LAWYERS AND HISTORIANS ARGUE ABOUT THE CONSTITUTION

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I. INTRODUCTION

The quarrel between lawyers and historians about the proper use of history in constitutional law is an old one. It predates the rise of conservative originalism in the 1970s and 1980s. For example, the term "law office history"—now regularly employed to criticize lawyers who engage in historical arguments that are opportunistic, anachronistic, and unsophisticated—was employed by the legal historian Alfred Kelly in 1965.[1]

Kelly's target was not today's movement conservatives. He criticized the Supreme Court's practices throughout the nineteenth century.[2] Kelly especially objected to the work of liberal Justices in the 1940s, 1950s, and 1960s, who, he argued, had misused the history of the Founding to overturn older, politically conservative precedents.[3] The Justices, Kelly complained, had anachronistically invoked history "as a precedent-breaking

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1. Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122, 122 n.13 ("By 'law-office' history, I mean 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."). Kelly was no stranger to the use of history in constitutional argument; he had helped the NAACP Legal Defense Fund in preparing its historical arguments in *Brown v. Board of Education*. But he worried that in doing so he had become less of a historian and more of an advocate. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 638–40 (1977).

Although the expression "law office history" is often associated with Kelly, he was not the first to use it. *See* Paul L. Murphy, *Time to Reclaim: The Current Challenge of American Constitutional History*, 69 AM. HIST. REV. 64, 77 (1963) (associating the phrase with Howard J. Graham).

2. Kelly, *supra* note 1, at 125–26.

3. *Id.* at 130–32.

instrument, by which the Court could purport to return to the aboriginal meaning of the Constitution. It was thus able to declare that in breaking with precedent it was really maintaining constitutional continuity."[4] What historians object to today—lawyers sanctimoniously using the authority of the Founding to enact their contemporary policy preferences—was not a modern innovation, Kelly explained. It had been the Supreme Court's standard operating procedure.

The quarrel, however, is not simply one between lawyers on the one side, and historians on the other. Lawyers (including legal academics) are often much more sharply critical of each other's historical arguments than are professional historians.[5] Many law professors have been trained as historians and some hold doctorates in history. Perhaps more important, lawyers may be especially sharply critical of how other lawyers use history because they are trying to win arguments within law and legal theory. (The often heated debates over the meaning of the Second Amendment are a prime example.)[6] The adversary culture of legal argument encourages portraying opposing arguments as incomplete, mistaken, anachronistic, or wrong-headed. So lawyers find themselves on all sides of debates about how lawyers should (and should not) use history in constitutional interpretation.

Even to speak of "lawyers" as a group neglects the fact that there are many kinds of lawyers. Some are judges deciding cases. Some are advocates before courts, legislatures, and administrative

4. *Id.* at 125.

5. *See, e.g.*, Martin S. Flaherty, *Can The Quill Be Mightier than the Uzi?: History "Lite," "Law Office," and Worse Meets the Second Amendment*, 37 CARDOZO L. REV. 663, 665 (2015) (reviewing MICHAEL WALDMAN, THE SECOND AMENDMENT: A BIOGRAPHY (2014)) (denouncing "the sorry tale of misuse and manipulations" of the history of the Second Amendment by legal scholars); William G. Merkel, *Heller As Hubris, and How* McDonald v. City of Chicago *May Well Change the Constitutional World as We Know It*, 50 SANTA CLARA L. REV. 1221, 1225 (2010) ("My own objections to Justice Scalia's work product in *Heller* focus on the fact that his allegedly history-driven method depends fundamentally on numerous false historical claims.").

6. *See, e.g.*, Flaherty, *supra* note 5; Paul Finkelman, *The Living Constitution and the Second Amendment: Poor History, False Originalism, and a Very Confused Court*, 37 CARDOZO L. REV. 623, 624 (2015) ("In both *Heller* and *McDonald* the Court bases its conclusions on a false history that is, for the most part, a fantasy of the majority of the Court and opponents of reasonable firearms regulation."); Nelson Lund, *The Second Amendment,* Heller*, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1356 (2009) (arguing that Justice Scalia pronounced a wide range of gun control regulations constitutional with no historical evidence or grounding in original meaning).

agencies. Some are legal academics writing learned studies that argue for the best interpretation of constitutional provisions. And some are legal academics who study history much as professional historians do, focusing not on which interpretation of the law is correct but on how law and society developed in the way they did.

The opposition between "lawyers" and "historians" runs together two distinctions. The first opposition concerns *professional training* and *professional culture*. Lawyers are educated to be lawyers and have law degrees. They are trained in an adversary culture and they are taught to assert and dispute claims about legal authority, to enter into and win arguments about what the law is or should be. They think about history and use history in ways that reflect this adversarial culture of authority claiming.[7] Historians are trained differently. Their central task is not winning legal arguments, or establishing or demolishing legal authority. They are interested in the past for many reasons other than present-day legal debates.[8] They are taught to relish and respect ambiguity, the inevitability of multiple interpretations, the complexity and multivocality of the past, the fact that the world of the past was quite different from the world of the present, and that that the concerns and understandings of people living in the past were often very different from concerns and understandings of people living in the present.[9] This first distinction—in

7. *See* Matthew J. Festa, *Applying a Usable Past: The Use of History in Law*, 38 SETON HALL L. REV. 479, 513–14 (2008) (noting the advantages of the the distinctively adversarial culture of lawyers.); Larry D. Kramer, *When Lawyers Do History*, 72 Geo. Wash. L. Rev. 387, 395, 402–05 (2003) (noting that law is an adversarial system that uses history to claim authority); John Phillip Reid, *Law and History*, 27 LOY. L.A. L. REV. 193, 195 (1993) (arguing that law is governed by the "logic of authority" rather than the "logic of evidence") (quoting Frederic W. Maitland, *Why the History of English Law Is Not Written*, *in* 1 THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 480, 491 (H.A.L. Fisher ed., 1911)); *id.* at 195–96 ("In discovering the past, the historian weighs every bit of evidence that comes to hand. The lawyer, by contrast, is after the single authority that will settle the case at bar.").

8. *See* Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 FORDHAM L. REV. 87, 114–15 (1997) (distinguishing "lawyers' legal history" and "historians' legal history.") (quoting Richard B. Bernstein, *Charting the Bicentennial*, 87 COLUM. L. REV. 1565, 1578 (1987) and WILLIAM E. NELSON & JOHN PHILLIP REID, THE LITERATURE OF AMERICAN LEGAL HISTORY 185, 235–37, 261–87 (1985)).

9. BERNARD BAILYN, SOMETIMES AN ART: NINE ESSAYS ON HISTORY 22 (2015) ("[T]he past is a different world."); Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 FORDHAM L. REV. 935, 942–43 (2015) (arguing that the Founders' world was different in its assumptions, in its conceptual structures, and in how it used language, so that one cannot assume "that Founding-era utterances are fairly easy to understand because they were spoken and written in English.").

professional training and professional culture—is neither clear-cut nor universal, because many law professors (and some practicing lawyers) have been trained as historians and hold history PhD's.

The second, and more important, distinction concerns *rhetorical aims* and *rhetorical structure*. This is not a distinction between those people who have law degrees, practice law, sit on the bench, or teach in law schools, and those who don't. It is a distinction that concerns how one makes an argument and what one is trying to achieve in making that argument. One the one side are those I will call "legal advocates"—most but not all of whom are trained as lawyers. This group includes judges, lawyers, and citizens: anyone who wants to make—or wants to win—an argument about the proper legal interpretation of the Constitution. On the other side are those I will call "scholar-historians"—who may include people in or out of the academy, including the legal academy. This group includes those who study history for reasons other than winning legal arguments or establishing the correct interpretation of the law.

The difference between these groups does not consist in the fact that one group makes arguments and the other doesn't. (Historians can be very argumentative when they want to be!) The difference is not that one group just focuses on the facts and the other has normative values. Historians' work may be strongly normative, in their interpretations, in the presuppositions they bring to their work, in their choice of subject matter, or in all three. And the difference is not that one group's work is aimed at influencing contemporary politics and public policy and the other eschews any ambition for influence or consequences. Historians, like legal advocates, may be very much in the world. Their histories may reflect present-day concerns. Their choice of subject matter, their treatment of that subject matter, and the conclusions they draw may be designed to comment critically on the present.[10]

Rather, the key difference between the categories of lawyer-advocates and scholar-historians is that lawyer-advocates make arguments that are *legally prescriptive* as well as normative. Their work *prescribes* the correct interpretation of law. It asserts what

10. *See, e.g.*, Adam Serwer, *The Fight Over the 1619 Project Is Not About the Facts*, THE ATL. (Dec. 23, 2019), https://www.theatlantic.com/ideas/archive/2019/12/historians-clash-1619-project/604093/.

the law is, or, when the law is unsettled, unclear, or in need of reform, what the best interpretation of the law should be. This way of arguing does not simply assert what is moral or immoral, prudent or imprudent, true or false. Rather, it claims legal authority, or it offers facts and arguments to support such claims of authority.[11]

Lawyers learn to argue for and against legal interpretations, to claim legal authority for their positions and to undermine the claims of legal authority of those they disagree with. They try to reduce uncertainty into certainty, and turn complication into persuasive argument. Lawyers believe that their audiences want clear cut answers, and so they provide them.

The tensions between the work of lawyer-advocates and scholar-historians are at their greatest precisely when lawyer-advocates are most adversarial and most prescriptive, when they are most determined to establish clear legal authority for their arguments and undermine or explode the claims of authority made by their opponents.[12] Historians have noted this tension repeatedly when they write or join amicus briefs in high profile cases, for example, concerning abortion and gun rights.[13]

In the legal academy, this assertion of legal authority may be

11. John Phillip Reid, *supra* note 7, at 196 ("The search for authority, the need to find 'the law' or 'the right law' is the main reason lawyers speak of the legal past in terms quite different from the historian's.").

12. *See* Kelly, *supra* note 1, at 144 (noting that the NAACP's brief in *Brown v. Board of Education* presented "a great deal of perfectly valid constitutional history," but that "it also manipulated history in the best tradition of American advocacy, carefully marshaling every possible scrap of evidence in favor of the desired interpretation and just as carefully doctoring all the evidence to the contrary, either by suppressing it when that seemed plausible, or by distorting it when suppression was not possible").

13. *See* Joshua Stein, *Historians Before the Bench: Friends of the Court, Foes of Originalism*, 25 YALE J.L. & HUMAN. 359, 362–80 (2013) (describing how historians had to alter their practices in writing Supreme Court amicus briefs involving the Second Amendment, gay rights, and detainees at Guantanamo Bay).

A famous example is the historians' brief in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), which spawned considerable reflection among legal historians. *Brief of 281 American Historians as Amici Curiae Supporting Appellees*, *reprinted in* 12 THE PUBLIC HISTORIAN 37 (1990); *see* Wendy Chavkin, *Webster, Health, and History*, 12 PUB. HISTORIAN 53 (1990); Estelle B. Freedman, *Historical Interpretation and Legal Advocacy: Rethinking the* Webster Amicus *Brief*, 12 PUB. HISTORIAN 27 (1990); Michael Grossberg, *The* Webster *Brief: History as Advocacy, or Would You Sign It?*, 12 PUB. HISTORIAN 45 (1990); Jane E. Larson & Clyde Spillenger, *"That's Not History": The Boundaries of Advocacy and Scholarship*, 12 PUB. HISTORIAN 33 (1990); Sylvia A. Law, *Conversations Between Historians and the Constitution*, 12 PUB. HISTORIAN 11 (1990); James C. Mohr, *Historically Based Legal Briefs: Observations of a Participant in the* Webster *Process*, 12 PUB. HISTORIAN 19 (1990).

several steps removed. Legal academics may renounce any interest in prescriptive arguments about legal authority. They may insist that they are not telling courts how to decide cases. But if courts are interested in a particular ground of decision—for example, the original meaning of the Constitution—this, and not that, is the correct answer to the question.[14] In this way, a legal academic, disclaiming all normative ambitions, may focus intensively on uncovering the original meaning of a particular constitutional provision, with the implication that if courts want to be faithful to the original meaning, they should see it the same way.

In the quest for authority, lawyers do not merely condense and simplify. They also *extend* legal authority from the past. They seek to infer, from an incomplete historical record reflecting a different historical context, how the past would bear on present-day problems. They complete arguments that may have never been completed; they draw inferences and apply insights that may never have been drawn or applied by people living in the past. This act of extension in pursuit of authority is always creative.[15]

Because they focus on cases, statutes, and other legal materials, professionally trained lawyers may not pay very much attention to what professionally trained historians think about the topics on which they expound. As Michael Rappaport puts it succinctly, "[T]he originalist is not looking for 'what the past tells us about a matter.' The originalist is looking for the original meaning."[16]

14. *See* Gary Lawson, *Dead Document Walking*, 92 B.U. L. REV. 1225, 1231 (2012) (distinguishing between the task of ascertaining original meaning, theories of political legitimacy, and theories of adjudication).

15. *See also* Kramer, *supra* note 7, at 402–08 (noting that lawyers have distinctive ways of making arguments, using evidence, imposing burdens of proof, and resolving uncertainties that are not shared in other disciplines). As Larry Kramer puts it:

> [I]nsofar as the originalist interpretive method unavoidably involves a creative act by the modern interpreter—that of completing an argument that may have been unfinished when the Constitution was adopted—this link [between the Founders and the present] is just as unavoidably broken. At that point, there is literally no difference between what an originalist does and what is done by the most anti-historicist non-originalist—except, of course, for the results (each approach producing its share of outcomes that adherents of the other approach view as bizarre, made up, and unjustifiable).

Id. at 407; *see also id.* at 412–13 ("Taking sides in an unresolved historical debate is no different from taking sides in an unresolved contemporary one, and doing so severs the link to what supposedly gives [an originalist] (or any) historical argument its normative legal significance.").

16. Mike Rappaport, *An Important Difference Between Historians and Originalist*

But when historians do criticize them, lawyers may tend to react defensively. In a blog post entitled "Challenging the priesthood of professional historians,"[17] constitutional scholar Randy Barnett argued that historians' criticisms of originalism were often misguided: "some [historians] apparently believe that they, and they alone, can recover the meaning of a law enacted in the Eighteenth Century when they would not be able to understand the meaning of a law enacted in the Twenty-First. That's either hubris or chutzpah."[18] Reviewing Jack Rakove's Pulitzer Prize-winning book *Original Meanings*,[19] Saikrishna Prakash complained that "Rakove's primary problem is that he approaches the law as a historian. . . . Rakove recounts events in the time-honored tradition of the historian less concerned about the meaning of legal text and more concerned with ideas."[20] Confronted by historians' critiques, lawyers may argue that historians do not understand what they are doing, and emphasize that historians and lawyers are engaged in different projects.[21]

Lawyers attempt to escape the gaze and condemnation of historians through two standard stories that explain the differences between what lawyers and historians do. The first is the story of *legal science*—by which I do not mean experimental science but an organized body of thought and methods characteristic of a learned profession. The second is the story of a *usable past*. Each explanation seeks to turn the tables on historians, arguing that they lack something necessary to interpret

Law Professors, LAW & LIBERTY (Oct. 11, 2018), https://old.lawliberty.org/2018/10/11/an-important-difference-between-historians-and-originalist-law-professors/.

17. Randy E. Barnett, *Challenging the Priesthood of Professional Historians*, THE VOLOKH CONSPIRACY (Mar. 28, 2017, 11:51 AM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/28/challenging-the-priesthood-of-professional-historians/. Barnett responded to a critique of originalism by Stanford historian Jonathan Gienapp. Jonathan Gienapp, *Constitutional Originalism and History*, PROCESS: A BLOG FOR AM. HIST. (Mar. 20, 2017), http://www.processhistory.org/originalism-history/ ("By understanding how [originalism] has changed, we can appreciate the unique, little understood, and urgent threat it now poses to the practice of history.").

18. Barnett, *supra* note 17.

19. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996).

20. Saikrishna B. Prakash, *Unoriginalism's Law Without Meaning*, 15 CONST. COMMENT. 529, 539 (1998).

21. *See, e.g.*, Prakash, *supra* note 20, at 539–40 (arguing that historians do not understand what originalist lawyers are doing); Barnett, *supra* note 17; Mike Rappaport, *Historians and Originalists*, THE ORIGINALISM BLOG (Aug. 21, 2013), http://originalismblog.typepad.com/the-originalism-blog/2013/08/historians-and-originalistsmike-rappaport.html (same).

the Constitution correctly.

The first story portrays lawyers as experts in legal science—a body of knowledge and a rigorous set of methods and practices that is known and practiced only by professionally trained lawyers with legal degrees. Historians are uneducated laypersons, unskilled in the special techniques of legal reasoning—the professional knowledge available only to the possessors of the JD degree—and ignorant of the artificial reason of the law. "[S]ome historians," Randy Barnett explains, "seem to think they can investigate the meaning of legal terms and concepts in the past without any legal training. For this it helps to be a lawyer. True, some of the best legal historians do have legal training, but not all who opine on the 'meaning' of the Constitution do."[22]

The second story portrays lawyers as practical people who must solve contemporary problems of great importance. Because of these worldly and professional obligations, lawyers need a useable past.[23] "The search for a useable past," Cass Sunstein argues, "is a defining feature of the constitutional lawyer's approach to constitutional history."[24] Lawyers, Alexander Bickel explained, "are guided in our search of the past by our own aspirations and evolving principles, . . . principles that we can adopt or adapt, or ideals and aspirations that speak with

22. Barnett, *supra* note 17; *see also* Rappaport, *supra* note 21 (arguing that "[h]istorians often do not understand or apply [originalism] correctly," because "historians often lack legal training," are "trained to be skeptical of reaching conclusions that suggest a single (or dominant) view at a time," and because "if one has the skills to be a historian, he or she may not have other skills."); *cf.* Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case Of History-In-Law*, 71 Chi.-Kent L. Rev. 909, 917 (1996) (explaining, with some degree of irony, that "the criteria for determining whether someone has done well at the practice of history-in-law may be different from those for determining whether someone has done well at the practice of history, and they may be developed and applied by lawyers and legal academics rather than historians.").

23. *See, e.g.*, Robert W. Gordon, *Historicism in Legal Scholarship*, 90 Yale L.J. 1017, 1055 (1981) ("Many of the criticisms that historians make of lawyers' history are indeed irrelevant to the lawyer's task. . . . [Sometimes] they want . . . to make new, mythic, traditions out of it to use in current argument."); Paul Horwitz, *The Past, Tense: The History Of Crisis—and the Crisis of History—in Constitutional Theory*, 61 ALB. L. REV. 459, 504–07 (1997) (reviewing LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996)) (noting the argument that lawyers are more interested in myth and heritage than in historical niceties); Cass R. Sunstein, *The Idea of a Useable Past*, 95 COLUM. L. REV. 601, 604 (1995) (arguing for "identify[ing] those features of the constitutional past" that a lawyer views as "especially suitable for present constitutional use"); Tushnet, *supra* note 22, at 924–28 (noting, without specifically endorsing, this feature of history-in-law).

24. Sunstein, *supra* note 23, at 603.

contemporary relevance. . . ."[25] But historians, because of their own professional norms and obligations, have a different approach. So they fail to understand what lawyers need in order to do their jobs; and this makes their criticisms unhelpful. In this story, historians are antiquarians: academics ensconced in the ivory towers of the humanities. Perversely, historians see it as their mission to make the past alien, convoluted, complicated, and of no practical use to anyone.[26]

These two rhetorical strategies push in opposite directions. The story of lawyers as legal scientists portrays lawyers as gatekeepers of an elite specialized knowledge misunderstood by and inaccessible to the general public, while the story of the need for a usable past portrays lawyers as practical problem solvers who, unlike historians, are very much in the world. But what unites the two stories is their emphasis on the distinctive professional identity of lawyers. Because (non-JD) historians do not face the professional imperatives of lawyers and lack their professional training, historians' objections are either naive or misguided.

Both of these stories are misleading. First, they paint a false picture of how the work of historians is relevant to legal argument. Second, by emphasizing lawyers' professional differences from historians, they disguise disagreements *within* the class of lawyers and legal advocates about how to use (and how not to use) history. When lawyers try to stiff-arm historians, often what they are actually doing is engaging in long-running disputes with other lawyers who disagree with their interpretive theories, their methods, and their conclusions.

We need a better account of the relationship between legal

25. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 109–10 (2d ed. 1986).

26. *See* Stuart Banner, *Legal History and Legal Scholarship*, 76 WASH. U. L. REV. 37, 37 (1998) ("History, or at least history written according to the conventions of late twentieth century professional historians, with an emphasis on the ways in which the past differed from the present—history as an account of the pastness of the past, as the standard expression goes—enormously complicates the task of legal argument."); Gordon, *supra* note 23, at 1055 ("[T]he immediate interest of historians is always in 'historicizing' the past as much as possible, tamping it down firmly into departed times and places."); Helen Irving, *Outsourcing The Law: History and the Disciplinary Limits of Constitutional Reasoning*, 84 FORDHAM L. REV. 957, 961 (2015) ("The instrumental use of history is entirely at odds with the skeptical discipline required of historians."); Tushnet, *supra* note 22, at 915 (noting the familiar historical tropes of showing the complexity, contradiction, foreignness, and strangeness of the past).

argument and historical scholarship, an account that shows how legal advocates and historians actually join issue in debates about the Constitution.

Fortunately, there is a fairly straightforward way to explain what is going on, and it uses a very familiar idea in constitutional theory—the modalities of constitutional argument. The modalities treat legal reasoning as rhetoric—as a set of common topics for argument that shape and structure legal discourse and legal imagination.[27] The modalities not only shape how an argument is constructed; they also connect the advocate's reasoning to claims of legal authority as naturally as ligaments connect muscle to bone.

Focusing on the modalities of constitutional argument helps us understand how legal advocates use history in constitutional argument. Modalities mediate and filter the past through rhetorical forms.[28] Legal advocates don't simply invoke history when making their arguments. They channel history through the standard topics of legal justification.[29] These forms of legal justification—for example, appeals to text, structure, and precedent—simultaneously explain why their positions claim legal authority, and why other people (and especially judges) should accept these arguments.[30]

The modalities are also the lenses through which lawyers see and discover history. Legal advocates—and especially

27. *See* Philip Bobbitt, *Reflections Inspired by My Critics*, 72 TEX. L. REV. 1869, 1881 (1994) ("[L]egal activity is . . . expressed and acted out through the various modalities of legal argument. . . . [T]the modalities are the grammar of the law. . . ."); *id.* at 1891 ("[W]e have the modalities we do because the Anglo-Americans took the forms of argument at common law and superimposed these on the state when they imposed a written, limiting constitution on the state.").

28. Jack M. Balkin, *Arguing About the Constitution: The Topics in Constitutional Interpretation*, 33 CONST. COMMENT. 145, 189 (2018) [hereinafter Balkin, *Arguing About the Constitution*]; Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 664–65 (2013) [hereinafter Balkin, *The New Originalism*].

29. The idea that argument is structured in rhetorical topics goes back to Aristotle. ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE 44–46 (George A. Kennedy trans., 2d ed. 2007) [hereinafter ARISTOTLE, ON RHETORIC]; Jack M. Balkin, *A Night in the Topics: The Reason of Legal Rhetoric and the Rhetoric of Legal Reason*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 211 (Peter Brooks & Paul Gewirtz eds., 1996). The modalities are what Aristotle would have called "special topics" connected to a particular discipline or science. Balkin, *Arguing About the Constitution*, *supra* note 28, at 170, 181–82.

30. Balkin, *Arguing About the Constitution*, *supra* note 28, at 185; Balkin, *The New Originalism*, *supra* note 28, at 664.

professionally trained lawyers—view history through the lens of shared forms of legal justification. And how legal advocates search for, understand, and employ history is shaped, consciously or unconsciously, by these same forms of justification.[31]

In short, if we want to understand the disputes between lawyers and historians, or between legal advocates and scholar-historians, there is no better place to look than the structure of legal rhetoric, because the structure of legal rhetoric reflects the structure of legal reasoning.

Once we examine the quarrel between lawyers and historians through the lens of the modalities, many issues become clear—why self-confident lawyers ignore historians or find them irrelevant, why they nevertheless cannot escape the critical gaze of historians, and why they cannot do without historians' history, however much they may abuse or mangle it.

Part II of this article explains how legal advocates use standard forms of argument to think and talk about history. The way they look at and use history depends on the modalities they employ. Part III explains that in using the modalities, legal advocates invoke history in four different registers: constructively and deconstructively, obediently and critically. Part IV shows how historians interact with these rhetorical structures. It argues that with respect to most of them, historians are as well-equipped if not better equipped than lawyers. The article then takes up the two standard ways that lawyers try to hold off criticisms from historians. Part V discusses the claim that lawyers have a special professionalized knowledge unavailable to non-legally trained historians. Part VI discusses the claim that lawyers need a useable past. Part VII concludes by arguing that the model of multiple modalities provides the best way to make the past useable, because it acknowledges the many different uses of history.

II. THE MODALITIES AND HISTORICAL ARGUMENT

Lawyers use a standard set of forms of argument to analyze constitutional problems and construct arguments about the best interpretation of the Constitution. Philip Bobbitt famously called these standard forms of argument "modalities,"[32] and his basic

31. Balkin, *The New Originalism*, *supra* note 28, at 668–72 (showing how a focus on text, tradition, and precedent look at the same history in different ways).

32. *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991) [hereinafter

account has become widely accepted in constitutional theory.

It turns out, however, that Bobbitt's original list of standard arguments is not very useful for thinking about how lawyers use history in constitutional argument. First, he confusingly called one of his modalities "historical" argument.[33] That seemed to imply that there was a single historical modality, and that all the other kinds of arguments—from text, precedent, consequences, structure, and national ethos—did not use history. (Bobbitt himself did not believe this.) Second, even more confusingly, Bobbitt identified "historical" arguments with arguments from original intention.[34] This seemed to imply that the only ways that lawyers used history in constitutional law was by making originalist arguments. It also seemed to suggest that all originalist arguments were arguments from original intention, which has not been true since at least the 1980s, when arguments from original public meaning became the dominant approach.

Some time back, building on the work of Bobbitt and Richard Fallon, I proposed a different list of standard constitutional arguments, better calibrated to the kinds of arguments that lawyers make, and better designed to explain the uses of history in constitutional argument.[35]

Most arguments about the proper interpretation of Constitution fall into the following basic categories:[36]

BOBBITT, CONSTITUTIONAL INTERPRETATION]; PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982) [hereinafter BOBBITT, CONSTITUTIONAL FATE].

33. BOBBITT, CONSTITUTIONAL FATE, *supra* note 32, at 9; BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 32, at 13.

34. BOBBITT, CONSTITUTIONAL FATE, *supra* note 32, at 9 (defining "[h]istorical arguments" as those which "depend on a determination of the original understanding of the constitutional provision to be construed"); BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 32, at 13 ("A[] *historical* modality may be attributed to constitutional arguments that claim that the framers and ratifiers [of a constitutional provision] intended, or did not intend. . . ."); *id.* ("Historical, or 'originalist' approaches to construing the text . . . are distinctive in their reference back to what a particular provision is thought to have meant to its ratifiers."). Similarly, Richard Fallon's list of constitutional arguments refers to "[a]rguments of historical intent," which he identified with "the intent of the framers." Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1244, 1254 (1987). Both Bobbitt and Fallon wrote at a time when the focus of originalist theory was shifting from original intention and understanding to original meaning.

35. Balkin, *Arguing About the Constitution*, *supra* note 28, at 183–84; Balkin, *The New Originalism*, *supra* note 28, at 660.

36. This list is taken from Balkin, *Arguing About the Constitution*, *supra* note 28, at 183–84; and Balkin, *The New Originalism*, *supra* note 28, at 660.

1. Arguments from *text*. These include arguments about definitions of the words and phrases in the text; arguments that compare and contrast different parts of the text; arguments that compare the text with other texts; arguments that look to dictionaries and corpus linguistics; and arguments that employ traditional canons of statutory interpretation.
2. Arguments about constitutional *structure.* These are arguments about how the constitutional system as a whole should operate and how the various parts of the system should interact with each other. These include arguments about the proper functioning of federalism, the separation of powers, democracy, and republican government.
3. Arguments from constitutional *purpose*. These are arguments about the point or purpose of the Constitution. They include arguments about the purposes, intentions, and expectations of the people who lived at the time of the adoption of the Constitution and its subsequent amendments, as well as purposes attributed to the Constitution over time.
4. Arguments from *consequences*. These are arguments about the likely consequences of interpreting the Constitution in one way rather than another. Arguments from consequences include arguments of institutional prudence: arguments that consider the political and practical consequences of a proposed interpretation (or implementing doctrine), the likely responses of other institutions or persons if the interpretation were accepted, and how well or how badly other actors will be likely to administer the interpretation in the future.
5. Arguments from *judicial precedent*. These are arguments based on previous judicial decisions, whether from the United States or from pre-1789 Great Britain. They include arguments about what is holding and what is dicta, about what is controlling authority and what is merely persuasive authority. They include familiar common law arguments for distinguishing cases, generalizing from cases, reasoning from case to case, and reasoning by analogy. Arguments from precedent include arguments based on the doctrinal categories and tests that previous precedents have generated. Hence, arguments from judicial precedent collectively form a very large family of topics and subtopics. They are probably the most common form of legal arguments about the Constitution.
6. Arguments from *political convention*. These are arguments about political conventions and settlements that arise within institutions or branches of government (for example, within the Executive Branch); or among institutions or branches of

government (for example, conventions that arise between the Executive Branch and Congress).

7. Arguments from the people's *customs* and lived experience. These arguments consider the public's customs, expectations, and ways of life and whether a proposed interpretation of the Constitution will conform to, vindicate, assist, defy, or disrupt them.
8. Arguments from *natural law or natural rights*. These arguments concern rights that governments exist to secure and protect (natural rights); as well as arguments about what kinds of laws are necessary to protect and promote human flourishing (natural law).
9. Arguments from *national ethos*. Arguments from ethos appeal to the character of the nation and its institutions, and to important, widely shared and widely honored values of Americans and American culture.
10. Arguments from *political tradition*. Arguments from political tradition appeal to the traditions and traditional values of the American people, to cultural memory, to the meaning of key events in American political history (e.g., the Revolution, the Civil War, the New Deal), and to the lessons we should draw from those events. They often overlap with arguments about national ethos.
11. Arguments from *honored authority*. Arguments from honored authority appeal to the values, beliefs, and examples of culture heroes in American life. Examples of culture heroes include the Founders as a group and key Founders like George Washington and James Madison; or important historical figures like Abraham Lincoln, Frederick Douglass, Susan B. Anthony, and Martin Luther King. They often overlap with arguments about national ethos and political tradition.

These categories are not exhaustive, but they cover most examples. All of the categories overlap to some degree, but the last three are very closely related, so I will sometimes refer to them collectively as arguments from ethos, tradition, and honored authority.

Looking at this list, we can immediately draw several conclusions about the use of history in constitutional argument.

First, people use history to support arguments from each of these modalities. Even arguments from judicial precedent often look to history.[37] The application of doctrinal categories may

37. For an excellent account of how lawyers use history in precedental argument, see

require historical inquiries. For example, the test for a suspect classification under the Equal Protection Clause depends on showing a history of previous discrimination.[38] That means that there is no single modality of "historical argument." Rather arguments using all of the modalities may invoke history to support their claims.

Second, how one uses history will differ depending on the modality of argument one uses. For example, textual arguments might look to dictionaries and corpus linguistics because they focus on the meaning of the words of the text; arguments from precedent might look to English legal history because they look for the history of legal understandings; arguments from custom might look to social histories; arguments from consequences might look to experiences in the American colonies, the states and other countries because they want to know how different choices produce different effects; arguments from honored authority might look to George Washington's behavior in his first Administration, or Frederick Douglass's views on public schools, and so on. For each modality of constitutional argument, there will be a different way to use history.

Third, the kind of history one looks for depends on the relevant modality of argument. The kind of argument one is making—about linguistic meaning, legal practices, social custom, predictable consequences—may make different historical sources relevant. But even the same historical sources and events might be used differently depending on the modality. Thus, different aspects of the history of Reconstruction might support arguments from text, structure, consequences, political tradition, or honored authority.

Fourth, what we call "originalist" arguments are only a small proportion of the many different kinds of legal arguments that use history. The modalities are not confined to adoption history. They can look to the history of many different times and places.[39] They

Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753 (2015).

38. Bowen v. Gilliard, 483 U.S. 587, 602 (1987); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440–41 (1985); Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion).

39. Balkin, *The New Originalism*, *supra* note 28, at 666–68 (giving the example of Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952), which makes a structural argument about executive power by drawing comparisons to pre-World War II France, Great Britain, and Germany).

can range across the whole of human activity. They need not be confined to the views of Founders or adopters. And they can focus on people who were excluded from or ignored in constitutional debates.[40]

Fifth, even if we restrict ourselves to originalist arguments or arguments from adoption history, there is not a single kind of originalist argument. Arguments that look to Founding-era dictionaries and corpus linguistics use history differently than arguments about constitutional structure taken from the state ratification debates; arguments about political conventions taken from Washington's First Administration; and arguments about the legal meaning of the Constitution drawn from the English Bill of Rights or the relative powers of Parliament and the King following the Glorious Revolution of 1688.

Sixth, and conversely, not all arguments about adoption history count as originalist. Consider arguments for departing from original legal understandings because those understandings bear the taint of racism or sexism. These arguments use adoption history, but not in the way that originalist legal scholars generally do. (I return to this point when I discuss the distinction between obedient and critical uses of history.)

Seventh, and finally, modalities of legal argument are centrally about how to claim legal authority. Each modality offers a different way to claim authority for a proposed legal interpretation. That is because each modality rests upon commonplaces about how to interpret the Constitution. Each offers an implicit theory for why arguments of a certain kind should be accepted as valid or as persuasive when people interpret the Constitution, and why such arguments further the Constitution and are faithful to the Constitution. When people use history to make arguments from each modality, they are using history to claim legal authority. They assert that the facts of history have consequences for whose interpretation has legal

40. ROSEMARIE ZAGARRI, REVOLUTIONARY BACKLASH, WOMEN AND POLITICS IN THE EARLY AMERICAN REPUBLIC (2007); Christina Mulligan, *Diverse Originalism*, 21 U. PA. J. CONST. L. 379 (2018); Reva B. Siegel, *The Nineteenth Amendment and the Democratic Reconstruction of the Family*, 129 YALE L.J.F. 450 (2020), https://www.yalelawjournal.org/pdf/Siegel_TheNineteenthAmendmentandtheDemocratizationoftheFamily_kwjdphtp.pdf; *see also* GERALD LEONARD & SAUL CORNELL, THE PARTISAN REPUBLIC: DEMOCRACY, EXCLUSION, AND THE FALL OF THE FOUNDERS' CONSTITUTION, 1780S–1830S at 60–71 (2019) (discussing the views of "constitutional outsiders").

authority and whose does not. This is what makes legal uses of history distinctive.

III. CONSTRUCTIVE AND DECONSTRUCTIVE, OBEDIENT AND CRITICAL USES OF HISTORY

The culture of legal argument is an adversarial culture. Legal advocates try to establish their own claims of legal authority, and they also try to undermine claims of legal authority by their opponents. This suggests two different rhetorical postures—one that promotes certainty and one that promotes uncertainty. *Authority-constructing* uses of history employ history to construct claims of legal authority using the various modalities. They marshal historical facts and organize historical studies to build a convincing case and ward off potential objections. *Authority-deconstructing* uses of history use history to rebut, cast doubt on, or complicate other people's uses of history as they employ the modalities. The goal of authority-deconstructing arguments are not to build up, but to tear down—to shift burdens of proof, to sow uncertainty, to deny clarity, to multiply complexity, and to assert that one's opponent's arguments gloss over important facts, indulge in anachronisms, or are overly simplistic.

In addition, when advocates use the modalities, there are two different ways to invoke the past as authority for law. The first approach treats the past as a positive source of authority, as something we should follow in the present. The second treats the past as something we should avoid or transcend, or whose unfortunate legacy we still suffer from.[41]

41. *See* ROBERT W. GORDON, *The Past as Authority and Social Critic: Stabilizing and Destabilizing Functions of History in Legal Argument*, *in* TAMING THE PAST: ESSAYS ON LAW IN HISTORY AND HISTORY IN LAW 282–316 (2017) (describing lawyers' opposing uses of history); Robert W. Gordon, *The Struggle Over the Past*, 44 CLEV. ST. L. REV. 123, 125 (1996) ("The *critical* modes [of historical argument] are used to destroy, or anyway to question, the authority of the past."); *see also* Deborah A. Widiss, Note, *Re-viewing History: The Use of the Past as Negative Precedent in* United States v. Virginia, 108 YALE L.J. 237, 238 (1998) ("Abandoned past practices can be used to argue, through a process of negative inference, against analogous modern practices. Equally important, negative precedent acknowledges the injuries caused by past practices that now seem unacceptable."); *cf.* Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 INT'L J. CONST. L. 296, 300 (2003) ("Aversive constitutionalism . . . is backward-looking, proceeding from a critique of where past (or other) institutions and principles went badly wrong and taking such critiques as the negative building blocks of a new constitutional order.").

Obedient uses of history treat the past as a positive model for present-day behavior, because it reveals correct meanings, because it serves as honored precedent, because it is morally worthy, because it offers a positive example of what to do, because it tutors us how to behave, or because it is consistent with political traditions. *Critical* uses of history treat the past as something that we should not follow in the present and should reject, compensate for, or disown. Critical history is aversive history. It describes faults, sins, and errors. It shows us what we should never let happen again, what should no longer be part of us, and what we should strive to repair. Critical history may also show us the legacy of mistake, injustice, and oppression that we should react against, that we should try to extirpate, compensate for, eliminate, or disestablish in our current practices.

Of course, the past is neither uniformly one thing or another. Good and bad, honorable and dishonorable, helpful and harmful, are all mixed together, and what we see in the past reflects our current situation and perspectives. The meaning of the past continually changes, not because the facts change, but because we change, pushed forward continuously into new situations, which form ever new perspectives and points of comparison with the old, and which cast a continuously changing light and shadow on what went before. Historical studies rightly emphasize the motley nature of the past, its richness and its ambiguity, as well as its difference from our current world. In distinguishing between obedient and critical uses of history, I am not claiming that the moral meaning of history is clear-cut. Instead, I am interested in how the past is used in legal rhetoric, as a positive model or a negative precedent.

Combining these rhetorical postures, we have a box of four:

TABLE 1: RHETORICAL POSTURES IN USING HISTORY

	Authority-constructing (using the modalities)	*Authority-deconstructing (directed against opponents' use of the modalities)*
Obedient	Claiming legal authority from positive example or precedent Example: "Alexander Hamilton's views in *The Federalist* are a sure guide to the powers of the Presidency today."	Undermining claims to legal authority from positive example or precedent Example: "There is insufficient evidence that the Founding generation believed that the Second Amendment guaranteed an individual right to bear arms outside of military service."
Critical	Claiming legal authority through aversive history or by negative example Example: "Today's voter identification laws are a continuation of the legacy of Jim Crow-era poll taxes."	Undermining claims to legal authority that draw use aversive history or negative examples Example: "It is a gross oversimplification to conclude that state bans on government aid to religion stem from anti-Catholic bigotry."

In practice, a skillful advocate will use all four of these approaches in framing a legal argument, offering positive precedents to be followed and negative historical examples to disown, while simultaneously highlighting mistakes, confusions, complexities, and anachronisms in opponents' arguments. Advocates will pick the part of the past they want to honor, while disclaiming or glossing over other parts of the past. Their opponents, eager to rebut them, will try to flip the script, seizing on omissions and complications.

IV. HISTORIANS MEET THE MODALITIES

How do scholar-historians fit into the rhetorical structures I've just described? This assumes, of course, that they *want* to participate. They might resist being drawn into forms of rhetoric at cross-purposes with their scholarly enterprise.[42] But many historians now author amicus briefs,[43] and serve as expert witnesses in constitutional controversies.[44] So we can ask how they might intervene in lawyers' forms of argument.

First, historians can use the standard forms of constitutional argument just as well as lawyers can. They can also make arguments from text, structure, purpose, consequences, custom, convention, tradition, ethos, honored authority, and so on. Most of the standard modalities of constitutional argument do not require any special professional training. A central motivation behind Bobbitt's original model of modalities, after all, was that lawyers and ordinary citizens alike could practice constitutional interpretation.[45] The modality of argument that seems to benefit most from specialized legal training is precedental argument: the ability to employ and manipulate legal precedents—for example, creating narrow and broad versions, distinguishing and connecting bodies of case law, and developing new doctrinal

42. *See* Stein, *supra* note 13, at 362–70 (describing how historians had to alter their practices in writing Supreme Court amicus briefs involving the Second Amendment); Tomiko Brown-Nagin, Linda Gordon & Kenneth Mack, *Historians in Court: A Roundtable*, OAH, https://www.oah.org/tah/issues/2017/november/historians-in-court-a-roundtable/ (discussing the differences between legal advocacy and historical inquiry); *see also* sources cited *supra* note 13 (discussing the choices historians had to make in the *Webster* amicus brief to explain to courts why *Roe v. Wade* was correctly decided).

43. *See, e.g.*, Nell Gluckman, *Why More Historians Are Embracing the Amicus Brief*, CHRON. OF HIGHER EDUC. (May 3, 2017), https://www.chronicle.com/article/why-more-historians-are-embracing-the-amicus-brief/ ("Historians say they feel that they are being asked to write or sign amicus briefs in Supreme Court cases more frequently."); Michael Grossberg, *Friends of the Court: A New Role For Historians*, PERSPS. ON HIST. (Nov. 1, 2010), https://www.historians.org/publications-and-directories/perspectives-on-history/november-2010/friends-of-the-court-a-new-role-for-historians ("[H]istorians are carving out a crucial new role for themselves as direct contributors to debates about contested legal issues such as same-sex marriage.").

44. *See, e.g.*, Jonathan D. Martin, *Historians at the Gate: Accommodating Expert Historical Testimony in Federal Courts*, 78 N.Y.U. L. REV. 1518, 1519 (2003) ("Historians are increasingly being called to testify as expert witnesses. They appear in cases adjudicating a vast array of matters. . . ."); Kritika Agarwal, *Historians as Expert Witnesses*, PERSPS. ON HIST. (Feb. 1, 2017), https://www.historians.org/publications-and-directories/perspectives-on-history/february-2017/historians-as-expert-witnesses-can-scholars-help-save-the-voting-rights-act ("Historians' testimony has had significant impact in voting rights cases.").

45. BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 32, at 28–30.

distinctions.[46] The ability to cite and employ canons of statutory construction might be a second, related skill. However, the majority of historical inquiry in law does not depend on these special skills. (And, of course, historians who are also lawyers have received this training.)

Second, with respect to some of the modalities of legal argument—arguments from custom, tradition, ethos, and honored authority, or arguments from consequences that depend on historical evidence and historical examples—we might expect that historians would be *better* than non-historian lawyers in using and deploying historical sources. That is especially the case for those periods of history and those parts of the world with which most lawyers are unfamiliar. But it is equally true of periods of intense lawyerly concern, such as the history of Great Britain in the seventeenth and eighteenth centuries, the Founding, the Civil War and Reconstruction. Historians may also be far more competent at the history of political and social movements (both successful and unsuccessful) that have shaped the American political tradition.

Third, as noted above, lawyers use history both to construct authority and to undermine and poke holes in other lawyers' uses of history. They use history both constructively and deconstructively. Historians can certainly marshal the kinds of evidence needed to support the standard forms of legal argument, perhaps better than many lawyers can. But historians can also offer the kinds of counter-evidence, counter-narratives, and complications that are useful in rebutting these arguments. In fact, historians are likely to be even better at these tasks than most lawyers.[47] After all, historians are professionally rewarded for discovering new forms of counter-evidence, offering interesting counter-narratives, and noting historical complications. They are rewarded for undermining previous historians' takes and producing ever new perspectives on the past.

Fourth, in constitutional law, lawyers not only disagree about

46. *See* Annette Gordon-Reed, *Uncovering the Past: Lessons from Doing Legal History*, 51 N.Y. L. SCH. L. REV. 855, 858–59 (2006–07) (arguing that lawyers are often better equipped than non-legally trained historians to think imaginatively about how historical figures would handle hypothetical problems given the legal materials of their day).

47. *See* Stein, *supra* note 13, at 380 ("Historians can make their advocacy more effective—and more in line with their professional methodology—by using alternative (rather than definitive) versions of the past to destabilize originalist argumentation.").

history; they also disagree about theories of legal interpretation—including the many varieties of originalism. Legal dispute occurs *both* at the level of historical inquiry and at the level of the interpretive theories that connect history to legal norms. Lawyers are hardly agreed on a single set of interpretive theories, and judges may switch their theoretical assumptions from case to case.

Because lawyers disagree about theory as much as about history, historians might play yet another role in legal disputes. They can offer examples from history (and from historiography) to critique the plausibility or practicality of some of these interpretive theories. They can explain why certain kinds of interpretive theories are anachronistic, or unlikely to be successful on their own terms.[48] They can offer reasons and evidence to show why certain theories of legal interpretation ask questions of history that the historical record cannot reliably answer.[49] They can show that certain historical sources that lawyers rely on have a different meaning or importance than lawyers think they do, or are not as reliable as lawyers imagine them to be.[50] Here again, historians are as likely to be as good as (or better than) lawyers at this particular critical task.

Posing the issues in this way has a certain partiality: It asks whether historians can play effectively on lawyers' turf. Historians might well wonder why this is the proper inquiry. After all, the

48. *See, e.g.*, Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 FORDHAM L. REV. 721, 724, 734–38 (2013) (criticizing original public meaning originalism for abstracting away from the complexities of language during the Founding era and projecting contemporary understandings onto the past in the form of an imagined reasonable person); Jack Rakove, *Tone Deaf to the Past: More Qualms About Public Meaning Originalism*, 84 FORDHAM L. REV. 969, 975 (2015) (criticizing original public meaning originalism for neglecting "the linguistic ideas that were dominant in eighteenth-century America").

49. *See, e.g.*, Kelly, *supra* note 1, at 156–57 (arguing that the Supreme Court's inquiry into history in the Establishment Clause "asks questions of the past that the past cannot answer"); Reid, *supra* note 7, at 202 (noting that "judges often read the records of the past as if they were prepared similarly to the legislative history of today's congresses, by professional staffs anticipating issues likely to arise in litigation . . . [and] ask the past to answer questions about matters that were not thought of at the time").

50. *See, e.g.*, MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION (2015) (showing how James Madison revised his notes of the Constitutional Convention over many years, often for political reasons); Saul Cornell, *Originalism on Trial: The Use and Abuse of History in* District of Columbia v. Heller, 69 OHIO ST. L.J. 625, 632–36 (2008) (arguing that Justice Scalia's opinion in *Heller* misunderstood how preambles were used at the Founding and failed to cite any Founding-era sources for his claims).

door between the two professions swings both ways. Certainly one could ask with equal merit whether lawyers can do the kind of archival research, ask the kinds of research questions, and offer the kinds of answers and analyses that professional historians would regard as competent.[51] Indeed, lawyers, who are often dogged investigators of facts, may be able to shed light on the historical record and correct the views of historians.[52] Nothing in what I say here denies the importance of these questions—or for that matter, the equal status and equal worth of the professional perspectives of lawyers and historians. But the focus of this article is the uses of history in constitutional interpretation and constitutional argument. That interpretation and those arguments are structured in the special topics of constitutional law. Therefore I ask whether there is something special about the modalities of legal argument that justifies lawyers discounting the contributions of historians. The answer is no.

Viewed from the perspective of the modalities, it is easy to understand how historians join issue with lawyers on the legal interpretation of the Constitution. Professional differences aside, the topics of legal argument are common topics for all—not just lawyers and judges—that facilitate a common conversation.

51. Kramer, *supra* note 7, at 389–94 (pointing out the effort required to become even minimally competent in understanding the thought of a given historical period).

52. For example, in litigation over the Foreign Emoluments Clause, Seth Barrett Tillman was able to show that a key document listing the officers under the United States (but not including the President) had been prepared and signed by Alexander Hamilton in 1793. He also showed that another document said to contradict this account was not signed by Hamilton and was actually a copy prepared many years later. *See* Adam Liptak, *'Lonely Scholar with Unusual Ideas' Defends Trump, Igniting Legal Storm*, N.Y. TIMES (Sept. 25, 2017), https://www.nytimes.com/2017/09/25/us/politics/trump-emoluments-clause-alexander-hamilton.html. The legal historians who accused Tillman of failing to cite the second document subsequently agreed with him and apologized. *Id.*

Perhaps the most famous example of lawyers correcting the work of legal historians is James Lindgren's efforts in exposing the errors and falsehoods in the work of historian Michael Bellesiles. *See* James Lindgren, *Fall from Grace: Arming America and the Bellesiles Scandal*, 111 YALE L.J. 2195 (2002) (book review). Bellesiles had won the prestigious Brancroft Prize for his 2000 book ARMING AMERICA: THE ORIGINS OF A NATIONAL GUN CULTURE (2000), which argued that, at the time of the Founding, most Americans did not own guns. Following the work of Lindgren, amateur historian Clayton Cramer, and other scholars and historians, Columbia University revoked the prize. Robert F. Worth, *Prize for Book Is Taken Back from Historian*, N.Y. TIMES (Dec. 14, 2002), https://www.nytimes.com/2002/12/14/business/prize-for-book-is-taken-back-from-historian.html.

V. THE SPECIAL SKILL AND KNOWLEDGE OF LAWYERS

Perhaps the most common way that lawyers try to deflect criticism from historians is to assert that historians are ignorant of the specialized craft of lawyerly reasoning. Professionally trained lawyers possess special techniques—known only to the professionally educated and accredited—that allow them to discern the *legal meaning* and the *legal consequences* of texts. Because non-legally trained historians do not understand these techniques, their criticisms of lawyers' use of history are likely to miss the mark. In our day, this kind of complaint is most likely to come from conservative originalists, who often find themselves beset by historians who claim that originalist uses of history are narrow, parochial and anachronistic.

Michael Rappaport offers a good example of this strategy. He argues that historians do not understand "the enterprise of interpretation as practiced by originalists."[53] "[T]he original public meaning approach asks what the meaning of a provision would have been to a reasonable and knowledgeable person at the time. Historians often do not understand or apply this correctly."[54] Because of this misunderstanding, "they often make statements that originalists would strongly disagree with, without any strong reasons backing them up—statements such as, because there was disagreement at the time of the Constitution on a provision, that means there was no original meaning."[55] Because historians do not accede to or correctly apply originalist theories of interpretation, their historical objections are irrelevant. Rappaport has dubbed these irrelevant objections "history office law," a play on "law office history."[56]

53. Rappaport, *supra* note 21.

54. *Id.*; *see also* Prakash, *supra* note 20, at 539–40 ("Rakove's primary problem is that he approaches the law as a historian. Although Rakove appears to understand that what matters is the original meaning of legal text, his historian's bent predominates. Rakove recounts events in the time-honored tradition of the historian less concerned about the meaning of legal text and more concerned with ideas.").

55. Rappaport, *supra* note 21; *see* Prakash, *supra* note 20, at 535 ("Originalism simply does not rest on a theory of definite meanings; it only requires an ability to determine which of several possible meanings better reflects the most natural reading of the word or phrase when the text was ratified.").

56. Rappaport, *supra* note 21; *see* Gary Lawson, *No History, No Certainty, No Legitimacy . . . No Problem: Originalism and the Limits of Legal Theory*, 64 FLA. L. REV. 1551, 1559 (2012) ("'[H]istory department law' is a much greater threat to sound constitutional interpretation than is 'law office history.'"); Prakash, *supra* note 20, at 534, 541 (criticizing "history department law").

What Rappaport sees as misunderstanding or an inability to use legal sources properly, however could equally be described as a theoretical disagreement about the best way to interpret the Constitution. Rappaport's objection does not actually turn on whether historians possess or lack legal training. Rather, his argument depends on the assumption that historians should accept his theory of the Constitution's "original public meaning."

"Original public meaning" is a theoretical construction, a mediated account of the past that serves the purposes of law and legal theory. This theory of interpretation selects certain features of the past as relevant to legal inquiry, and discards the rest. It takes those features of the past that it deems relevant and reconfigures them for purposes of a particular theory of law. Then, having selected and reconfigured the past, it dubs the result the "original public meaning" and declares it binding on everyone.[57]

Lawyers—including originalist lawyers—do not assume that the past comes to us in the form of unambiguous and easily intelligible commands; often it does not. Rather, originalist theory treats the past as it does because of its theoretical commitments and the practical needs of the present.[58] History looks the way it does to originalist theory because of what originalism needs the past to be in order for it to serve the requirements of present-day law.[59] Originalism seeks to obey the past, but it can only do so if it reconfigures the past so that it can be followed. Originalism is a servant that needs a particular kind of master, and therefore goes about constructing one. The past that emerges from originalist inquiry is not simply a description of past events. It is an understanding refracted through theoretical choices, some of which may be plausible to other lawyers, and some of which may

57. I explain these claims more fully in Jack M. Balkin, *The Construction of Original Public Meaning*, 31 CONST. COMMENT. 71 (2016).

58. *See, e.g.*, Kramer, *supra* note 7, at 405 ("Legal interpretation is fundamentally about resolving ambiguities and uncertainties in language: about determining and bringing to closure that which is undetermined and open."); H. Jefferson Powell, *Rules For Originalists*, 73 VA. L. REV. 659, 669 (1987) ("The originalist's use of history is goal-directed: he wants to understand past thought and action in order to address present concerns."); Prakash, *supra* note 20, at 535 (arguing that the point of originalist methodology is to do the best we can in order to solve current legal problems).

59. *See, e.g.*, Lawson, *supra* note 56, at 1554 (arguing that an originalism "in which meaning is determined by the hypothetical understandings of a fictitious reasonable observer, rather than those of any concrete historical figures" can solve practical problems of adjudication).

be highly controversial.

Originalist theories are hardly unique in this respect. Rather, they exemplify how law and legal theory usually employ history. They do not simply report what happened at a special moment in time. Rather, they construct events—drawing together occurrences in disparate locations, and collapsing and telescoping time frames—to draw conclusions about meanings and purposes. The "Founding," for example, is not a magical moment in time. It occurs in many different places, over several decades. But originalist theories tend to treat the Founding as a unified event producing meanings that are intelligible and tractable.

Originalist theories select elements from the historical record, leaving much of the messy details of history on the cutting room floor. They reorganize and reconfigure the record of the past to produce the kind of knowledge that might be useful to the legal enterprise. They make the past useful to lawyers so that lawyers can employ it for present-day purposes. They beat the past into a shape that can serve present-day objects.[60]

Once again, we should not see this as a particular problem of originalism. All legal theories reconfigure history to theory in varying degrees. All legal theories beat the past into shape, they simply do it in different ways and for different ends. Theoretical commitments tell lawyers what facts are relevant and important and why they are relevant and important. These commitments shape what lawyers look for in the past and what they find there; what they obsessively focus on and what they casually discard.

A theory of original public meaning—and there are several competing accounts—carefully constructs the past so that it can serve the needs and values of the present. However, there is nothing wrong with this as long as (1) people are candid about the nature of the enterprise; (2) they do not pretend that they are simply reporting facts free from theoretical framing and reconfiguration; and (3) they are candid about the values that their interpretive theory serves and are willing to defend those values openly.

60. For a forthright defense of the practice, see Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 80 (2006) ("Lawyers create the object of interpretation, so it is not surprising that lawyers might play a key role in understanding it."); *see also* Kramer, *supra* note 7, at 407 (pointing out that both originalists and non-originalists are engaged in creative extensions of historical materials).

Thus, the dispute is not over whether historians understand or misunderstand constitutional interpretation or constitutional law. Rather, it is a dispute is over whether a particular theoretical construction—offered by a lawyer, judge or legal scholar—is a good way to approach constitutional interpretation, or whether it is too artificial, too limited, or too blinkered.

Most historians probably don't accept Rappaport's views about the best way to interpret the Constitution. But most well-trained lawyers in the United States probably don't accept this theory either. Not all lawyers are originalists, and even among originalists, there are important theoretical disagreements about what original meaning is, how it is best demonstrated, and what legal force it should have.[61] Lawyers might make some of the same objections that historians would. That is hardly surprising; lawyers on either side of a controversy reach out for support from other disciplines all the time.

In short, the problem is not that historians do not understand the enterprise of originalist interpretation. It is that they do not agree with the underlying theory, and many other lawyers would agree with them.[62] Instead of a dispute between untutored historians and knowledgeable lawyers, we also have an intermural scrum among lawyers. Instead of a dispute between "law" and "history," we actually have a dispute *within* legal theory itself. It is a dispute over how law should select from, filter, and reconfigure the past so that law can use it for legal purposes.[63] With respect to that task, historians have something to say, not because they are experts in legal theory, but because they know

61. For examples of criticisms of Rappaport's theory from non-originalists, see Frederic Bloom & Nelson Tebbe, *Countersupermajoritarianism*, 113 MICH. L. REV. 809 (2015); John W. Compton, *What Is Originalism Good For?*, 50 TULSA L. REV. 427 (2015); Stephen M. Feldman, *Constitutional Interpretation and History: New Originalism or Eclecticism?*, 28 BYU J. PUB. L. 283 (2014); James E. Fleming, *Fidelity, Change, and the Good Constitution*, 62 AM. J. COMPAR. L. 515 (2014); Heidi Kitrosser, *Interpretive Modesty*, 104 GEO. L.J. 459 (2016). For examples of criticisms from originalists, see Kurt T. Lash, *Originalism All the Way Down?*, 30 CONST. COMMENT. 149 (2015); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 503–11 (2013).

62. The number of critiques of originalism by lawyers and law professors is seemingly endless. For a recent example of the genre, see ERIC J. SEGALL, ORIGINALISM AS FAITH (2018).

63. *See* Horwitz, *supra* note 23, at 503 ("The use of history in law, after all, is at bottom a question of legal theory, and just as this method of constitutional interpretation (originalism) is demonstrably flawed as a matter of practice, so it may also be a weak candidate as a matter of theory.").

something about what kinds of theoretical projects the historical record can plausibly support.

If lawyers would disagree with Rappaport about these matters, it is not clear that similar objections by historians may be dismissed as irrelevant. Put another way, it does not matter *who* raises the objection, as long as the objection is an appropriate one in the context of the forms of legal argument.[64]

To be sure, given their professional outlook and training, historians may have particular reasons for objecting to a given theory of original meaning. Jack Rakove, for example, has strongly criticized the notion that we should equate original meaning with the hypothetical reasonable and informed person at the time of adoption. He points out that this is simply not a credible way to do history.[65] Inquiries into original meaning, he believes, should be based on sound practices of historical research, otherwise the account of original public meaning will be anachronistic, and "nothing more nor less than a creature of the modern originalist jurist's imagination."[66]

Rakove's objections, however informed by his professional training, would also be perfectly sensible for any lawyer to make in rebutting arguments from text, structure, or purpose.[67] It is always appropriate to point out that one's opponent employs an implausible methodology, that her arguments misuse historical sources, that her theory of original meaning is question begging, or that her inferences about historical meaning are naive or anachronistic. It should not matter that these objections come from the mouth of a professionally trained historian, who, if anything, has even greater credibility in making them.

64. Consider, for an example, the argument that we cannot ground originalism on original legal methods because there was no agreement about how to interpret the Constitution at the time of the Founding. This argument has been made both by a historian, Saul Cornell, and by law professors Larry Kramer and Caleb Nelson. *See* Saul Cornell, *Reading the Constitution, 1787–91: History, Originalism, and Constitutional Meaning*, 37 L. & HIST. REV. 821, 835–40 (2019); Larry Kramer, *Two (More) Problems with Originalism*, 31 HARV. J.L. & PUB. POL'Y 907, 912–13 (2008); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 555–56, 561, 571–73 (2003).

65. Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, the Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575, 585–88 (2011).

66. *Id.* at 586.

67. Not surprisingly, non-originalist law professors have also attacked this approach to originalism. *See, e.g.*, Feldman, *supra* note 61; Kitrosser, *supra* note 61; John T. Valauri, *Originalism and the Necessary and Proper Clause*, 39 OHIO N.U. L. REV. 773 (2013).

Rappaport might respond that lawyers who do not agree with his theory of original public meaning are also wrong. They have the wrong theory of interpretation, and therefore their historical objections are equally irrelevant. But this means that his complaint is not really that historians lack some skill that lawyers possess, or that historians cannot grasp the special forms of reasoning of professionally trained lawyers. Rather, his objection is that other people—including both professionally trained lawyers and historians—don't share his particular theory. Agreeing with a particular jurisprudential theory is not the same thing as possessing lawyerly skill.

Randy Barnett has pointed out that if one adopts the New Originalism, much history is not especially necessary or even helpful to the task of interpretation.[68] That is because New Originalists are mostly concerned with the definitions of words and phrases, along with their use in legal context. "The fact that a legal text is old sometimes makes the identification of meaning more difficult, but far from impossible in most cases. For one thing, the meaning of language hasn't changed that much."[69] Historians, Barnett suggests, are interested in "describing past events, . . . explaining why what happened in the past happened, [and] why people did what they did; as a result, they are very concerned with identifying motives, or other causal influences."[70] These skills, he contends, are not particularly helpful in ascertaining the objective meaning of legal terms.[71]

Barnett's argument somewhat overstates the case. Historians are not simply or exclusively interested in motives and causal influences. They too, care a great deal about how people used words and what they meant by them.[72] More to the point, they are interested in how people used words as rhetorical weapons, and

68. Randy Barnett, *Can Lawyers Ascertain the Original Meaning of the Constitution?*, THE VOLOKH CONSPIRACY (Aug. 19, 2013, 4:22 PM), http://volokh.com/2013/08/19/can-lawyers-ascertain-the-original-meaning-of-the-constitution/.

69. *Id.*

70. *Id.*

71. *See also* Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 292–93 (2017) (noting that historians are interested in questions of motive, purpose, and causation, the development of ideas over time, and the discovery of archival material, which may not be relevant to the discovery of original public meaning).

72. *E.g.*, Saul Cornell, *Originalism as Thin Description: An Interdisciplinary Critique*, 84 FORDHAM L. REV. RES GESTAE 1 (2015); Cornell, *supra* note 64; Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 FORDHAM L. REV. 935 (2015); Rakove, *supra* note 48; Rakove, *supra* note 65.

how different political, religious, or social groups used the same words in slightly different ways. Historians are interested in the rough and tumble of rhetorical combat. They are interested in the refusal of particular combatants to employ key words and ideas in the same ways as their opponents. (Something, which, I should point out, happens even today.)

Moreover historians, like lawyers, may be interested in how people deliberately used vague and equivocal language to win others over or deflect uncomfortable difficulties in their political positions. Historians care about such things because they recognize that the exercise of language and the exercise of social and cultural power are not fully distinct enterprises. The most important words and phrases of a particular time may have been a terrain of political combat in the eighteenth and nineteenth centuries, just as they are today. People wielded language as a weapon in politics then just as they do now.

* * *

In sum, both historians and lawyers may think that language works somewhat differently than Barnett describes. Therefore, they may disagree with his assumption that it is fairly easy to pin down a univocal original public meaning as to highly contested terms such as "executive power," "arms" or "commerce." Once again, this is not a dispute that can be resolved simply by noting that one is a lawyer and pointing to one's superior legal expertise. Rather, it is a dispute about theories—and practices—of interpretation to which many kinds of scholars might contribute.

In any case, even if we accept Barnett's central point—that much history is not needed to understand the standard meanings of words in common use—it only goes to the question of interpretation. It says nothing about construction. One consequence of the New Originalism's theory of original meaning is that many contested questions cannot be resolved solely through ascertaining original meaning (in New Originalism's sense of that word). Instead, people must resolve these controversies through constitutional construction.[73]

73. Balkin, *The New Originalism*, *supra* note 28; Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 70 (2011); Solum, *supra* note 61.

Constitutional construction, in turn, requires us to use the eleven modalities of constitutional construction described in this article. When we turn to those modalities, wide swaths of history—and of the work of historians—are relevant and important.[74]

William Baude and Stephen Sachs offer an ingenious way to sidestep this problem. They argue that law avoids most of the complications and uncertainties that professional historians find in the past because law uses history in only limited ways. The task of lawyers is to follow the law of the past, which continues as law until it is (lawfully) changed.[75] Deciding what the law of the past is draws on lawyers' legal training. Although "lawyers must often defer to historical expertise on the relevant questions,"[76] Baude and Sachs explain, those relevant questions are greatly circumscribed, so that "the legal inquiry is a refined subset of the historical inquiry."[77] In particular, law "looks to legal doctrines and instruments specifically, rather than to intellectual movements more generally."[78] The law "interprets these instruments in artificial ways, properly ignoring certain facts about their historical authors and audience. And when there is uncertainty, it also applies various evidentiary principles and default rules that can give us confidence about today's law, even when yesterday's history remains obscure."[79]

Because the focus of law is the application of old doctrines and old statutes, rather than the entire corpus of historical knowledge and intellectual history, the problem of applying old law in new factual settings is greatly reduced. Ordinary legal reasoning already involves the application of "old law to new facts."[80] This means that "originalism demands no more than

74. Balkin, *supra* note 57, at 91–96 (describing the different ways one uses history in interpretation and construction). In his argument for why intellectual history is not relevant to the ascertainment of original public meaning, Lawrence Solum briefly mentions the possibility that historians' work might be relevant to construction, especially if construction includes the modality of national ethos. *See* Lawrence B. Solum, *Intellectual History as Constitutional Theory*, 101 VA. L. REV. 1111, 1162 (2015). I argue that history is relevant to all of the modalities, not just ethos.

75. William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 L. & HIST. REV. 809, 812 (2019).

76. *Id.* at 810.

77. *Id.*

78. *Id.*

79. *Id.* at 810–11.

80. *Id.* at 811.

ordinary lawyer's work."[81] For example, "[d]eciding whether a 'no vehicles in the park' ordinance forbids motorized wheelchairs differs only in degree from reviewing warrantless GPS searches under Founding-era trespass doctrines."[82] Lawyers employ standard techniques when they apply an ancient ordinance to new factual situations not imagined at the time of its adoption: "We would need to know the legal content of the ordinance when it was made, the sorts of considerations that validly guided its application at the time, and so on. These questions are the bread-and-butter of ordinary legal reasoning."[83] Thus, "[w]e do not know what James Madison thought about video games, but we do know how to apply general legal concepts to facts, even when the concepts are very old and the facts are very new."[84]

For the same reason, lawyers need not worry too much about historical indeterminacy. Lawyers have the situation well in hand—this is what they do for a living. There may be multiple answers, but some answers are likely to be better than others from a legal perspective. "[T]oday's lawyers are fully capable of rendering an opinion on which side of a Founding-era dispute had the better claim."[85] The reason is that these are "claims of legal interpretation, *as are their negations*; just as much the bread-and-butter of modern judges as 'no vehicles in the park.'"[86]

Baude and Sachs seek to insulate law from historians' methodological criticisms by arguing that no history gets in unless law says that it does. That is, Baude and Sachs argue for the methodological autonomy of law. Law, in this account, is a bit like a submarine that travels blissfully through the oceans of history, and only lets water in on its own terms. Otherwise, the submarine would sink. Put another way, law that is fully permeable to historical inquiry is about as useful as a screen door on a submarine.

Baude and Sachs are correct that law uses history for its own ends. They are also correct that how lawyers think about history and employ history is refracted through standard forms of legal justification. Indeed, these are the central claims of this article.

81. *Id.*
82. *Id.*
83. *Id.* at 818.
84. *Id.*
85. *Id.* at 818–19.
86. *Id.* at 819 (emphasis in original).

The difficulty is that lawyers use many different modalities of argument, far more than Baude and Sachs let on. These modalities of argument use history in ways that make it far more difficult to ignore historians' work and historians' objections. Because these modalities are part of legal argument, they continually invite history—and historical criticism—inside Baude and Sachs' carefully constructed scheme of legal reason.

Equally important, lawyers have incentives both to construct authority and to undermine the authority of their opponents through the use of history. Although Baude and Sachs claim that legal doctrines and legal methods tend to keep history out of legal argument, the incentives of legal argument work in precisely the opposite direction. It may well be that lawyers employ a truncated version of history to establish authority. But lawyers on the other side of a dispute may not let them get away with it. They will object to how history is being used *as part of their legal arguments*. Conversely, lawyers with novel claims will have incentives to bring new historical claims, new historical sources, and new methods of historical proof to lend authority. The recent emergence of corpus linguistics is an example of lawyers' perpetual quest for ever new ways to wield history to establish their claims and discomfit their opponents.[87] To the extent that historians' criticisms are useful to lawyers who want to criticize other lawyers or buttress their own work, Baude and Sachs will not be able to keep history or historians sealed off from law.

Baude and Sachs foreground only a few types of legal argument out of many. This follows from their theory of originalism, which asks whether today's legal decisions have a traceable pedigree to the law of the past and to the doctrines of the past.[88] Because of their distinctive theory of originalism, their paradigm case of legal argument is *precedental* argument, which constructs doctrines from past decisions, reasons from case to case, and applies existing doctrines to new facts. They also advert to textual arguments that apply familiar canons of construction.

87. *See, e.g.*, Josh Blackman & James C. Phillips, *Corpus Linguistics and the Second Amendment*, HARV. L. REV. BLOG (August 7, 2018), https://blog.harvardlawreview.org /corpus-linguistics-and-the-second-amendment/ ("Applying corpus linguistics to the Second Amendment leads to potentially uncomfortable criticisms for both the majority and dissenting opinions in *Heller*.").

88. William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. L. REV. 1455, 1457 (2019) ("[W]hatever law [enacting the Constitution] made back then remains the law, subject to de jure alterations or amendments made since.").

These modalities of argument seem very lawyerly and isolated from much of historical inquiry. Baude and Sachs' emphasis on these modalities gives their argument much of its rhetorical force.

But there are plenty more arguments in constitutional law than are dreamt of in their philosophy. When we turn to arguments from purpose, structure, consequences, convention, custom, ethos, tradition and honored authority, it is hard to foreclose recourse to lots and lots of history. And not just adoption history—all kinds of history from different times and places. As soon as we focus on questions of purpose, or tradition, or structure, or consequences, or custom, it is hard to make a hard distinction between "legal doctrines and instruments" on the one hand, and "intellectual movements" on the other.[89]

And even if we focus only on doctrinal argument, we cannot seal off law from history. Doctrinal arguments can have lots of historical tests embedded within them—for example, whether a group has been subject to a long history of discrimination;[90] whether a certain right or interest is deeply rooted in our nation's history and traditions;[91] or whether there is historical evidence of a purpose or effect to promote religion.[92] When forming doctrines and applying precedents, lawyers don't seem to be able to resist gesturing to the past, and as soon as they do, historical inquiry seeps in. Or to vary the metaphor, the more that lawyers try to flee from history, the more history catches up with them.

Take Baude and Sachs's own example: the status of warrantless GPS searches under the Fourth Amendment.[93] In applying new technologies to old understandings, it will not be sufficient to parse "Founding-era trespass doctrines."[94] We will have to make analogies. Making analogies will require inquiries into—among other things—purpose, institutional history, structure and consequences. Making analogies will require what Lawrence Lessig has called "translation."[95] It will require us to understand the world the Framers operated in and consider how best to realize their purposes in a very different historical context

89. Baude & Sachs, *supra* note 75, at 810.
90. Bowen v. Gilliard, 483 U.S. 587, 602 (1987).
91. Washington v. Glucksberg, 521 U.S. 702, 719 (1997).
92. Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).
93. Baude & Sachs, *supra* note 75, at 811.
94. *Id.*
95. LAWRENCE LESSIG, FIDELITY & CONSTRAINT: HOW THE SUPREME COURT HAS READ THE AMERICAN CONSTITUTION (2019).

with different institutional and law-enforcement structures. Or in the words of fellow originalist Judge Robert Bork, we must attempt "to discern how the Framers' values, defined in the context of the world they knew, apply to the world we know."[96] As we make these inquiries, we will not be able to avoid venturing outside of the history of doctrine; or beyond the comfortable cocoon of common-law canons of construction. We will have to understand "the context of the world the [Framers] knew," and that will invite the historians in. And even if we ourselves refuse to venture into broader historical inquiries, we will not be able to prevent the other lawyers we must argue with from venturing outside.

We can put the point more generally. Lawyers use history to make arguments through standard forms of interpretation. They use history to give their arguments authority—many different kinds of authority, in fact. Because lawyers use history to establish authority, they must allow arguments about history into legal disputes. And because they must allow arguments about history, they must allow those who study and interpret history—that is, historians—into these disputes as well. Chief John Roberts once famously asserted that "history will be heard."[97] It would be quite odd—and perhaps even a bit hypocritical—to announce that history will be heard but not historians. It would be like saying that one is very serious about climate change but has no interest in hearing from any climate scientists.

All that may be so, Baude and Sachs might respond, but the way that lawyers use these various modalities cuts off a great deal of historical evidence and historical argument. Lawyers, unlike historians, are simply not interested in endlessly going down historical rabbit holes. Lawyers, unlike historians, are not interested in endless disputation. They seek closure and decision. They seek easily tractable questions that lawyers can answer on their own. And once lawyers have set up the questions in ways that lawyers believe they can answer—for example, what is the best legal analogy between a GPS system and a common law

96. Ollman v. Evans, 750 F.2d 970, 995 (D.C. Cir. 1984) (en banc) (Bork, J., concurring), *cert. denied*, 471 U.S. 1127 (1984).

97. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 705 (2007) (plurality opinion) (arguing that it was important to remember that the point of *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), was to outlaw "using race to assign children to schools").

trespass?—historians, and their annoying complications, can (very politely) be shown the door. It was lovely talking with you for a brief spell, dear historians, but your services are no longer needed. We've got this!

But of course, lawyers *are* interested in endlessly going down historical rabbit holes. And lawyers *are* interested in endless disputation. This, too, is the "bread-and-butter"[98] of ordinary legal practice. Baude and Sachs are surely correct that, when lawyers argue, they are arguing about legal claims. They are also correct that lawyers believe that some legal claims are more plausible than others, and that judges make decisions about which arguments are more plausible all the time. But it does not follow that historical inquiry is limited in the way they suggest. Quite the contrary, precisely because lawyers have incentives to make whatever arguments they believe will persuasively construct legal authority, they also have incentives to make whatever arguments they believe will persuasively undermine the legal authority of their opponents. Thus, if lawyers use history to establish their authority, other lawyers will turn to history to dispute that authority. In response, the first group of lawyers will return to history to refute the arguments of the second group, the second group will return to history to rebut the arguments of the first group, a third group will intervene to say that the first two groups have completely misunderstood the history, and so on.

Some lawyers, it is true, may want to constrict historical inquiry and deny that historians have much to say to them. But other lawyers, hoping to rebut them, will happily bring the historians in. Historians do not even need to be invited—as I've argued previously, the modalities of argument are always available to them, as they are to all other citizens. Accordingly, we should not understand Baude and Sachs' arguments—or those of Rappaport and Barnett—as actually setting the ground rules for legal argument. Rather, they are particular moves *within* legal argument—moves designed to structure agendas, and thereby make a particular set of theoretical claims and approaches seem more natural and plausible.

It is worth emphasizing this point. When a group of lawyers say that what historians do is not relevant to law or misses the point of legal argument, they are not simply drawing disciplinary

98. Baude & Sachs, *supra* note 75, at 818.

boundaries between law and history. They are also attempting to set agendas, assert theoretical claims, and establish burdens of proof within legal argument. Lawyers and legal scholars who make these kinds of moves are not simply stiff-arming historians; they are also setting boundaries on how other lawyers should use history. By defining legal reason in this way, they seek to foreclose uses of history that might undermine their particular interpretive theories or might rebut arguments using those theories.

Attempts to fence out historians, in other words, are often intra-disciplinary rather than cross-disciplinary: Lawyers who hope to fence out historians may also object to lawyers who would disagree with them about how to use history, or who would use history in different ways to rebut their claims to legal authority. Baude and Sachs' picture of legal reason portrays a rough consensus among lawyers about how to make arguments and what sources to draw on. It is a constricted set of considerations about which all (or almost all) well-trained lawyers agree. In fact, the historical tools available to lawyers—and disagreements about how to use history to persuade—are much broader than they let on.

Baude and Sachs hold out the hope that legal doctrines and canons of construction will limit disputation about history; that they will tell lawyers when to stop. They imagine that there is some constitutional law equivalent to a statute of frauds that will rule out of bounds large swaths of historical evidence. But—especially in constitutional law—it is quite the opposite, as anyone who has ever picked up an amicus brief or a (very long) law review article can tell you. Fights over constitutional doctrine do not hold off historical dispute; they encourage lawyers to find ever new ways to make their cases. They make historical dispute never-ending.

Law claims legal authority through legal arguments. But lawyers do not simply stop arguing. Even when things are settled—which they often are—lawyers will continue to find new ways to keep on arguing, and they will bring history to bear to help them argue in new ways. And each time that lawyers bring history to bear, either they, or their opponents, or their opponents' opponents, can and will enlist the work of historians. Historians cannot be kept out of legal argument because lawyers simply will not allow it. History is too valuable to law's claims to authority to banish historians.

It is precisely because lawyers' use of history is rhetorical—employed to persuade in conditions of uncertainty—that lawyers cannot really escape or seal off historical inquiry. And because lawyers cannot escape or seal off historical inquiry, they cannot escape or seal off those potential participants—historians—who are professionally devoted to knowing something about history. Lawyers cannot, as Baude and Sachs hope, limit historical inquiry, and stop the arguments from becoming ever more about history, or about new ways of proving (or disproving) what history shows (or does not show). Even if, as Baude and Sachs correctly state, law's interest in history is limited—indeed, *because* it is limited—it has a hydraulic effect. Lawyers want to establish authority, and other lawyers want to deny them that authority. This hunger for authority creates incentives to turn to history to construct and deconstruct authority, to find ever new ways to make historical claims and rebut them, to find ever new archives and methods (such as corpus linguistics) to demonstrate and to refute historical claims.

No doubt many historians will be horrified by what I have just said. History, they will point out, is not simply the plaything of adversarial legal argument. It is an inquiry into truth, even if the conditions of that truth are uncertain and contested. What I am describing is a perversion of the task of historical inquiry, a task transformed and corrupted by lawyers' desire to have the last word in an argument for authority—a last word that, I hasten to add, lawyers never really can have.

But the question on the table is not whether lawyers might misuse historical methods and the work of historians—I not only believe it, I have seen it done. Rather, the question is whether lawyers can find ways, internal to law, to keep historians from interrupting them and pointing out that their historical claims are anachronistic, naive, distorted, or simply wrong. The question is whether lawyers can successfully wield their professional identity and their professional norms to hold off historians' objections. The question is whether they can pound the table, announce that they are lawyers, and tell the historians to just shut up because, frankly, it's none of their business.

My point is that lawyers cannot successfully do this, and the reason they cannot do this is because of their very professional identity as lawyers and their own professional norms. The very features of professionalism that cause lawyers to distort history

also open the door to history and historical criticism. As long as lawyers want to find ways of persuading others, and as long as they want to rebut the arguments of their fellow lawyers, they will find all sorts of history, and all sorts of historians, indispensable to their task. The relevance of history—and therefore historical dispute—is baked into the modalities of argument that lawyers unself-consciously employ. This does not make lawyers good historians—it only makes them perpetually subject to historians' interventions.

Baude and Sachs, like Rappaport and Barnett, are simply the latest in a long line of defenders of law's methodological autonomy, the latest constructors of a Maginot line that hopes to let in only a controlled dose of history and keep the rest—and those pesky historians—out. The drawing of metes and bounds is not inappropriate by itself—it is part of what it means for a profession to be a profession. At the same time, for reasons internal to this particular profession, each attempt to simultaneously use history to establish legal authority *and* to exclude historical critiques from historians will fail. It will fail not because lawyers lack distinctive professional identities and professional training but *because of* their distinctive professional identities and their professional training. Because lawyers are lawyers, they will continually alternate between pushing away and embracing forms of expertise that might assist them in building up or chipping away at claims of legal authority. The problem is not that the historians won't shut up; it is that the lawyers won't shut up. Lawyers will always try to find new ways to establish the authority of their positions and undermine the authority of their competitors' claims. Lawyers, because they are lawyers, simply cannot help themselves.

VI. THE NEED FOR A USABLE PAST

The second standard way that lawyers attempt to deflect criticisms from historians is to argue that lawyers, because they are practical people of the world, need a useable past. The expression "a usable past" was coined in a 1918 essay, "On Creating a Usable Past," by the American literary critic Van Wyck Brooks.[99] Brooks was one of the "Young Americans," who

99. Van Wyck Brooks, *On Creating a Usable Past*, 64 DIAL 337 (1918), http://www.archive.org/stream/dialjournallitcrit64chicrich#page/337/mode/1up. Many

offered cultural criticisms of the United States in the early twentieth century.[100] Many people have subsequently spoken of a "usable past" without mentioning Brooks, while uncannily replicating some of the themes of his essay. And of course, although Brooks coined the term "usable past," the idea that people should deliberately use the memory of the past to inspire great work in the present long precedes him. To give only one example, this is one of the themes of Friedrich Nietzsche's famous 1874 essay, "On the Use and Abuse of History for the Present."[101]

Brooks's concern was not authority in constitutional interpretation, but greatness in American letters. The problem, as Brooks saw it, was how to create a national culture in the United States that could inspire greatness in American writers and promote finer attitudes and better ideals. Unfortunately, Brooks believed, American culture at the beginning of the twentieth century was a "travesty of a civilization."[102] It was materialistic and stupid; it blindly worshiped wealth and technological progress. Professors of literature and history in universities were of little use. They celebrated the great deeds of America's past, but only used this knowledge to shame young people rather than inspire them; moreover, academics were no less compromised by the technology-worship and materialism of the age.[103]

Brooks contrasted America with Europe. Europe, he believed, had a past that inspired and encouraged great art. (This assertion is somewhat ironic, of course, given the currents of artistic modernism then working their way through Europe.) Americans lacked a cultural memory that grounded their efforts, situated their art, and offered an artistic tradition to work with or against.

How could Americans use their past to enrich their culture? The answer, Brooks argued, was that Americans should invent

people now associate the phrase with the work of Henry Steele Commager and Herbert Muller. *See* HENRY STEELE COMMAGER, THE SEARCH FOR A USABLE PAST AND OTHER ESSAYS IN HISTORIOGRAPHY 3–27 (1967); HERBERT J. MULLER, THE USES OF THE PAST: PROFILES OF FORMER SOCIETIES (1967).

100. On the Young Americans, see CASEY NELSON BLAKE, BELOVED COMMUNITY: THE CULTURAL CRITICISM OF RANDOLPH BOURNE, VAN WYCK BROOKS, WALDO FRANK, & LEWIS MUMFORD (1990).

101. FRIEDERICH NIETZSCHE, *On the Use and Abuse of History for the Present*, *in* UNTIMELY MEDITATIONS (Daniel Breazeale ed., R.J. Hollingdale trans., 1997).

102. Brooks, *supra* note 99, at 339.

103. *Id.* at 337–38.

the kind of past that they could use.[104] They should draw on elements of the past and reinterpret them into a worthy tradition that could inspire them: "The past is an inexhaustible storehouse of apt attitudes and adaptable ideals; it opens of itself at the touch of desire; it yields up, now this treasure, now that, to anyone who comes to it armed with a capacity for personal choices."[105]

In Brooks' account, a usable past is a selective history; it does not revel in needless complications or complexities. It does not require a comprehensive record of history. It wants just enough history to do its job—which is to inspire the present. Nor is a usable past a foreign country or an alien realm. Advocates of a usable past are not interested in the inherent pastness of the past, but in its organic relationship to the present. A usable past is a past that is connected to us, not separated from us. A usable past is a past that we can understand and relate to, a past that is not hopelessly different from our own world. Above all, a usable past is a resource that people in the present can deploy selectively to support and inspire fellow citizens to great deeds and great works of art. Brooks uses the metaphor of a "storehouse" of objects that one might choose from, while leaving the others behind. The riches of this storehouse emerge from "desire" and "personal choice." It contains "apt" features that we can take with us to the present, and ideals that are "adaptable" to our needs. And above all the storehouse is valuable *to us* because it can revitalize and motivate the present and spur great cultural achievements.

Brooks' fellow Young American, Lewis Mumford, emphasized that a usable past gave meaning to our endeavors by connecting us to the past. A culture needs continuity with the past to ground itself and give itself direction. Because America lacked a usable past, Mumford believed, it was prey to the social forces of the present, including social disconnection and unchecked materialism: "Establishing its own special relations with its past, each generation creates anew what lies behind it, as well as what looms in front; and instead of being victimized by those forces

104. *Id.* at 339 ("[T]he American writer floats in [a] void because the past that survives in the common mind of the present is a past without living value. But is this the only possible past? If we need another past so badly, is it inconceivable that we might discover one, that we might even invent one? Discover, invent a usable past we certainly can, and that is what a vital criticism always does.").

105. *Id.*; *see also id.* at 340 ("*What is important for us?* What, out of all the multifarious achievements and impulses and desires of the American literary mind, ought we elect to remember?").

which are uppermost at the moment, it gains the ability to select the qualities which it values, and by exercising them it rectifies its own infirmities and weaknesses."[106]

A usable past is a form of cultural memory and tradition, and Brooks viewed cultural memory and tradition as constructed, either by accident or by design. Cultural memory is made up of what people in a society choose to remember about their past. Tradition is made up out of what they choose to honor. Brooks pointed out, for example, that other nations found plenty of things in the American experience to celebrate—and each nation found different things to admire because they saw things in America that resonated or contrasted with the cultural memory and traditions of their own countries.[107]

It followed then, that Americans should create their own memories and traditions that could inspire them by mining the storehouse of the past to find what was useful for the present, and to elevate it even if it had not been previously been deemed important. To this end, Brooks argued against focusing on the relatively small number of celebrated American authors and acknowledged masterpieces of American literature.[108] Instead, to create a useable past Americans should focus on the strivings of eccentrics and failures—now mostly forgotten—whose creativity and genius had been unfairly stunted by the national culture that surrounded them. Inspiration for great work in the future would come from rediscovering and elevating this "limbo of the non-elect."[109] American artists should select from the past according to their values, and find their heroes, even among the forgotten and cast-off elements of history.

Some eighty years later, in 1995, the American legal scholar Cass Sunstein wrote a short essay in the Columbia Law Review entitled "The Idea of a Usable Past."[110] His goal was to explain why constitutional lawyers could and should use history differently than professional historians. He offered virtually all of the standard arguments that lawyers make in their defense, and his article remains the best and most sustained argument for a

106. BLAKE, *supra* note 100, at 296–97 (quoting Lewis Mumford, *The Emergence of a Past*, 45 NEW REPUBLIC 19 (1925)).

107. Brooks, *supra* note 99, at 339–40.

108. *Id.* at 341.

109. *Id.* at 340.

110. Sunstein, *supra* note 23.

"usable past" in the law review literature. Although Sunstein did not mention Brooks, his account has striking similarities.

Sunstein wrote to respond to criticisms—by both lawyers and historians—directed at the "republican revival" in American legal scholarship in the 1980s. Almost contemporaneous with the promotion of conservative originalism by the Reagan Administration and the Federalist Society, liberal academics like Sunstein and Frank Michelman had begun to offer a left-liberal version of originalism, grounding a progressive constitutionalism in a distinctive account of the Founding.[111] They drew on historical work by Bernard Bailyn, Gordon Wood, and J. G. A. Pocock, among others.[112]

Sunstein and Michelman argued that the true tradition of American constitutionalism was not exclusively Lockean liberal individualism, which generations of scholars had used to justify a focus on individual rights and interest group pluralism. Rather, the Founding generation was also steeped in the ideology of civic republicanism, which emphasized civic virtue, social connection, deliberative democracy, and the common good. By forgetting these traditions of civic republicanism, American legal scholars had cut themselves off from their own history, and adopted a false narrative that legitimated a politics of selfishness and self-interest.

The republican revival, as it was called, generated rebuttals from historians and from legal scholars who specialized in Founding-era history. Critics charged that neo-republicans were engaged in a more sophisticated version of the law-office history of conservative originalists. As Laura Kalman put it, the neo-republicans rummaged through the past "to find arguments for whatever vision of the social order they wished to promote. By

111. Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988); Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985). Civic republican themes were also combined with feminism and critical legal studies. *See, e.g.*, MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986).

112. *See* JOYCE APPLEBY, CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790S (1984); BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–87 (1969).

mooring their vision in the Founding, law professors believed they could make a more powerful case for it. They could claim kinship with the Founders."[113]

To be sure, there were a few differences between the neo-republicans and conservative originalists. First, most professional historians, who were liberals themselves, tended to sympathize with the political project of the neo-republicans. Second, the neo-republicans drew on a wider range of sources and secondary literature than conservative originalists, including the work of the most distinguished professional historians. "[T]he civic republicans," Mark Festa explained, "sought to invoke the authority not just of historical evidence itself, but also of the professional expertise of the historians who interpreted it."[114]

But these differences hardly absolved the liberal law professors in the eyes of professional historians. If anything, they made historians uneasy. It was one thing to see conservatives quoting Blackstone or *The Federalist* anachronistically and out of context. It was quite another to see the best historical scholarship deployed in this way.[115]

Historians like Gordon Wood and Joyce Appleby pointed out that neo-republicans could not find the historical pedigree they sought by appealing to the ideology of civic republicanism.[116] Linda Kerber noted that the civic republicanism of the Founders was not easy to separate from militarism, patriarchy and oligarchy, and that it was anachronistic to try to separate them.[117] Law professors, who are often the sternest critics of other law professors doing history, were more blunt. Mark Tushnet worried that the ideology of eighteenth century civic republicanism "unravels once we attempt to disentangle the currently attractive strands from the currently unattractive ones."[118] H. Jefferson Powell argued that there was little connection between Sunstein's political ideals and "specific schools of thought in the founding

113. LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 175 (1996).

114. Festa, *supra* note 7, at 495–96.

115. *Id.*

116. KALMAN, *supra* note 113, at 175–76 (quoting GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC viii (1969)).

117. Linda K. Kerber, *Making Republicanism Useful*, 97 YALE L.J. 1663, 1667–69 (1988).

118. Mark Tushnet, *The Concept of Tradition in Constitutional Historiography*, 29 WM. & MARY L. REV. 93, 96 (1987); *see also* Hendrik Hartog, *Imposing Constitutional Traditions*, 29 WM. & MARY L. REV. 81–82 (1987).

era."[119] Barry Friedman argued that "[t]he very same problems that haunt originalism also haunt republicanism." [120] Martin Flaherty dubbed the republican revival "History Lite."[121]

In response, Sunstein defended his use of civic republicanism on the grounds that constitutional lawyers need a usable past, which he defined as "finding elements in history that can be brought fruitfully to bear on current problems." [122] In fact, Sunstein, argued "[t]he search for a useable past is a defining feature of the constitutional lawyer's approach to constitutional history."[123]

Invoking Ronald Dworkin's idea of constructive interpretation, which tries to make the materials of the law "the best they can be," [124] Sunstein asserted that "constitutional lawyers, unlike ordinary historians, should attempt *to make the best constructive sense out of historical events associated with the Constitution*." [125] Consistent with the "fit" of historical facts, lawyers should "try to conceive of the materials in a way that makes political or moral sense, rather than nonsense, out of them to current generations."[126] Obviously this meant viewing history in the light of the present-day lawyer's moral and political judgments. "Everyone can see that the political or moral commitments of the constitutional lawyer are an omnipresent part of the constitutional lawyer's constitutional history." But this is not an embarrassment. "Political or moral commitments play a role because of the interpretive nature of the lawyer's enterprise, which involves showing how the history might be put to present use."[127]

Sunstein denied that there was anything illegitimate about "identify[ing] those features of the constitutional past" that a

119. H. Jefferson Powell, *Reviving Republicanism*, 97 YALE L.J. 1703, 1706, 1711 (1988).

120. Barry Friedman, *The Turn to History*, 72 N.Y.U. L. REV. 928, 945 (1997) (reviewing LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996)).

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

122. Sunstein, *supra* note 23, at 603; *cf.* Brooks, *supra* note 99, at 340 ("Only by the exercise of a little pragmatism . . . can the past experience of our people be placed at the service of the future").

123. Sunstein, *supra* note 23, at 603.

124. RONALD DWORKIN, LAW'S EMPIRE vii, 52–55, 62, 77, 229 (1986).

125. Sunstein, *supra* note 23, at 602 (emphasis in original).

126. *Id.*

127. *Id.* at 603.

lawyer views as "especially suitable for present constitutional use."[128] "Constitutional law is based on ideas about authority, not just on ideas about the good or the right."[129] And "[t]he American constitutional culture gives special weight to the conventions of those who ratified constitutional provisions."[130]

Sunstein's model of a useable past was primarily concerned with adoption history. But not all of adoption history—much less all of American history—can form part of a useable past, Sunstein explained. "[M]uch in our constitutional history is bad and no longer usable."[131] For example, the Founders accepted slavery, a "much narrower" conception of freedom of speech "than anyone would find reasonable today," and "the Framers' conception of equality would permit forms of discrimination that the Supreme Court would unanimously condemn" today.[132] Sunstein did not deny that these events happened. His point was that they were not useful to constitutional lawyers who sought to create a useable past: "[a]spects of constitutional history that are of considerable importance to constitutional historians may not be so useful for constitutional lawyers."[133]

"[T]he constitutional lawyer, thinking about the future course of constitutional law, has a special project" that distinguishes her from the professional historian.[134] The professional historian is "subject to the discipline provided by the sources and by the interpretive conventions in the relevant communities of historians."[135] But "the constitutional lawyer is trying 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."[136] The professional historian may have her eyes on the past, but the constitutional lawyer has her eyes on the future. She wants to forge a rhetorical connection between the admirable features of the Founders' vision and the political world she would like to bring into being. Because the Founders are central to our

128. *Id.* at 604.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* at 605.
133. *Id.* at 604–05.
134. *Id.* at 605.
135. *Id.*
136. *Id.*

constitutional heritage, they can encourage, authorize, and inspire our efforts in the present.

Two features make the past usable. First, the past "discipline[es] legal judgment." It bounds utopian speculation and connects legal argument to the American constitutional tradition. It requires lawyers to argue in terms of materials that have "at least some kind of democratic pedigree" because they were adopted by We the People.[137]

Second, and equally important, what makes the past usable is that it is normatively admirable by today's standards. Conversely, what is not normatively acceptable is not usable. As Sunstein put it, "much in our constitutional history is bad and no longer usable."[138] Again contrasting the interests of lawyers to those of historians, he explained, "[p]erhaps the historian wants to reveal the closest thing to a full picture of the past, or to stress the worst aspects of a culture's legal tradition," but "constitutional history as set out by the constitutional lawyer, as a participant in the constitutional culture, usually tries to put things in a favorable or appealing light without, however, distorting what can actually be found."[139]

Sunstein believed that the civic republican tradition offered an excellent example of how present-day lawyers could interpret the past constructively—that is, admirably—by abstracting away its normatively unacceptable features. The tradition of civic republicanism was built on social hierarchy. Male citizens could be devoted to the public good because they were heads of households. They were supported by women and (sometimes) slaves, who were regarded as properly subordinate to a community of equal male citizens. Civic duty was connected obligations of militia service, including the willingness to fight and die for the republic; thus, the idea of civic virtue had overtones of militarism and manly virtue.

Sunstein was perfectly aware of all this but argued that it did not matter. The republican tradition, "in some of its incarnations," was "associated with unappealing and unusable ideas—exclusion of women, militarism, lack of respect for

137. *Id.* at 604.
138. *Id.*
139. *Id.* at 603.

competing conceptions of the good, and more."[140] (Note, once again, that what makes these ideas "unusable" is that they are wrong by today's standards.) "But the commitment to deliberative democracy is not logically connected with those unappealing ideals; indeed, as an abstraction it is in considerable tension with them."[141] Abstracting away the unjust elements of a tradition is acceptable, Sunstein argued, and may even be necessary to render it usable to the present. "Constitutional lawyers who are interested in republicanism need not be embarrassed by its contingent historical connection with unjust practices."[142]

Despite the disciplinary differences between law and literature, Sunstein's account of a usable past is remarkably similar to Brooks' version in 1918. Americans need inspiration to achieve great things, whether in politics, law or in letters. To do that they need a past that is useful for this purpose. Academic historians, with their eyes fixed on the past, reined in by their own professional norms, are often mired in antiquarian projects, and can offer only limited assistance. Academic historians are far more likely to complicate than to elucidate, to depress and confuse their audiences than to inspire them to great things. American lawyers, like American literary critics, understand that the point of the past is to serve the future. Accordingly, they need to reach into the storehouse of history, construct inspiring narratives, and create a past worthy of instruction to the present. Just as Mumford believed that establishing connections with history could help us from being "victimized by those forces which are uppermost at the moment,"[143] Sunstein argued that retelling the story of civic republicanism could help constitutional lawyers combat the selfishness of 1980s politics. In this way progressive lawyers could counter the neo-liberal agenda of the Reagan years—itself defended in originalist terms—with a communitarian vision drawn from the Founding.

In terms of the modalities of historical argument described in Part II of this article, it is easy to see that Sunstein's version of a usable past is an appeal to ethos, tradition, and honored authority.

140. *Id.* at 606.
141. *Id.*
142. *Id.*
143. BLAKE, *supra* note 100, at 297 (quoting Lewis Mumford, *The Emergence of a Past*, 45 NEW REPUBLIC 19 (1925)).

His arguments about civic republicanism appeal to the same modalities of ethos, tradition and honored authority as many conservative originalist arguments do—either implicitly or explicitly.[144] That is why, I suspect, professional historians may have reacted in the way that they did.

Sunstein, however, was insistent that he was not countenancing bad history, much less advocating sloppiness: "[I]t is familiar to find a constitutional lawyer reading history at a very high level of abstraction ("the Framers were committed to freedom of speech") and concluding that some concrete outcome follows for us ("laws regulating obscenity are unconstitutional.") This use of history is not honorable."[145] The problem for Sunstein was that pointing to the level of abstraction did not really distinguish how he wanted to use history from the kind of historical arguments he did not respect. To create his version of a usable past, Sunstein also wanted to read history at a fairly high level of abstraction; and, as we have seen, he believed that one could abstract away the unpalatable parts of the civic republican tradition.

"The Framers," Sunstein explained, "were republicans. . . . [T]hey prized civic virtue and sought to promote deliberation in government—deliberation oriented toward rights answers about the collective good."[146] Sunstein sought to apply these abstract propositions to modern First Amendment law and other doctrinal areas. His 1993 book *Democracy and the Problem of Free Speech*, for example, was premised on a "Madisonian" conception of free speech which purportedly reflected the Founding-era ideals of deliberative democracy.[147] Reviewing Sunstein's book, I joked that "Sunstein's 'Madisonian' theory of the First Amendment is about as Madisonian as Madison, Wisconsin: It is a tribute to a great man and his achievements, but bears only a limited connection to his actual views."[148]

144. *See* Balkin, *The New Originalism*, *supra* note 28, at 652, 682–96 (arguing that originalist arguments involve multiple modalities and usually implicitly or explicitly appeal to ethos, tradition, and honored authority).

145. Sunstein, *supra* note 23, at 603.

146. *Id.* at 605.

147. *See* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH xvi–xviii, 132–33, 241–44 (1993).

148. J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 1935, 1955 (1995) (reviewing CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993)).

What distinguishes good from bad uses of history, however, is not the level of abstraction. It is whether we acknowledge or disguise our modality of argument. Bad uses of history mislead their audiences about the kinds of justification they actually employ. For example, they might assert that they are only concerned with discerning the historical facts of meaning, purpose or intention when they are actually appealing to (and reconstructing) ethos and tradition, using the Framers and the Founding generation as culture heroes.[149] Perhaps what Sunstein should have said was that while those who misused history refused to admit this, he would do so forthrightly. He was acting as what I call a "memory entrepreneur," seeking to construct inspiring narratives of the past to articulate a desirable conception of American values in the present.[150]

In hindsight, then, it would probably have been better for Sunstein to avoid making his first amendment theory sound like conservative originalism, much less to assert that his theory of freedom of speech was Madison's theory, or that it had "firm support" from Founding-era history.[151] Instead, he might simply have emphasized that, like Justice Brandeis in *Whitney v. California*, he was making an argument about national ethos.[152] The American tradition of freedom of expression, understood in its best light, and symbolized by Madison, the First Amendment's author, is a tradition that celebrates reason and deliberation to make democracy work. Put in terms of Sunstein's arguments about a useful past, he was "contribut[ing] 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."[153] This might have robbed his arguments of the historical pedigree that originalist scholars sometimes like to claim for themselves. But it would have offered a more appropriate use of history.

Sunstein's account of a usable past is quite common among

149. Balkin, *The New Originalism*, *supra* note 28, at 641, 652, 682–96.

150. *Id.* at 696.

151. SUNSTEIN, *supra* note 147, at 132.

152. Whitney v. California, 274 U.S. 357, 373–74 (Brandeis, J., concurring) (1927) ("Those who won our independence believed that the final end of the State was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary."); Balkin, *The New Originalism*, *supra* note 28, at 676–77.

153. Sunstein, *supra* note 23, at 605.

American constitutional lawyers, even if they have not always expressed their aims so coherently and candidly.[154] American lawyers are not interested in antiquarianism for its own sake. They want to draw lessons, advice, and even commands from history. To this end, they seek a past that can justify interpretations of the Constitution in the present. They look for those features of the American constitutional tradition that, given their political and theoretical commitments, deserve to be continued and followed today. This is an example of what I earlier called an obedient use of history. We might call this model of a usable past the *model of admirable ancestors*. By the standards of this model only some history is usable. The rest is not.

Understood as a justification for making arguments from ethos, tradition, and honored authority—the model of admirable ancestors is a perfectly legitimate use of history. Legitimate, that is, if it does not try to conceal its nature to its audience. Nevertheless, as a general account of a usable past for constitutional argument, this model has very significant limitations.

First, the model of admirable ancestors is usually concerned with adoption history, and especially the history of the Founding. All other history of the nation, and indeed, of the world, is, by implication, not usable for these purposes. Similarly, it is a history of persons and groups who successfully managed to change the text of the Constitution or to influence those who did. Thus, Locke and Blackstone are part of a usable past because the adopters read them and were influenced by them. The Anti-Federalists are part of a usable past because their objections to

154. For example, Alexander Bickel anticipates many of Sunstein's arguments. *See, e.g.*, BICKEL, *supra* note 25, at 109 (quoting Herbert Muller for the view that "[o]ur task is to create a 'usable past,' for our own living purposes"); *id.* (quoting Jacob Burckhardt for the view that history "is on every occasion the record of what one age finds worthy of note in another"); *id.* ("We are guided in our search of the past by our own aspirations and evolving principles, which were in part formed by that very past."); *id.* at 109–10 (arguing that "[w]hen we find in history . . . principles that we can adopt or adapt, or ideals and aspirations that speak with contemporary relevance," we should focus on "the rhetorical tradition and its implications, not the inconsistent commitment.").

Like me, Howard Vogel connects the idea of a usable past in constitutional law to the forms of argument. *See* Howard J. Vogel, *The "Ordered Liberty" of Substantive Due Process and the Future of Constitutional Law as a Rhetorical Art: Variations on a Theme from Justice Cardozo in the United States Supreme Court*, 70 ALB. L. REV. 1473, 1545–52 (2007) ("[L]egal argument is always, in various ways, a search for a 'usable past' in light of the need to resolve disputes in the present").

the proposed Constitution forced its advocates to modify their claims about how the Constitution would operate in practice, and to support new amendments to the Constitution, some of which appeared in the Bill of Rights. Likewise, the views of nineteenth-century abolitionists are part of a usable past because their opposition to slavery eventually carried the day in the Reconstruction Amendments. In sum, this account of a usable past focuses on the history of those who won struggles for constitutional adoption—or influenced those who won—as opposed to those whose claims were ignored or crushed; or those who, like women before the adoption of the Nineteenth Amendment, were given no voice in governance.[155] (We might contrast this model of a usable past to that of Van Wyck Brooks, who sought to construct a tradition from those who lost so badly that they are not even remembered.) Selecting only the winners' perspectives discards a great deal of history as not usable.

Second, what makes the past usable in this model is that it is normatively admirable by today's standards—or at the very least acceptable and inoffensive. (More precisely, it is admirable in the eyes of the particular person making the historical argument.) Conversely, what is not normatively admirable or acceptable is not usable; therefore it must be omitted, distinguished, or separated from the honorable and usable parts of history.

History is usable in this model because it teaches us something important about the past that we should follow in the present. We might follow it because it provides an authoritative construction of features of the Constitution, its purposes, text, and structure. Or we might follow it because it offers us models for appropriate behavior or principles for present-day law and politics. But in either case, a usable past gives us guidance about what to do today, either through instruction or inspiration. Thus, in terms of Part III's typology, the model of admirable ancestors is both an obedient and an authority-constructing use of history.[156]

Nevertheless, this conception of a usable past throws away a great deal of history; and it discards many possible ways of using a complex tradition in the present.[157] History that shows that our

155. Siegel, *supra* note 40.

156. *See supra* Part III.

157. *See* Stephen M. Griffin, *Constitutional Theory Transformed*, 108 YALE L.J. 2115, 2153 (1999) ("Sunstein does not come to grips with the reality that *all* of American history is potentially relevant to his project.").

constitutional traditions are not worthy, admirable, or inspiring is not usable. History that shows how application of past practices to present-day circumstances is inevitably anachronistic is not usable. History that complicates—that denies that we have inherited a coherent or unitary tradition—is not usable. Similarly, history that shows that there was not a clear, definitive answer to how the Constitution was understood at the time of adoption, is not usable. Critical accounts of history, which show how our present traditions, values, and arrangements are inextricably bound up with past errors and injustices, are not usable. Historicist accounts, which show how features of the constitutional tradition—and our understanding of those features—have not been constant or enduring but have altered with changing times, are not usable.

The irony of this model of a usable past is that it renders so much history unusable.

It is a bit like a man who enters a huge room with a vast variety of fresh ingredients, meats, fruits, vegetables, condiments and spices before him. He then proceeds to throw away almost everything in the room and make a grilled-cheese sandwich. He defends his wastefulness on the grounds that he is not a professional chef—he is a special kind of short-order cook. From his perspective, all of the other food in the room is simply unusable. And besides, he explains earnestly, the customers won't swallow anything else.

I myself have nothing against a really good grilled-cheese sandwich. But surely there is more nourishment to be found in history.

For history to be usable, it does not have to offer a clear command to the present. It does not have to be honorable or inspiring. The past is a motley arrangement of good and bad, just and unjust, often inextricably bound together. Negative precedents may be more valuable to us than hero worship. Knowing how the nation went wrong may be more useful than hearing yet again how splendidly our predecessors got things right. History may edify even if it does not inspire.

This point holds true even if we limit ourselves to arguments from ethos and tradition. In 1995, Sunstein hoped to abstract the tradition of civic republicanism from its unpalatable historical elements. These unjust elements, he thought, were merely

"contingent."[158] But what if they were not? Suppose that the social hierarchy of the eighteenth century helped make civic republicanism possible? Then it would be partly constitutive of the tradition and not merely contingent. If we want to follow that tradition today, we may have to take the bitter with the sweet. Or we may have to change the tradition significantly, in which case we are not following it so much as transforming it.

Political traditions are entangled in complex social relations and historical contexts. Transporting these values from the past may bring other less admirable features and complications along with them. If we assume that we can easily cleanse these traditions of their less troublesome elements, we may miss some of the most important lessons of the past for the present. Working within a tradition, no matter how hallowed, may involve moral compromises. There are no traditions without tradeoffs.

Instead of trying to abstract away the problems of past traditions, it may be more appropriate to acknowledge their difficulties and complications. The past may be more usable if we do *not* treat our traditions as unequivocally admirable; it will simply be usable in a different way.[159] History has many uses besides imitation, obedience, or encouragement. It may edify, enlighten or admonish us. We might use the past to make the present strange to us, thereby loosening us from our accustomed habits of thinking, and our constant tendency to accept the world before us as just and natural; or, conversely, as incorrigible and impossible to reform.

History may reveal problems never solved and injustices never corrected whose consequences haunt us today. It may show the residue of ancient wrongs in a modern world. It may remind us not to paper over past difficulties with the banner of a glorious and unitary tradition. History might suggest alternatives to our present arrangements, or offer warnings about disasters we should avoid. Instead of directing our course of action, it may clarify our choices. Instead of urging us to imitate our ancestors, it may remind us how much our actions must be our own responsibility.

158. Sunstein, *supra* note 23, at 606.

159. *See, e.g.*, Nomi Maya Stolzenberg, *A Book of Laughter and Forgetting: Kalman's "Strange Career" and the Marketing of Civic Republicanism*, 111 HARV. L. REV. 1025, 1084 (1998) (reviewing LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996)) (arguing for employing the civic republican tradition in all its interpretive complexity and normative ambiguity).

VII. CONCLUSION: ADMIRABLE ANCESTORS OR MULTIPLE MODALITIES

To imagine a better model of a usable past for constitutional lawyers, begin with a different set of questions: What do lawyers want from the past, and what makes it useful to them? By this point in the Article, the answer should be obvious. Lawyers want to use the past to help them make arguments that (1) successfully claim legal authority and (2) rebut claims to authority offered by their opponents.

It follows that a usable past might include any part of the past that might assist lawyers in the construction *or* the deconstruction of legal authority. The past is potentially usable whenever it assists lawyers in making or rebutting arguments according to the eleven modalities of constitutional argument. We might call this conception of a usable past *the model of multiple modalities*.

The model of admirable ancestors is only a special case of this model because it limits itself to certain arguments from ethos, tradition, and honored authority. The model of multiple modalities encompasses all of the history relevant to the model of admirable ancestors. But it includes far more history, and values it for a much wider range of purposes.

To be sure, this account of a usable past is still selective. Not every part of the past is equally useful to the modalities of legal argument, even considered collectively. The model of multiple modalities is not a neutral or dispassionate inquiry into history, because of the close connections between usable history and theories of legal justification. Above all, this model of a usable past is shaped by lawyers' concerns. It is an adversarial conception of history shaped by the needs of the legal profession—the need to create new arguments for new situations and to rebut the arguments of one's opponents. It differs from how other parts of the humanities and social sciences may think of the past; and historians may still criticize how lawyers use history for this reason.

Nevertheless, this conception of a usable past has definite advantages over the model of admirable ancestors.

First, it employs a far broader set of historical materials than adoption history. It ranges over the whole of American history, and indeed, the history of the world.

Second, it is not limited to appeals to ethos, tradition, and

honored authority. History may be useful to assess consequences, to understand the structures of a well-functioning government, and to reckon with the meaning of events quite distant from the Founding.

Third, this model does not require that history be admirable, uncomplicated, or univocal in order to be useful, especially when the advocate's task is criticism or rebuttal. It does not rule out complexity or shun a critical approach. It does not require that history be inspiring or that we must always place our traditions in their best light. And it does not assume that in searching for a usable past, we may excise what is unjust or uncomfortable, especially if we can learn from it.

Finally, the model of multiple modalities is a better account of a usable past because it better integrates the contributions of historians. It does not assume that professional historians cannot usefully critique lawyers' history because lawyers inhabit different professional roles and are engaged in different intellectual projects.

I have no quarrel with the notion of a usable past. But constitutional lawyers have not taken the idea seriously enough—or considered all of its ramifications. Even if we restrict ourselves to the lawyer's obsessive focus on constructing and deconstructing legal authority, there are many ways to use history; and many different kinds of history, from all times and places, that one might employ. Critical uses of history, which show the limits and failings of the past, may be every bit as useful as heroic accounts. Complicating uses of history, which reveal dissensus, ambiguity and contingency, may be as important to understanding the present as stylized accounts that seek a single, univocal, lesson or command.

If we want a usable past, we should not be wasteful. We should be willing to use as much of the past as possible, and for as many purposes as we can. If we are economical with history, and remember the multiple ways to employ and learn from it, it will provide us with all the riches we could desire.