account of past events is often considered to be untheoretical antiquarianism.³¹ Yet in a strict sense any type of historical inquiry rests on theoretical assumptions. In his attack on original intent historicism, Jacobus ten Broek noted that the historical approach rests on logic, or theory. It assumes that the intent of a constitutional provision can be discovered by identifying matters that demanded treatment by constitution makers, on the theory that ideas which were part of the climate of opinion or which resulted from current problems must have been in the minds of the authors of the text.³² The purpose of inquiries into legal history, moreover, is often to resolve contemporary legal controversies.

William Nelson, a liberal legal historian, has argued that conservative original intent scholars on the one hand and radical devotees of critical legal studies on the other use history to resolve present problems.³³ Yet if liberal historians have been unsuccessful in illuminating legal policy questions, it has not been for want of trying. A glance at recent legal historiography suggests that liberal scholars, no less than other historians, have been theoretically inclined in the sense of joining history with normative philosophical considerations to help solve current problems.

The tradition of external legal history, defined in relation to social and economic forces rather than the formal doctrines of internal legal history, is self-consciously instrumental. James Willard Hurst, the founder of law-and-society historiography, took for granted the reformist ends of social science and legal realism in the 1930s in his effort to re-direct legal history away from technical professional concerns. Hurst viewed law as a social institution, an instrument of individual, group, and community purpose rather than a self-contained body of autonomous principles and rules. Hurstian legal history aimed at measuring the actual past performance of government against man's potential for rational control of his environment and decision-making. It provided a

30. Peter H. Schuck, *Public Law Litigation and Social Reform*, 102 Yale L.J. 1763, 1764 (1993) (book review).

31. William M. Wiecek, *The Constitutional Snipe Hunt*, 23 Rutgers L.J. 253, 254 (1992).

32. ten Broek, 26 Cal. L. Rev. at 677 (cited in note 28). ten Broek denied that facts now apparent can be assumed to have presented themselves to the framers of a constitution in the same light and with the same force as they now appear to a historical observer.

33. William E. Nelson, *New Directions in American Legal History*, 4 Benchmark 283, 284-86 (1990).

standard by which the present generation of lawyers could determine the circumstances that best promoted the intelligent direction of society in favor of growth.³⁴

Normative moral ends were more explicitly avowed in Paul Murphy's appeal in the early 1960s to historians to reclaim the field of constitutional history from lawyers and political scientists. Issuing a kind of liberal manifesto for the era of judicial activism that was then beginning, Murphy advocated the use of history to promote social change. The theoretical basis of the project he envisioned was the assumption that the judicial function tends naturally to historical study to discover the precise locus of constitutional language, and to ascertain its thrust, implications, and over-all justification. Murphy proposed a "new role" for constitutional history "as an auxiliary tool for the jurist, not for 'the consecration of an already established order of things,' but for a new order seeking a new level of equal rights and social justice through law."³⁵

In the 1970s radical historians, updating the theory of legal realism, began to challenge the normative perspective of liberal legal history. To proponents of critical legal studies, the work of the Hurst school appeared as pragmatic functionalism signifying political acceptance of the existing order. In an early statement of the radical argument, Morton Horwitz asserted that legal history should no longer be content with justifying the world as it is, but should penetrate the distinction between law and politics. It should view jurisprudential change as the product of social forces and political struggle.³⁶ In more mature form this argument became an explicit plea for historians to take up questions of legal and political theory. According to Horwitz, legal theory inevitably uses history to show how existing arrangements were created and legitimized. By the same token, historical interpretation serves as a proxy for more general controversies over political theory. When, for example, historians argue over whether liberalism or republicanism was the ideology of the American Revolution, they are really debating the primacy of politics and substantive visions of the good society. "It is time for us to

34. James Willard Hurst, *Legal History: A Research Program*, 1942 Wis. L. Rev. 323, 323-33; James Willard Hurst, *Law and Social Process in United States History* 1-15 (U. of Mich. Law School, 1960); Robert W. Gordon, *J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 Law & Soc. Rev. 9, 48 (1975).

35. Paul L. Murphy, *Time to Reclaim: The Current Challenge of American Constitutional History*, 69 Am. Hist. Rev. 64, 74-77 (1963).

36. Morton J. Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 Am. J. Legal Hist. 275, 281 (1973).

bridge the chasm between legal theory and legal history," Horwitz urges.³⁷

Robert Gordon contends that history in general liberates the political imagination by revealing suppressed alternatives, and radical history discloses the fact that the rule of law is really "a teeming jungle of plural, contradictory, orders struggling for recognition and dominance." In the politics of radical reformation, the role of history is "to describe as concretely as possible how constraints upon freedom get socially manufactured and how people acting collectively through politics sometimes succeed and sometimes fail in breaking through the constraints."³⁸ According to Gordon, radical legal history teaches the "political lesson" that there exist, "immanent in such familiar ideals and institutions as private property and free contract, possibilities for transforming the society and economy in more democratic and egalitarian . . . directions."³⁹

The result of uniting history and theory can be seen in the Bicentennial symposium of the Organization of American Historians. Repudiating the traditional concern of constitutional history with constitutional maintenance, the symposium authors build their accounts around the idea of constitutional aspiration popular among legal theorists. Undertaking "the social construction of constitutional history," they describe how "disinherited groups" "have made aspirations to a life free from legally recognized hierarchies—to a life without the badges and incidents of slavery—into a superconstitution that has taken precedence over any merely transitory determination of constitutional meaning." The effect of this reconstruction of constitutional history, speculates Hendrik Hartog, may be the rejection of "notions of a distinctly legal or constitutional history, abandoning a perspective founded on the American Constitution's separation from the indeterminacies of American social and political history."⁴⁰

Despite its growing professional acceptance, the trend toward explicitly normative historiography has provoked dissent. The constitutional historian Alfred Kelly, after first-hand experience using history to promote legal reform in the school desegre-

37. Morton J. Horwitz, *History and Theory*, 96 Yale L.J. 1825, 1830, 1832, 1835 (1987).

38. Robert W. Gordon, *An Exchange on Critical Legal Studies between Robert W. Gordon and William Nelson*, 6 Law & Hist. Rev. 139, 181-82 (1988).

39. Robert W. Gordon, *The Politics of Legal History and the Search for a Usable Past*, 4 Benchmark 269, 280 (1990).

40. Hendrik Hartog, *The Constitution of Aspiration and 'The Rights That Belong to Us All'*, 74 J. Amer. Hist. 1013, 1024, 1029 (1987).

gation cases, condemned the types of history found in constitutional adjudication. This consisted of a priori history, created by judicial fiat, and law-office history aimed at selection of data favorable to a position. Questioning whether court-oriented history and scholarly history were reconcilable, Kelly held that truth in history was independent of its usefulness.⁴¹ Similarly Charles Miller, though fully sensitive to the normative use of history to transmit values, cautioned against reliance on ideologically charged "ongoing" history by the Supreme Court. Miller declared: "The Supreme Court as a whole cannot indulge in historical fabrication without thereby appearing to approve the deterioration of truth as a criterion for communication in public affairs. . . . where it matters most to society, it matters most that the story be a true one."⁴²

A recent convert to nontheoretical, objective history is William Nelson, who concedes the failure of his own efforts to show the utility of legal history in contemporary legal analysis. Criticizing the normative-theoretical bent of both the original-intent school and the critical legal studies movement, he appeals to a pure, genuinely historical inquiry that studies the past for its own sake.⁴³ Michael Les Benedict similarly sees a clear distinction between genuine historical inquiry and legal scholarship that uses historical materials. The legal scholar is committed to settling a policy question and uses judicially tested rules of evidence to evaluate evidence. The historian seeks to explain change over time, showing how events occurred to produce the present state of affairs. Benedict observes further that legal scholarship using history tends toward advocacy, while historical inquiry eschews judgment and accepts ambiguities in the evidence. It does not force the evidence to yield a definite conclusion.⁴⁴

Benedict's historiographical analysis may be more heuristic than empirical. While disavowing a normative task for history, he himself employs theoretical premises. Historians assume, he tells us, that historical actors do not have firm intentions and clear understandings about events they are involved in. Historians assume further that understandings will change over time and intentions will go awry.⁴⁵ Benedict's "historical principles of

41. Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 Sup. Ct. Rev. 119, 122, 157.

42. Miller, *The Supreme Court and the Uses of History* at 195-96 (cited in note 2).

43. Nelson, 4 *Benchmark* at 284-91 (cited in note 33).

44. Michael Les Benedict, *Book Review*, 10 *Law & Hist. Rev.* 378, 379-80 (1992).

45. *Id.* at 380.

analysis" implicate a philosophy of history that is no less important for being presented in a theoretically modest way.

III

If it is hard to disentangle history from philosophy, it is equally difficult to extricate theory from the toils of history. At first glance the pursuit of legal theory, in its eager embrace of moral philosophy, seems remote from the pedestrian factuality of history. History must nevertheless be taken into account, for constitutional and legal theorists recognize that their normative arguments will gain in persuasiveness if supported by evidence of the actual experience of human thought and action in the past.

Theory, including political science, is integral to American constitutionalism. At the start of the twentieth century constitutional theory became preoccupied with the justification of judicial review, the famous "countermajoritarian difficulty" which inspired a rich body of criticism through the 1960s.⁴⁶ In the past two decades constitutional theorizing has assumed a new level of urgency. This is in large part a response to the historicist challenge to judicial activism thrown down by the proponents of original intent jurisprudence. William Wiecek notes that the coherence of constitutional theory disintegrated in the 1980s as debate focused on the Framers' intent and the use of history in constitutional adjudication.⁴⁷ The fight over the Bork nomination in 1987 signified fundamental conflict over constitutional philosophy and theory.⁴⁸

The varieties of constitutional theory can be bewildering.⁴⁹ For present purposes it is sufficient to note the basic distinction between those who appeal to the Constitution as an authoritative historical document having a substantially fixed, objective meaning, and those who conceive of the Constitution as a text of largely symbolic import that enables interpreters to appeal elsewhere for authority to decide constitutional questions. We shall

46. Robert Lowry Clinton, *Marbury v. Madison and Judicial Review* (U. Press of Kansas, 1989).

47. William M. Wiecek, *Liberty Under Law: The Supreme Court in American Life* 2, 190 (Johns Hopkins U. Press, 1988).

48. Goldstein, *In Defense of the Text* at 1 (cited in note 26).

49. Goldstein enumerates the following theories: intentionalism and textualism (often considered as a single theory under the name of originalism or interpretivism); extratextualism (also called fundamental values jurisprudence or noninterpretivism); indeterminacy; and Dworkinism. *Id.* at 2. Lief Carter identifies interpretivism (which he calls preservatism), and political and normative alternatives to interpretivism. Lief H. Carter, *Contemporary Constitutional Lawmaking: The Supreme Court and the Art of Politics* (Pergamon Press, 1985) ("*Contemporary Constitutional Lawmaking*").

note the response of representative theorists on both sides of this distinction to the fundamental requirement that history be taken into account in constitutional interpretation.

Radical historicism figures prominently in the writing of several theorists who adopt the second of these views, and who can be considered in the "fundamental values" school. The defining feature of radical historicism is the idea that the Constitution, although it has a history, never has a historical meaning, but always and only a current meaning.

In the theory of Ronald Dworkin, for example, law is the rights and duties that flow from past collective decisions. Judges are not required, however, to understand the law they enforce as continuous and consistent in principle with the law of the past. "Law as integrity," he explains, "begins in the present and pursues the past only so far as and in the way its contemporary focus dictates." It does not aim to recapture the ideals or practical purposes of those who created it.⁵⁰ Hercules, Dworkin's fabled judge-interpreter, seeks in statutory and constitutional construction "to make the best he can of this continuing story [i.e. the life of the statute or constitution], and his interpretation therefore changes as the story develops." Making the story the best it can be, Hercules "interprets history in motion."⁵¹ Dworkin rejects the historical approach of original intent interpretivism because it makes the Framers' mental state decisive in reading the abstract language of the Constitution. It thus denies that the Constitution expresses principles. Asserting that constitutional principles do not stop "where some historical statesman's time, imagination, and interest stopped," Dworkin avows a "thoughtful" historicism that retrieves the Framers' abstract convictions and asks how they can be best understood in contemporary terms.⁵²

David Richards argues similarly that legal interpretation is a form of historical reconstruction by which a community understands itself as a legal tradition. According to Richards, sound legal interpretation requires critical historiography, in contrast to the providential and mythical history often found in legal arguments. Richards attacks Raoul Berger's original intent historicism as an abuse of critical historiography because it does not fit the available data. Berger's history is flawed as a theory of interpretation because it identifies the meaning of the Constitution

50. Dworkin, *Law's Empire* at 227 (cited in note 24).

51. *Id.* at 348, 350.

52. *Id.* at 369, 361.

with the Framers' subjective intent. It is also inadequate as political theory because it rests on an indefensible notion of popular sovereignty.⁵³ Richards advocates a type of historical reconstruction in which the facts bearing on the central texts of the legal tradition are used to provide the best theory of the values constituting the tradition.⁵⁴ "[G]ood legal interpretation," he declares, "requires that history and moral philosophy be practiced together."⁵⁵ But in Richards's scheme the meaning of a political theory or constitutional principle is never something objective to be discovered in the past; it is a contemporary philosophical conception. He concludes that constitutional interpretation is best understood "as the imputation of reasonable purposes to the text and history of the Constitution."⁵⁶

A different concept of history operates in the theory of constitutional aspiration. As seen in the writings of Sotirios Barber and Walter Murphy, this historical understanding is substantially different from radical historicism in a philosophical sense, although in programmatic terms the difference may be only slight. Barber's theory of aspirational constitutionalism rests on the proposition that the Constitution has a meaning—in the past, presumably, as well as in the present—that is independent of what any interpreter might want it to mean.⁵⁷ Affirming natural law principles, Barber rejects the relativist position, which denies this independent meaning and holds that a constitutional principle means different things at different times. Historical relativism cannot comprehend the Constitution as supreme law, a concept that assumes some values are fundamental and transhistorical.⁵⁸ At the same time, Barber avoids the pole of positivistic conventionalism. He argues that the Constitution embodies the nation's traditions, not simply its history in the sense of the indiscriminate past. Tradition in this view is different from the past. It is a normative theory of what we stand for and what has been best in us as a people.⁵⁹

Aspirational historicism rejects original intent historicism, with its focus on a single, discoverable intent and the specific

53. David A.J. Richards, *Interpretation and Historiography*, 58 S. Cal. L. Rev. 490, 512, 505, 509 (1985).

54. *Id.* at 501.

55. *Id.* at 548.

56. *Id.* at 527. For a concise statement of the epistemological theory of radical historicism, see Gregory Leyh, *Toward a Constitutional Hermeneutics*, 32 Amer. J. Pol. Sci. 369 (1988).

57. Barber, *On What the Constitution Means* at 7 (cited in note 24).

58. *Id.* at 36.

59. *Id.* at 84-85.

ideas of the Framers as the key to understanding the meaning of constitutional principles.⁶⁰ Aspirational theorists nevertheless recognize the significance of empirical research and find examples of constitutional aspiration in history.⁶¹ The work of Walter Murphy has been described as a natural law theory, built largely out of historical materials of law and politics in action, that finds a coherent vision of the lessons of constitutional history.⁶²

A more astringent theory of constitutional aspiration seeks to recover the meaning of constitutional principles as the Framers understood them. In this historical outlook, constitutional concepts are not merely symbolic abstractions that permit boundless interpretive possibilities for those who would improve on the work of the Founders.⁶³ Gary Jacobsohn, for example, holds that the Constitution embodies our aspirations, but he rejects the idea that to be supreme it must always be "reaffirmed as descriptive of our best current conception of an ideal state of affairs."⁶⁴ Analyzing Lincoln's statesmanship as the preeminent example of constitutional aspiration, Jacobsohn emphasizes Lincoln's interpretation of the Constitution in relation to the moral theory of the Founders. "Only in the framework of this particular association," he reasons, "may the Constitution be understood to embody the nation's aspirations."⁶⁵ Rejecting both the undisciplined subjectivism of unwritten constitutionalism and the parsimonious positivism of original-intent historicism, Jacobsohn understands the Constitution as "flow[ing] out of a coherent and knowable, not arbitrary or ever-mutable, set of philosophic presuppositions."⁶⁶

The theoretical writing of Hadley Arkes further illustrates what we may refer to as a nonhistoricist historical inquiry aimed at understanding constitutional principles as the Framers understood them.⁶⁷ According to Arkes, in order to defend, justify, and preserve the Constitution it is necessary to establish its es-

60. Walter F. Murphy, *Constitutional Interpretation: The Art of the Historian, Magician, or Statesman?*, 87 *Yale L.J.* 1752, 1764 (1978).

61. Barber, 3 *Stud. Amer. Pol. Dev.* at 68 (cited in note 21).

62. Carter, *Contemporary Constitutional Lawmaking* at 123, 125-26 (cited in note 49). See Walter F. Murphy et al., *American Constitutional Interpretation* (Foundation Press, 1986).

63. Gary J. Jacobsohn, *The Supreme Court and the Decline of Constitutional Aspiration* 95 (Rowman & Littlefield, 1986).

64. *Id.* at 96. The quoted material and view criticized are those of Sotirios A. Barber.

65. *Id.*

66. *Id.* at 75.

67. The idea and the necessity of nonhistoricist historical inquiry is discussed in Leo Strauss, *Natural Right and History* 33-34 (U. of Chi. Press, 1953).

sential character or meaning. This is not a historicist meaning that changes with the passing generations; it is a philosophical meaning and moral understanding, grounded in modern natural rights theory, that can be grasped again. "To restore those understandings is not to engage in a quaint project in 'historical' reconstruction," Arkes observes. It is a task of philosophical recovery and reflection on principles that have a timeless historical existence. The purpose of this type of inquiry, Arkes writes, is "to recall the arguments of the Founders themselves in order to restore" their original understanding that "it was necessary to move . . . beyond the text of the Constitution to the principles of right and wrong that stood antecedent to the Constitution."⁶⁸ Arkes proposes "to state anew, and perhaps state more fully, the issues that were raised" in the debate over the Constitution and the Bill of Rights. In order to apply the Constitution in practical cases and preserve and perfect constitutional government, he declares, "[t]here is a need to know again what was known by these men."⁶⁹

It is generally agreed that the Framers were natural law thinkers who relied on modern natural rights theory. Sound historical method, in order to understand the Framers as they understood themselves, should therefore be open to the possibility that philosophical truth or moral reality exists.⁷⁰ This historical attitude is disputed by radical historicism on the left (informed by pragmatism and cognitive relativism), and by original-intent historicism on the right (informed by legal positivism).

It is ironic that while originalist scholars have forced legal theorists to take history into account, they have been somewhat reticent about the type of historical thinking that original intent jurisprudence requires. The writings of Raoul Berger, the most prolific originalist legal historian, appear to rest on the assumption that historical facts are objectively knowable, that the past exists independently of the way it is interpreted and does not change, and that applying the past to the present is simply a matter of getting the historical facts straight.⁷¹ Whether this approach to history is sound is not the issue, or at least it is not an

68. Hadley Arkes, *Beyond the Constitution* 17-18 (Princeton U. Press, 1990).

69. *Id.* at 19-20.

70. For discussion of this outlook see Michael S. Moore, *Do We Have an Unwritten Constitution?*, 63 S. Cal. L. Rev. 107 (1989), Stanley C. Brubaker, *What Constitutes 'this Constitution'?* (unpublished paper presented at the 1990 Annual Meeting of the American Political Science Association), and *Conserving the Constitution*, 1987 Am. B. Found. Res. J. 261.

71. William M. Wiecek, *Clio As Hostage: The United States Supreme Court and the Uses of History*, 24 Cal. W. L. Rev. 227, 266 (1987).

issue that originalist scholars feel obliged to discuss.⁷² Their task rather has been to explain in normative terms why constitutional original intent, which they assume can be ascertained as readily as the purpose or intent of any other historical event or idea, should be relied on in constitutional adjudication.

The reasons for employing original intent include considerations of democratic political theory, the rule of law, neutrality in judicial decision-making, and governmental flexibility and responsiveness. According to Earl Maltz, originalism and original intent are labels for a set of conventions reflecting a political theory about the judicial function. Maltz argues that modern theory, not traditionalism or an obligation to the past, requires fidelity to Framers intent.⁷³ Thus, although original intent thinking is in some sense historical by definition, there is an element of truth in John Phillip Reid's assertion that original intent jurisprudence is more accurately seen as a rejection of judicial activism, rather than "a respect for constitutional meaning discovered through the discipline of history."⁷⁴

The best known recent work of originalist scholarship, Robert H. Bork's *The Tempting of America*,⁷⁵ presents very little, if any, historical evidence that original intent was ever a practical and effective method of constitutional adjudication. Bork's theory of judging is not supported by his history, which is a tale of judicial legislation from John Marshall to Thurgood Marshall.⁷⁶ A more illuminating account written from an original intent point of view is Christopher Wolfe's *The Rise of Modern Judicial Review*.⁷⁷

Wolfe attempts to show that interpretivism, or constitutional interpretation in accordance with the Framers' purpose and intent, was standard judicial practice in the nineteenth century. He argues that John Marshall, for example, relied on intrinsic and extrinsic sources of intent, with a view toward discovering what

72. Although this concept of historical method is held in intellectual disrepute among theorists of historiography, the practice of historians suggests there may be substantial truth in it.

73. Earl Maltz, *Foreword: The Appeal of Originalism*, 1987 Utah L. Rev. 773, 800, and *Some New Thoughts on an Old Problem—The Role of the Intent of the Framers in Constitutional Theory*, 63 B.U. L. Rev. 811 (1983).

74. John Phillip Reid, *Originalism and Subjectivism in the Bicentennial Year*, 68 Soc. Sci. Q. 687, 700 (1987).

75. Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (The Free Press, 1990).

76. Brubaker, *What Constitutes 'this Constitution'?* at 28 (cited in note 70).

77. Christopher Wolfe, *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law* (Basic Books, 1986) ("*Rise of Modern Judicial Review*").

the Framers meant by the principles they embodied in the Constitution.⁷⁸ Wolfe's concept of original intent recognizes the role of prudence in the performance of the judicial function and is different from Berger's and Bork's positivist conception.⁷⁹ A more philosophically precise description would say Wolfe seeks to determine the real or intrinsic meaning—as opposed to either original or current meaning—of the Constitution.⁸⁰ In the context of the present analysis, however, the important point is Wolfe's attempt to demonstrate the possibility of objective constitutional interpretation, as a theoretical matter, by making a good-faith effort to be faithful to the Constitution through historical reenactment of the process of interpretation.⁸¹

To conclude this brief survey we consider a different kind of historical reenactment, tending toward radical historicism and recalling the legal realism with which we began, that has been proposed by the constitutional theorist Bruce Ackerman. Criticizing the ahistorical character of much constitutional theory, Ackerman urges “a reflective study of the past” to determine “the concrete historical processes” that allowed Americans to transform moments of passionate political mobilization into lasting legal achievement.⁸² The result of his historical inquiry is the theory of dualist democracy, describing how the people at decisive historical moments amend the Constitution through the practice of constitutional—as opposed to normal—politics. Ackerman claims the authority of the Framers for this theory. As they made the original Constitution by acting illegally outside the Articles of Confederation, so later generations properly emulate them by creatively altering the regime (in reality creating new regimes as in Reconstruction and the New Deal), through the exercise of the de facto amending power inherent in popular sovereignty. In the legal realist spirit of Llewellyn and Corwin, Ackerman views the Constitution as “a historically rooted tradition of theory and practice—an evolving language of politics” and “historical practice.” He evokes their unwritten, political constitutionalism in asserting that the basic reality is the radically different government Americans have made for themselves, to which the paper

78. *Id.* at 49-50.

79. *Id.* at 37, 71, 85, 88.

80. Brubaker, *What Constitutes 'this Constitution'?* at 37 (cited in note 70).

81. Wolfe, *Rise of Modern Judicial Review* at 14 (cited in note 77). Similar in methodology and in historiographical significance is Richard A. Maidment, *The Judicial Response to the New Deal: The US Supreme Court and Economic Regulation, 1934-1936* (Manchester U. Press, 1991).

82. Bruce Ackerman, *We The People: Foundations* 17, 22 (Belknap Press, 1991).

or ceremonial Constitution is adapted.⁸³ Ackerman's radical historicism convinces him that we are not "rootless epigones of bygone eras of constitutional creativity." By rewriting history, the constitutional theorist can recover "the distinctive aspirations of the American Republic."⁸⁴

History and theory are reciprocally related in American constitutionalism. To assist in realizing the ends of constitutional government in the United States, theory must take account of history.⁸⁵ At the same time, the historical knowledge that is essential for maintaining the Constitution has a normative dimension. This is not to endorse partisan or ideological history, any more than to say the purpose of liberal education is political is to approve the politicization of the university.⁸⁶ As education is political in aiming to produce good citizens, so history—like its sister discipline political science—has reason to be partial to the regime of liberal democracy.⁸⁷ Of course there is always the risk that history and theory will be abused in the service of ideology. In constitutional scholarship, no less than in political life generally, prudence is required in applying the principles and rules that constitute and define inquiry in the respective fields. When pursued according to rational and objective scholarly standards, however, the disciplines of history and theory can enrich each other and contribute much to the discipline of constitutionalism.

83. Id. at 22, 34-35.

84. Id. at 57. A similar goal is asserted in Sunstein, *The Partial Constitution* at 17-39 (cited in note 24).

85. Paul W. Kahn goes farther in arguing that American constitutional theory is centrally concerned with history for the reason that, after the founding generation, the state is a historical phenomenon. The task of constitutional theory is to explain how self-government is possible under the conditions of temporality in which the state exists. Kahn, *Legitimacy and History* (cited in note 29).

86. John Alvis, *Why a Proper Core Curriculum Is Political and Ought Not Be 'Politicized'*, 28 *The Intercollegiate Rev.* 28-29 (1993).

87. Ernst Breisach, *Historiography: Ancient, Medieval, & Modern* 409-10 (U. of Chi. Press, 1983); James W. Ceaser, *Liberal Democracy and Political Science* 20-24 (Johns Hopkins U. Press, 1990).