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History in Law, Mythmaking, and Constitutional Legitimacy - Symposium: History and Meaning of the Constitution

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HISTORY IN LAW, MYTHMAKING, AND CONSTITUTIONAL LEGITIMACY

PATRICK J. CHARLES*

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The practice of history in law is a time honored tradition in American jurisprudence. Since the Constitution's inception, lawyers and jurists have relied on history, in one form or another, to adjudicate constitutional questions and controversies.¹ It is a practice that has been categorized under many subheadings, to include historicism, intentionalism, interpretivist history, and historical narrative.² Today the practice has become more popular than ever with the rise of originalism, a form of constitutional interpretation and construction that views the Constitution's text as a past to be preserved for use in the present.³ Originalism means different things to different people. For some, originalism is about resurrecting the intentions of the delegates who drafted and framed the Constitution or what is otherwise

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¹ See PATRICK J. CHARLES, HISTORICISM, ORIGINALISM AND THE CONSTITUTION: THE USE AND ABUSE OF THE PAST IN AMERICAN JURISPRUDENCE 1-31 (McFarland Publishing 2014).

² See Robert W. Gordon, *The Arrival of Critical Historicism*, 49 STAN. L. REV. 1023 (1997); Martin H. Redish, *Interpretivism and the Judicial Role in a Constitutional Democracy*, 19 HARV. J.L. & PUB. POL'Y 525 (1996); William M. Wiecek, *Clio as Hostage: The United States Supreme Court and the Uses of History*, 24 CAL. W. L. REV. 227 (1987); William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237 (1986); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983); Raoul Berger, *Mark Tushnet's Critique of Interpretivism*, 51 GEO. WASH. L. REV. 532 (1983); Robert W. Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017 (1981); John Hart Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399 (1977); Roger S. Ruffin, *The Constitution and the Dilemma of Historicism*, 6 SAN DIEGO L. REV. 171 (1969); John Phillip Reid, *Legal History*, 1966 ANN. SURV. AM. L. 669 (1966); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119 (1965); Paul Murphy, *Time to Reclaim: The Current Challenge of American Constitutional History*, 69 AM. HIST. REV. 64 (1963).

³ PAUL W. KAHN, LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY 59 (Yale University Press 1992).

referred to as original intent.⁴ For others, originalism is about how the Constitution's text and provisions were understood by the generation that adopted it or what has been referred to as the new originalism.⁵ Then there are originalists that believe the only way to be faithful to the Constitution, and its prescription for a republican form of government, is to apply the interpretive rules of those who adopted it or what is referred to as original methods originalism.⁶ To restate this last premise more succinctly, original methods originalism requires interpreting a 1787 constitutional provision according to late eighteenth-century rules, interpreting a 1868 constitutional provision according to mid to late nineteenth-century rules, and so forth. There are indeed variations and nuances to these and other originalist methodologies,⁷ but whatever variety of originalism is applied, the overarching premise is similar given that originalists advocate the Constitution should be interpreted according to a set of fixed and unalterable principles.⁸ This in turn limits judicial activism and allows the constitutional amendment process to fix any undesirable results.⁹

Originalists sometimes claim originalism has always existed in one form or another since the Constitution's ratification,¹⁰ but there is no substantiated evidence,

⁴ See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 143-60 (Free Press 1997).

⁵ See, e.g., Keith Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 609 (2004).

⁶ See JOHN O. MCGINNIS & MICHAEL RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* (Harvard University Press 2013); John O. McGinnis & Michael Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 751 (2009); John O. McGinnis and Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 372 (2007).

⁷ See James E. Fleming, *Living Originalism and Living Constitutionalism as Moral Readings of the American Constitution*, 92 B.U. L. REV. 1171, 1174 (2012). See also Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 244 (2009) ("A review of originalists' work reveals originalism to be not a single, coherent, unified theory of constitutional interpretation, but rather a smorgasbord of distinct constitutional theories that share little in common except a misleading reliance on a single label.").

⁸ Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 412 (2013) ("Originalism stands for the proposition that the meaning of a written constitution should remain the same until it is properly changed."); Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 377-78 (2013) (stating originalists agree that the text "historically fixed" is at the heart of originalism); MCGINNIS & RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION*, *supra* note 6, at 117 ("Originalist theories argue that the actual meaning of the Constitution is fixed as of the time of its enactment.").

⁹ For a more in depth discussion, see LAWRENCE B. SOLUM & ROBERT W. BENNETT, *CONSTITUTIONAL ORIGINALISM: A DEBATE* 1-35, 84-119 (Cornell University Press 2011). See also Lawrence B. Solum, *Faith and Fidelity: Originalism and the Possibility of Constitutional Redemption*, 91 TEX. L. REV. 147, 156 (2012) ("The fixation thesis and the constraint principle constitute the core of contemporary originalist thought.").

¹⁰ See, e.g., ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 79 (West 2012); see also MCGINNIS & RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION*, *supra* note 6, at 126-33; Lee J. Strang, *Originalism, the Declaration of*

at least in total historical context, to support it.¹¹ The truth of the matter is originalism is a revival, or one might argue evolution, of a late nineteenth-century and early twentieth-century debate over constitutional interpretation that centered on whether history can pinpoint a set of fixed and unalterable principles to interpret the Constitution.¹² It was a debate historians dismissed given the complexities of importing the past for use in the present, and the wide acceptance of the common law approach to constitutional interpretation.¹³ Historian Charles A. Beard, for one, dismissed the view of lawyers and laymen that asserted the “provisions of the Constitution are clear and fixed—like or similar to the multiplication table or natural science.”¹⁴ While Beard expressed “no doubt” that a number of constitutional provisions were intended to be rigid, he maintained reservations concerning the Constitution’s “broad and general” clauses such as “due process of law, life, liberty and property, commerce among the states, general welfare, and privileges and immunities.”¹⁵ Beard was also concerned with the dilemma of multiple meanings. There would always be instances where jurists must choose between competing interpretations. It was primarily for this reason that Beard felt characterizing the Constitution as “changeless” to be without substance.¹⁶

Prominent English jurist and historian Sir Frederick Pollock was another early voice to dismiss the notion that the Constitution was intended to be changeless. According to Pollock, history showed how it was not unusual for new generations of lawyers to regard the system they are trained in as “a monster of inhuman perfection.”¹⁷ Pollock was particularly defensive when lawyers asserted the need to cast out the common law approach to constitutional interpretation, where precedent and reason dictated the results. In Pollock’s mind, to cast out the common law

Independence, and the Constitution: A Unique Role in Constitutional Interpretation?, 111 PENN ST. L. REV. 413, 438-39, 447 (2006).

¹¹ See generally JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (Alfred A. Knopf 1996). See also Lorianne Updike Toler, J. Carl Cecere, & Justice Don Willett, *Pre-“Originalism,”* 36 HARV. J.L. & PUB. POL’Y 277, 304 (2012) (showing originalist methodologies were not employed following the ratification of the Constitution); Sister Marie Carolyn Klinkhamer, *The Use of History in the Supreme Court, 1789-1835*, 36 U. DET. L.J. 553 (1959) (showing the early Justices of the Supreme Court used history to explain the path of the law); Sister Marie Carolyn Klinkhamer, *John Marshall’s Use of History*, 6 CATH. U. L. REV. 78, 88-95 (1956) (showing how John Marshall used history sparingly and did not employ it as an outcome determinative tool).

¹² CHARLES, *supra* note 1, at 7.

¹³ See, e.g., Julius Goebel, Jr., *Constitutional History and Constitutional Law*, 38 COLUM. L. REV. 555 (1938).

¹⁴ Charles A. Beard, *The Act of Constitutional Interpretation*, 1 NAT’L LAW. GUILD Q. 9, 12 (1937).

¹⁵ *Id.* at 13.

¹⁶ *Id.* at 14. For more on the view that Charles A. Beard dismissed originalism before it ever came to fruition, see R.B. Bernstein, *Charles A. Beard: Foe of Originalism*, 2 AM. POL. THOUGHT 302 (2013); Adrian Vermeule, *Beard and Holmes on Constitutional Adjudication*, CONST. COMMENT. (forthcoming 2014).

¹⁷ Frederick Pollock, *The Genius of the Common Law I: Our Lady and Her Knights*, 12 COLUM. L. REV. 189, 189 (1912).

approach was rooted in arrogance. “But the dogmatic assertion that law is the perfection of reason belongs to a later age,” wrote Pollock, “an age of antiquarian reverence often falling into superstition and of technical learning often corrupted by pedantry.”¹⁸

This is not to say Beard, Pollock, and later historians dismissed the use of history in law outright. It was quite the opposite. Historians understood that history was a valuable and irresistible tool from which to legally reason.¹⁹ The reservation historians maintained with the practice was history of the “law office” variety—the selection and manipulation of historical data favorable to a predisposed legal position—for by quoting and selecting history the courts made history.²⁰ Therefore, historians proposed that the legal academy seek a more sophisticated and restrained approach.²¹ What this entailed was employing the evidentiary record in historical context, but only in a minority of cases, thus preventing the use and abuse of history to advance judicial philosophies.²²

In the years that followed, the Supreme Court somewhat adhered to the historical academy’s call for a more restrained approach to history in law,²³ however, in the minority of cases where history was used, the legal academy made little, if any, improvement of its employment of historical methodologies, especially limiting history of the law office variety.²⁴ It was in the midst of this practice that original intent originalism thrust itself into the debate over constitutional interpretation. Whether originalists forgot or just ignored the preceding debates over history in law,²⁵ original intent proponents claimed the history of those who drafted and framed the Constitution’s text was the key to unlocking the correct interpretation of constitutional provisions. In response, historians and legal critics showed the difficulties in pinpointing the collective intentions of those who drafted and approved the Constitution.²⁶ By the time historians and legal critics had exposed

¹⁸ *Id.* at 190.

¹⁹ See JULIUS GOEBEL, JR. & T. RAYMOND NAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664-1776)* xxxiii-xxxiv (Patterson Smith 1944); Murphy, *supra* note 2, at 72-79.

²⁰ Kelly, *supra* note 2, at 122.

²¹ *Id.* at 157.

²² *Id.* at 158.

²³ See, e.g., Charles E. Wyzanski, Jr., *History and Law*, U. CHI. L. REV. 237, 239 (1959).

²⁴ For some discussions, see Buckner F. Melton, *Clio at the Bar: A Guide to Historical Method for Legists and Jurists*, 83 MINN. L. REV. 377, 434 (1998); Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court’s Uses of History*, 13 J.L. & POL. 809, 818 (1997); CHARLES A. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* (Harvard University Press 1969).

²⁵ Even before originalism came to the forefront in the late 1970s, such a methodology of interpreting the Constitution was sufficiently challenged. See, e.g., John G. Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502 (1964).

²⁶ There are numerous criticisms of original intent, but for some of the more prominent, see Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349, 351-52 (1989); LEONARD W. LEVY, *ORIGINAL*

original intent as the pathetic fallacy²⁷ it was, however, originalist proponents had refocused their approach by centering on the original meaning or original understanding of the Constitution's text. Known as the "new originalism," the interpretational approach was born from the understanding that the Constitution was ratified by consent of "the people," and could not solely revolve around what the drafters and framers thought at the 1787 Constitutional Convention.²⁸ Instead, the historical net needed to be cast wider to include how the public understood the Constitution at the point in time the provision was drafted, debated, and ratified. To be clear, what mattered most was the linguistic usage of constitutional text among those who wrote and ratified the text, as well as the general public to whom the Constitution addressed.²⁹ But here too what new originalists have claimed as an objective approach to decoding the Constitution has proven to be another false idol.³⁰

Perhaps the greatest objectivity issue with new originalism remains that its textually-oriented methodologies do little to prevent subjective outcomes,³¹ particularly given that a number of originalists perform the task of recreating a hypothetical reasonable person that lived during the period a respective constitutional provision was drafted, debated or ratified.³² This is objectively problematic on a number of levels. First and foremost, as constitutional historian Saul Cornell has pointed out, the varieties of legal interpretation that can be found in any historical era are numerous.³³ Certainly not every interpretation can be

INTENT AND THE FRAMERS' CONSTITUTION (Macmillan Publishers 1988); H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

²⁷ I have borrowed this characterization to describe originalism from the late English historian Herbert Butterfield, who used the term to describe Whiggish history. In my opinion, originalism and Whiggish history suffer from similar defects. See HERBERT BUTTERFIELD, *THE WHIG INTERPRETATION OF HISTORY* 20 (1931).

²⁸ This approach to constitutional interpretation is often credited to or draws from the writings of James Madison. See RAKOVE, *supra* note 11, at 17-18, 352-53, 362-64; LEVY, *supra* note 26, at 5, 20-29.

²⁹ See, e.g., Randy Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237, 239-40 (2004).

³⁰ See, e.g., Saul Cornell, *The People's Constitution vs. the Lawyer's Constitution: Popular Constitutionalism and the Original Debate Over Originalism*, 23 YALE J.L. & HUMAN. 295 (2011).

³¹ See Eric Berger, *Originalism's Pretenses*, 16 U. PA. J. CONST. L. 329, 331, 345-65 (2013); Jack Rakove, *Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism*, 48 SAN DIEGO. L. REV. 575, 578 (2011) ("Whether originalism does more to constrain than liberate would be hard to measure.").

³² See, e.g., Gary Lawson, *No History, No Certainty, No Legitimacy . . . No Problem: Originalism and the Limits of Legal Theory*, 64 FLA. L. REV. 1551, 1559 (2012); see also Barnett, *supra* note 8, at 413-15.

³³ See Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L.J. 625, 626-31 (2008); see also Larry Kramer, *Two (More) Problems with Originalism*, 31 HARV. J.L. & PUB. POL'Y 907 (2008); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003).

categorized as reasonable or dominant.³⁴ The hypothetical reasonable person construct also fails because this historical reader is unidentifiable, for this imaginary person is constructed in the visionary mind of the respective originalist.³⁵

Essentially, what it boils down to is new originalism's hypothetical reasonable person construct raises the dilemma of subjective outcomes. It is no secret that the same type of originalist inquiry can lead to competing results, all dependent on the methodologies employed by the researcher, including the manner and order the empirical questions are asked and answered.³⁶ From the historian's perspective, this often results from a lack of historical consciousness or when the inquirer reads his or her own predilections from the evidentiary record.³⁷ To borrow from Detroit Mercy law professor and originalist critic Bret Boyce, it should "not be surprising that public meaning originalists . . . reach such dramatically divergent conclusions about . . . proper [constitutional] interpretation and construction," for when "they peer into the magic mirror of [constitutional] meaning, originalists tend to see their own political philosophies and ideological presumptions."³⁸

Lastly, there is the matter of new originalist outcomes contradicting what a thorough historical inquiry provides. A notable example is the First Amendment's Press Clause. Just recently, UCLA law professor Eugene Volokh claimed an originalist inquiry confirms the founding generation foresaw the Press Clause as enshrining a right to print technology, and then suggested there is no substantiated historical evidence showing that the founding generation interpreted the Press Clause as guaranteeing *any* press freedoms.³⁹ Volokh's originalist conclusion, however, is deeply problematic given two indisputable historical truths. First and foremost, the technological vehicle of printing books, pamphlets, and newspapers remained unchanged from the late seventeenth century through the Early Republic. With only one publishing technology having been made available up through the late eighteenth century, it is impossible for Volokh to conclude the founding generation

³⁴ Cornell, *supra* note 30, at 295-304; see also Gordon Wood, *Rhetoric and Reality in the American Revolution*, 23 WM. & MARY Q. 3 (1966) (discussing the historian's dilemma when separating political propaganda, changing arguments, and political realities).

³⁵ Rakove, *supra* note 31, at 584-86.

³⁶ The Fourteenth Amendment is a case in point. See generally Bret Boyce, *The Magic Mirror of "Original Meaning": Recent Approaches to the Fourteenth Amendment*, 66 ME. L. REV. 29 (2013).

³⁷ See J.G.A. Pocock, POLITICAL THOUGHT AND HISTORY: ESSAYS ON THEORY AND METHOD 3-20, 189 (Cambridge University Press 2009); J.G.A. Pocock, *British History: A Plea for a New Subject*, 47 J. MOD. HIST. 601, 614-15 (1975).

³⁸ Boyce, *supra* note 36, at 36. Brett Boyce is not the first to make this kind of observation. Following the ratification of the Fourteenth Amendment, Henry Reed made a similar line of argument. See Henry Reed, *American Constitution in 1787 and 1866*, 2 THE INT'L REV. 604, 619 (1875).

³⁹ Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459 (2011). For a recent application of Volokh's thesis to potential Press Clause jurisprudence, see Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 YALE L.J. 412, 432-447 (2013) (arguing that history does not support recognizing any organizational press freedoms).

viewed the Press Clause as an evolving technological right of “the people” to employ free speech. Such a conclusion is nothing more than Volokh imprinting his modern libertarian values onto the past. Second, Volokh’s originalist claim is undermined by the evidentiary record that most originalist inquiries seem to overlook, particularly through a detailed intellectual and ideological historical inquiry. In terms of the Press Clause, the historical evidence suggests that both the public and printers viewed the “liberty of the press” as providing some protections to acquire and print information on matters of public concern.⁴⁰ This is not to say that every person in the late eighteenth century perceived the Press Clause in this light, but there is evidence suggesting that many did.

The constitutional scope of the Press Clause is just one of many examples of originalist constructs resulting in subjective outcomes. And, of course, originalism, in any of its forms, is not the only culprit when it comes to substituting one’s personal beliefs as historical fact. Originalism is merely the most popular means employed today.⁴¹ It seeks to persuade us that the generation who drafted, framed, debated, and ratified a respective constitutional provision would have agreed with whatever outcome the originalist proclaims to be true. But again, more often than not, the results end up replacing facts with myths.⁴²

The practice of recasting constitutional history to conform to one’s own predilections first grew to prominence in the seventeenth century.⁴³ It was a practice employed during the Constitution’s ratification in 1789, but became even more prominent near the turn of the nineteenth century with the rise of the Jeffersonian Republicans.⁴⁴ And it is a practice that continues today whenever politicians, lawyers, jurists, and pundits substitute their personal views as historical fact. Lawyers regularly perform this task in court pleadings when they ask the judiciary to accept historical source “X” or “Y” as binding legitimate authority, while, at the same time, requesting the judiciary to ignore others. The same holds true for jurists who rely on certain facets of the evidentiary record to support the outcome of case, all the while denouncing, rejecting or discounting others.⁴⁵ In either instance, the

⁴⁰ For a full discussion on the history of the “liberty of the press,” see Patrick J. Charles & Kevin F. O’Neill, *Saving the Press Clause from Ruin: The Customary Origins of a “Free Press” as Interface to the Present and Future*, 2012 UTAH L. REV. 1691 (2012).

⁴¹ Originalism in many ways has become intertwined with popular constitutionalism. For some discussions, see Rebecca E. Zietlow, *Popular Originalism?: The Tea Party Movement and Constitutional Theory*, 64 FLA. L. REV. 483 (2012); Todd E. Pettys, *Popular Constitutionalism and Relaxing the Dead Hand: Can the People Be Trusted?*, 86 WASH. U. L. REV. 313 (2008); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008); see also Eric A. Posner, *Why Originalism Is So Popular*, NEW REPUBLIC, Jan. 14, 2011, <http://www.newrepublic.com/article/politics/81480/republicans-constitution-originalism-popular>.

⁴² See, e.g., RAY RAPHAEL, CONSTITUTIONAL MYTHS: WHAT WE GET WRONG AND HOW TO GET IT RIGHT (New Press 2013).

⁴³ J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY (Cambridge University Press 1957).

⁴⁴ Powell, *The Original Understanding of Original Intent*, *supra* note 26, at 924-35.

⁴⁵ Wiecek, *supra* note 2, at 227-28.

result is the acceptance of historical myth in lieu of historical fact. The question moving forward, and what this article seeks to answer, is when, if ever, is the use of myth a constitutionally legitimate enterprise.

Given that the act of modifying the dead hand of the past to meet the desires of the present has been practiced for centuries, it may be argued that substituting historical myth for fact is already a constitutionally legitimate enterprise. There are two problems, however, with this statement. First, jurists who have practiced or currently practice history in law, no matter the respective case or controversy, do not openly admit to modifying the past for use in the present. To do so would reveal their subjective leanings and ultimately call into question the legitimacy of their analysis. Second, even though a respective jurist may, in fact, have advanced false notions of history—at the time the jurist wrote or joined the opinion—the jurist generally believes he or she is being a good steward of the past. Otherwise, he or she would not have written or joined the opinion in the first place.⁴⁶

Still, one may assert that modifying the past to adjudicate constitutional questions and controversies is in line with the practice of living and popular constitutionalism, *i.e.* interpreting the Constitution in line with the beliefs, views, and needs of the present. This is a valid response if, and only if, constitutional interpretation is limited to notions of living and popular constitutionalism, and it is acknowledged that the past is nothing more than a subcontractor for use in the present. American constitutional jurisprudence, however, has never been solely based on the doctrines of living and popular constitutionalism.⁴⁷ As it stands today, there are indeed a number of opinions, holdings, and legal precedents that reflect notions of living and popular constitutionalism, but there are an equal number of opinions, holdings, and legal tests that emphasize the importance of history, custom, and tradition.⁴⁸

It is in these latter instances that the use of historical myth in lieu of historical fact is facially illegitimate. If one pauses to consider, it is impossible to proclaim that any historically based argument is legitimate if it contradicts what a thorough examination of the evidentiary record provides.⁴⁹ It is the equivalent of a court

⁴⁶ For some useful discussions on history in law by jurists, see Amanda L. Taylor et al., *A Dialogue with Federal Judges on the Role of History in Interpretation*, 80 GEO. WASH. L. REV. 1889 (2012); Jeffrey S. Sutton, *The Role of History in Judging Disputes About the Meaning of the Constitution*, 41 TEX. TECH L. REV. 1173 (2009); Robert H. Jackson, *Full Faith and Credit: The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1 (1945).

⁴⁷ See, e.g., William H. Rehnquist, *The Notion of a Living Constitution*, 29 HARV. J.L. & PUB. POL'Y 401 (2006); DAVID STRAUSS, *THE LIVING CONSTITUTION* (Oxford University Press 2010).

⁴⁸ The Supreme Court's jurisprudence concerning the First and Seventh Amendments illustrates this point succinctly. See Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852 (2013); Erwin Chemerinsky, *History, Tradition, the Supreme Court, and the First Amendment*, 44 HASTINGS L.J. 901(1993); see also *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (stating the appropriate limits of constitutional rights and governmental power “come not from drawing arbitrary lines, but rather a careful ‘respect for the teachings of history [and], solid recognition of the basic values that underlie our society.’”).

⁴⁹ Helen Irving, *Constitutional Interpretation, the High Court, and the Discipline of History*, 41 FED. L. REV. 95, 124-25 (2013).

deciding a civil or criminal case based upon inaccurate or false statements. For in those civil and criminal cases where a court lays an inaccurate factual foundation, the subsequent legal analysis and holding will most certainly be insufficiently reasoned and therefore illegitimate.⁵⁰ In the words of late eighteenth-century jurist and Supreme Court Justice James Wilson, “The more accurately and the more ingeniously men reason, and the farther they pursue their reasonings, from false principles, the more numerous and inveterate will their inconsistencies, nay, their absurdities be.”⁵¹ This baseline principle equally applies when historical myths are incorporated into the constitutional equation. Any subsequent legal analysis and holding will create an illegitimate foundation. But unlike the typical civil and criminal case, incorporating historical myths into constitutional jurisprudence can have far reaching negative effects in both law and society.⁵²

The legal and societal repercussions of substituting historical myth in lieu of historical fact are often ignored by members of the legal academy.⁵³ Originalists, however, have countered historians’ concerns of “law office history” by arguing it is better than the alternative, “history office law” or inquiring into the meaning of the Constitution, yet neglecting the distinctive aspects of the legal task at hand.⁵⁴ Thus, according to originalists, because historians are not trained legal professionals, it is historians that are the greater threat to objective constitutional interpretation.⁵⁵ To state it in even simpler terms, many members of the legal academy perceive themselves as being better equipped to interpret historical legal texts than historians.⁵⁶

This dismissal of historians is actually commonplace among originalists, but it is a hypocritical and unsupported argument.⁵⁷ It remains unclear why it is acceptable

⁵⁰ CHARLES, *supra* note 1, at 87.

⁵¹ JAMES WILSON, 1 COLLECTED WORKS OF JAMES WILSON 467 (Kermit L. Hall & Mark David Hall eds., 2007).

⁵² David Thomas Konig, Heller, *Guns, and History: The Judicial Invention of Tradition*, 3 NE. U. L.J. 175, 177-78 (2011).

⁵³ Of course, not every member of the legal academy has ignored the subject. See Matthew J. Festa, *Applying a Usable Past: The Use of History in Law*, 38 SETON HALL L. REV. 479 (2008); LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (Yale University Press 1996); Cass R. Sunstein, *The Idea of a Useable Past*, 95 COLUM. L. REV. 601 (1995).

⁵⁴ Lawson, *supra* note 32, at 1559; Saikrishna B. Prakash, *Unoriginalism’s Law Without Meaning*, 15 CONST. COMMENT. 529, 534 (1998).

⁵⁵ See Michael Rappaport, *History Office Law*, THE ORIGINALISM BLOG (Dec. 27, 2010), <http://originalismblog.typepad.com/the-originalism-blog/2010/12/recently-i-linked-to-this-op-ed-by-distinguished-historian-pauline-meier-the-piece-defended-justice-breyers-comments-on-the.html>.

⁵⁶ Randy Barnett, *Can Lawyers Ascertain the Original Meaning of the Constitution?*, THE VOLOKH CONSPIRACY (Aug. 19, 2013), <http://www.volokh.com/2013/08/19/can-lawyers-ascertain-the-original-meaning-of-the-constitution/>; Lawson, *supra* note 32, at 1559; Lawrence B. Solum, *Semantic Originalism* 115 (Univ. Ill. Coll. Of Law Ill. Pub. Law & Legal Theory Research Paper Series, NO. 07-24, 2008). OR Lawrence B. Solum, *Semantic Originalism*, at 34 (Nov. 22, 2008), available at <http://papers.ssrn.com/abstract=1120244>. (citation taken from Strang’s article).

⁵⁷ See, e.g., Gerard N. Magliocca, *Lawyers Masquerading as Historians*, BALKINIZATION (Nov. 21, 2013), <http://balkin.blogspot.co.uk/2013/11/>

for the legal community to make legal claims about historical text, which often end up contradicting what a thorough historical inquiry provides, yet it is unacceptable for historians specializing in a particular era to perform the same task, especially in cases where historical context is elicited to the greatest detail.⁵⁸ According to originalists, we should accept this academic double standard for two reasons. First, given the Constitution's language has not changed that much in two hundred years, legal professionals are better suited to interpret legal texts. Second, the employment of historical methodologies and constructs "without legal training" generally leads to "dumb results."⁵⁹

These types of criticisms are a revelation to intellectual historians who specialize in the interpretation of texts, to include their philosophical origins, meaning, and influence in the public discourse, politics, and law. But even if originalists are correct that the meaning of the Constitution's text has not changed that much, the overarching body of law existing at a particular time, to include the culture and society with which it operates, has changed substantially. One cannot merely extract those legal principles and lessons one likes and discard the others. Legal principles all operate in conjunction within their respective era. This is what makes history in law such a contentious topic among historians who see it as their duty to preserve the past, for originalists often only want to carry forward those portions of the past they agree with and discard the remainder. The overarching point here is a simple one. Unless originalists can identify something more, some ethical or functionality problem with the use of history in context to correct the problems associated with originalism or "law office history" in general, claims of "history office law" are more nominal than real.

Essentially the "history office law" argument is the equivalent of proclaiming less information about the past produces better outcomes than more information. Somehow we are more enlightened, as to the Constitution's meaning and purpose, if we focus intently on what its text means (or can make it mean) and subordinate the larger social, political, intellectual, ideological, and philosophical considerations that took place. It is a nonsensical argument seeing that many of the Constitution's phrases and terms of art embody much broader legal, intellectual, and philosophical

lawyers-masquerading-as-historians.html ("A historian of the Founding era is no better at determining how we should interpret the Constitution than a lawyer. Much more than history goes into that task. To be sure, history is a useful tool, and historians should step up to correct inaccurate information that lawyers are using.").

⁵⁸ See generally Rakove, *supra* note 31, at 575-600 (dissenting to original and semantic meaning originalism on contextual grounds).

⁵⁹ Randy Barnett, *My Fed Soc Panel on Textualist Interpretation*, THE VOLOKH CONSPIRACY (Nov. 19, 2013), <http://www.volokh.com/2013/11/19/fed-soc-panel-textualist-interpretation/>. Barnett was clarifying what he meant at a Federalist Society event. See, e.g., Randy E. Barnett, *Showcase Panel II: Textualism and Constitutional Interpretation*, Statement Before the Federalist Society 2013 National Lawyers Convention 14:18 (Nov. 15, 2013), available at <http://www.fed-soc.org/events/page/2013-national-lawyers-convention-schedule>. ("Ask a historian what the meaning of a legal text is in history, and you know what, unless they are a trained lawyer they are not going to be able to tell you something that is very helpful about it. Historians stock and trade is not legal interpretation. They are very bad at it. They just say stupid things about legal interpretation, while they are saying wonderful things about the periods they are studying. You need to be a lawyer in order to interpret legal texts.").

principles than what any textually based inquiry will illuminate.⁶⁰ This does not even consider the jurisprudential consequences which may result from poor historical paradigms.⁶¹

The intellectual and philosophical development of a free press circa the late eighteenth century has already provided us with one illustration on this point. It is, however, worth providing another, such as the Second Amendment's reference to a "well regulated Militia."⁶² If one subscribes to new originalist methodologies—which, according to Barnett, lead us to "discover an empirical fact"⁶³—the phrase "well regulated Militia" was a synonym for "well trained," embodied the promise of an "armed citizenry," and cannot be read as limiting the "right of the people to keep and bear arms" in any way.⁶⁴ For contemporary readers unfamiliar with late eighteenth-century society and law the conclusion makes sense.⁶⁵ How are they to know the intricacies of a "well regulated Militia" in late eighteenth-century terms?

For those historians who specialize in the rich history of standing armies and militias from the sixteenth century through the turn of the nineteenth century, however, such a construct is in direct contradiction to republican liberty. It would make an "unregulated" or "ill-regulated" militia the historical equivalent of a well-regulated one.⁶⁶ This is highly problematic seeing that a "well regulated Militia" was intended to provide constitutional balance and united the people in defense of their rights, liberties, and property in order to extol Machiavelli's *virtù* and unite the people as a common community. It was a state-sanctioned constitutional body capable of bearing arms so men could train together in the art of war and foster an *esprit de corps*. Such a body of citizen soldiers needed to be professionally disciplined and trained, for this, and this only, prevented the establishment of standing armies and provided a constitutional check on the federal government.⁶⁷

⁶⁰ See, e.g., Irving, *supra* note 49, at 123 (criticizing how a textualist focus "reveals nothing about the context or purpose of the object" being examined).

⁶¹ Charles & O'Neill, *supra* note 40, at 1751-52.

⁶² U.S. CONST., amend. II.

⁶³ Barnett, *supra* note 8, at 415.

⁶⁴ See Barnett, *supra* note 29, at 273-77; see also David T. Hardy, *Ducking the Bullet: District of Columbia v. Heller and the Stevens Dissent*, 2010 CARDOZO L. REV. DE NOVO 61, 67 (2010); STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 85, 144 (2d ed., 1994); David I. Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 FORDHAM URB. L.J. 31 (1976).

⁶⁵ Jeffrey M. Jones, *Public Believes Americans Have Right to Own Guns*, GALLUP (Mar. 27, 2008), <http://www.gallup.com/poll/105721/public-believes-americans-right-own-guns.aspx>.

⁶⁶ See SAUL CORNELL, *A WELL-REGULATED MILITIA AND THE ORIGINS OF GUN CONTROL IN AMERICA* (Oxford University Press 2006); LOIS G. SCHWOERER, *THE DECLARATION OF RIGHTS, 1689 74-78* (John Hopkins University Press 1981); H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* (Duke University Press 2003).

⁶⁷ See Patrick J. Charles, *The Constitutional Significance of a "Well-Regulated Militia" Asserted and Proven with Commentary on the Future of Second Amendment Jurisprudence*, 3 NE. U. L.J. 1, 9-85 (2011); Patrick J. Charles, *The 1792 National Militia Act, the Second Amendment, and Individual Militia Rights: A Legal and Historical Perspective*, 9 GEO. J.L. & PUB. POL'Y 323, 374-90 (2011).

Here again we find an example of how originalism, particularly its adherence to textualist methodologies, can result in an illegitimate understanding of the past.⁶⁸ Constitutional constructs are illegitimate when they are based on illegitimate historical foundations. Eliciting historical context to the greatest detail is the only means of alleviating this dilemma.⁶⁹ It provides a far more legitimate guidepost to reason and creates constitutional constructs. As I have outlined elsewhere, when applying history in law the goal should be to employ the evidentiary record thoroughly, accurately, and objectively. This in turn provides the best foundation from which to legally reason.⁷⁰

History is not, has never been, nor should it ever be the entire means and ends of constitutional interpretation.⁷¹ There are just too many unknowns and unanswered questions for history to be law's sole driving force. History is much better suited as a philosophical and moral guide towards understanding the law's development.⁷² This in turn minimizes mythmaking and the creation of poor constitutional constructs. This does not mean, however, that to legally reason from subjective historical accounts or myth can never be a legitimate enterprise. Before exploring this issue, though, one must distinguish between what constitutes myth and the pursuit of an objective historical account, particularly within the construct of history in law.

⁶⁸ In terms of the Second Amendment, the failure rests on originalists' inability to conduct a thorough ideological or intellectual historical investigation. It is a problem that persists to this day. *See, e.g.*, Barnett, Showcase Panel II, *supra* note 59, at 14:18 (stating, "[l]ike those who previously defended the collective rights interpretation [of the Second Amendment], proponents of the new militia conditioned individual right were unable to produce a single example of anyone, during the founding period, who said this was the meaning of the right to keep and bear arms. In short, they could not provide a single example of anyone who they expressed everyone claimed everyone held..."). For an historical refutation of Barnett's claim, see Patrick J. Charles, *The Second Amendment in Historiographical Crisis: Why the Supreme Court Must Reevaluate the Embarrassing "Standard Model" Moving Forward*, 39 FORDHAM URB. L.J. 1727, 1336-46, 1761-67 (2012).

⁶⁹ This applies to the interpretation of legal texts. One must not only focus on the text to be interpreted, but also on the issues or themes which the text is concerned and the larger mental world from which it is derived. *See* Quentin Skinner, *Motives, Intentions and the Interpretation of Texts*, 3 NEW LITERARY HISTORY 393, 406-7 (1972).

⁷⁰ Rakove, *supra* note 31, at 580 ("[T]he only possible way in which one could satisfactorily reconstruct the original meaning of a constitutional text must necessarily involve an essentially historical inquiry. Such an inquiry would have to take careful account of the sources, explaining how and why a document was drafted, debated, and finally approved. It would involve immersion in the kinds of sources that historians ordinarily use and would need to consider the array of purposes shaping their action.").

⁷¹ This is not to say history cannot affect constitutional outcomes. *See, e.g.*, *Dred Scott v. Sandford*, 60 U.S. 393, 410 (1856); Cass R. Sunstein, *Constitutional Myth-Making: Lessons from the Dred Scott Case*, The Univ. of Chicago Law School Occasional Paper No. 37, 2 (1996) ("*Dred Scott* was one of the first great cases unambiguously using the 'intent of the framers' . . .").

⁷² CHARLES, *supra* note 1, at 85-86; *see* Wofford, *supra* note 25, at 528-33. Recently, constitutional historian Saul Cornell has put forth a similar argument by stating the "basic methods of intellectual history" offer a more honest approach to understanding the Constitution's origins than originalism; *see also* Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 FORDHAM L. REV. 721 (2013).

I. HISTORY, MYTH, AND HISTORY IN LAW: A DISCOURSE

Defining what constitutes myth and history has been an ongoing debate among historians for over a century. The debate centers on whether there can truly ever be such a thing as an objective historical account.⁷³ Given that all historical inquiries grow out of the respective historian's ideological mind, it is argued the writing of history is not so much about truth-seeking as it is about the ideological leanings of the respective historian. In other words, critics of objective history frequently claim that one historian's truth is another's falsity.⁷⁴ What drives this criticism is the frequency in which historical narratives can change. But shifts in historical narratives are not so much driven by the respective historian's subjectivity or personal bias, but by academic curiosity. Historians are asking more questions than ever from a variety of social and intellectual viewpoints. These inquiries continue to develop because up to the mid nineteenth century nationalistic historical narratives were hindering an objective understanding of the past.⁷⁵ Not only did these narratives oversimplify the complexities of a particular event or era, they reconstructed the past through the lens of the present, not through the lens of the time period in question.⁷⁶

In any case there is an argument to be made that all history is myth and all myth is history.⁷⁷ No matter how much of the evidentiary record is uncovered, no historian can ever fully reconstruct the past as it was. In their totality, those moments in history are lost forever. The best any historian can do is build upon those evidentiary remnants which remain. Still, at one level or another, historians will have to make a number of assumptions about the past. In some instances the assumptions will be small or minute because the evidentiary record is rich with information about the past, allowing the respective historian to recreate an event or time period in excruciating detail. In other instances the assumptions can be substantial, especially when the evidentiary record is barren, requiring the respective historian to fill the evidentiary gaps. But whenever historians make *any* assumptions about the past—whether they are minor or substantial—they are perpetuating myth in some form or another.

Considering this fact, it is understandable when critics of history in law denounce the practice as being replete with errors and unreliable.⁷⁸ To completely remove

⁷³ See generally PETER NOVICK, *THAT NOBLE DREAM: THE 'OBJECTIVITY QUESTION' AND THE AMERICAN HISTORICAL PROFESSION* (Cambridge University Press 1998).

⁷⁴ William H. McNeill, *Mythistory, or Truth, Myth, History, and Historians*, 91 *THE AM. HIST. REV.* 1, 1 (1986).

⁷⁵ For a detailed discussion, see JOYCE APPLEBY, LYNN HUNT, & MARGARET JACOB, *TELLING THE TRUTH ABOUT HISTORY* 198-270 (W.W. Norton & Company 1994); see also Joyce Appleby, *The Power of History*, 103 *THE AM. HIST. REV.* 1 (1998); Irving, *supra* note 49, at 100-102.

⁷⁶ As historian Herbert Butterfield aptly observed in 1931: "Real historical understanding is not achieved by the subordination of the past to the present, but rather by making the past our present and attempting to see life with the eyes of another century than our own." BUTTERFIELD, *supra* note 27, at 16.

⁷⁷ For some discussions on this point, see Jonathan Friedman, *Myth, History, and Political Identity*, 7 *CULTURAL ANTHROPOLOGY* 194 (1992); M.I. Finley, *Myth, Memory, and History*, 4 *HIST. & THEORY* 281 (1965).

⁷⁸ See, e.g., STRAUSS, *supra* note 47, at 7-32.

history in law from the interpretational process, however, is to undo the law itself. If one pauses to consider how case facts, judicial precedent, and legal text all embody facets of history, one cannot dispute that history is the law and the law is history.⁷⁹ The two disciplines are inseparable. There are indeed objectivity problems with the general practice of history in law, but as long as these problems are acknowledged and the practice is reformed in a way that minimizes subjectivity to the greatest extent, history in law can provide an invaluable tool from which to legally reason. In the words of the late Charles E. Wyzanski, Jr., despite the problems associated with history in law, there is in “history a meaning, and a meaning that has value for law, as it has for the spirit of man in many another aspect.”⁸⁰ History not only provides us with “another perspective or value against which to measure law,” but it also “teaches us the nature of legitimate authority.”⁸¹

What qualifies as “history” among legal professionals as compared to historians are often two different things.⁸² What many legal professionals deem as history is what historians would classify as “law office history” or historical myth. In a panel discussion before Ohio University, Pulitzer Prize winning historian Gordon S. Wood recently articulated this line of argument, particularly as it applied to Supreme Court jurisprudence, stating:

I have no doubt that the Supreme Court should use history and will use history, but there is no doubt in my mind also that it’s not really history that the justices are using. It’s not the history that historians write, and I would go beyond that and say it’s impossible for jurists, law professors, and Supreme Court justices—or judges anywhere—to really use history. It simply would not work. Judges have to invent another kind of history: We call it “law office history,” or “history lite.” It’s a necessary fiction, and I don’t consider that to be a bad thing. It’s a necessary fiction for judges and other jurists to get along with their work—they need some kind of history to work with. History is much too complicated to be used effectively by judges and the courts.⁸³

Wood’s observation that the practice of history in law is not really history is worth noting, but it is an outdated criticism.⁸⁴ Certainly most historians would agree with Wood that the general practice of history in law is rife with subjective intentions. But there have been instances where legal professionals have produced excellent histories or where jurists have invoked history in law responsibly,

⁷⁹ Festa, *supra* note 53, at 483-85; MILLER, *supra* note 24, at 20-21.

⁸⁰ Wyzanski, Jr., *supra* note 23, at 244.

⁸¹ *Id.*; see also Larry D. Kramer, *When Lawyers Do History*, 72 GEO. WASH. L. REV. 387, 395 (2003) (“When lawyers, judges, and legal scholars turn to history, they do so because they believe, and want their readers to believe, that an historical pedigree adds authority to their argument.”).

⁸² See, e.g., John Phillip Reid, *Law and History*, 27 LOY. L.A. L. REV. 193, 195-97 (1993).

⁸³ Gordon S. Wood & Scott D. Gerber, *The Supreme Court and the Uses of History*, 39 OHIO N.U. L. REV. 435, 443 (2013).

⁸⁴ See, e.g., Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1032 (1997).

especially where history is a moral and philosophical guidepost to the law's development.⁸⁵ To characterize the invocation of history in these latter instances as "law office history" or "history lite" would be improper.

What Wood also fails to mention is that one cannot solely point the finger at legal professionals for the problems associated with history in law. For decades, professional historians gave little attention to the fields of legal and constitutional history. It was not until the rise of originalism, in the late twentieth century, that historians became deeply troubled by the problems originalist methodologies present. Today, given originalism is more prominent than ever, it is as if every constitutional provision is being explored through some form of history in law.⁸⁶ This is indeed a blessing and a curse. On the one hand, it is a curse given that the majority of these inquiries do not adhere to the primary rule of any historical inquiry—understanding the past for the sake of the past. At the same time, these inquiries are a blessing in disguise because they provide historians with an infinite number of topics from which to reexamine the past. The more historians explore such topics, the more accurate, objective, and therefore legitimate the practice of history in law will become. As historian Paul Murphy remarked fifty years ago, so long as historians furnish "complementary modern architectural materials," the courts will "not have to rely upon scrap lumber, salvage bricks, and raw stones" when adjudicating constitutional cases and controversies from an historical standpoint.⁸⁷

This is not to say advocates—whether they are lawyers or legal scholars—will ever end the practice of "law office history." It is the advocates' roles to advance their causes by any means necessary. This includes compiling or cherry-picking historical evidence in their favor, all the while ignoring what a thorough historical inquiry provides or even discussing the limits of historical explanation.⁸⁸ The interpretational consequences associated with "law office history," however, are not in the hands of advocates.⁸⁹ It is the judiciary that is the gatekeeper of how history is relevant to the respective case or controversy, the manner in which history in law is applied, and what historical evidence is to be admitted.⁹⁰ Therefore, when historians

⁸⁵ John Phillip Reid, Bruce Ackerman, Kurt Lash, and Barry Friedman are a few notable examples. See JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION* (Wisconsin University Press 1986); BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (Harvard University Press 1993); KURT T. LASH, *THE LOST HISTORY OF THE NINTH AMENDMENT* (Oxford University Press 2009); BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (Farrar, Straus, & Giroux 2009).

⁸⁶ For the rise of originalism and its continued appeal, see Jamal Greene, Nathaniel Persily, & Stephen Ansolabehere, *Profiling Originalism*, 111 COLUM. L. REV. 356 (2011); JOHNATHAN O'NEILL, *ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY* (John Hopkins University Press 2005).

⁸⁷ Murphy, *supra* note 2, at 78.

⁸⁸ Melton, *supra* note 24, at 382-88.

⁸⁹ Reid, *supra* note 82, at 203-5.

⁹⁰ Wiecek, *supra* note 2, at 227-28. See also Berger, *supra* note 31, at 360-68 (discussing the problems associated with history in law, originalism, and judicial decision making, and judicial restraint).

provide the most accurate, thoroughly documented, impeccable history they are capable of producing, it operates as a counterpoise to the false historical claims of advocates.⁹¹ In fact, a number of jurists look to the writings and opinions of historians when history is presented to the court, for they feel compelled to operate under the assumption the history being presented by the respective parties is that of the law office variety.⁹²

Jurists like these are not seeking to perpetuate what Wood refers to as a “necessary fiction” or to engage in judicial mythmaking.⁹³ They are not seeking to rewrite the past or proclaim one historical narrative is better suited for the present than another. Instead, these jurists desire to know whether there exists a sufficient historical foundation and its explanatory limits. In other words, they are in search of objective historical truths from which to legally reason. One cannot classify this pursuit under the subheadings of fiction or mythmaking. It is a reasonable inquiry.⁹⁴ What constitutes an objective historical truth—and whether there is such a thing—is debatable, but it generally depends on whether the respective historical claim qualifies as myth, theory or thesis. The three categories are distinguishable by the breadth of evidentiary record, the connection between pieces of evidence, and the historical methodologies employed by the historian.

Let us begin with *historical myth*. It is an historical claim generally rooted in some form of societal tradition.⁹⁵ In some instances, the myth is trivial and retains broad support from the populace such as the belief that George Washington’s teeth were made of wood.⁹⁶ In other instances, the myth can have serious societal consequences, yet exists in only a subset of the population, such as the case of the individual tyranny model of the right to “keep and bear arms.”⁹⁷ In any case the individual’s belief in the respective myth is not based on concrete historical evidence, its interconnection or the employment of even the most basic historical methodologies. Instead it is a historical claim that each individual chooses to believe,

⁹¹ Murphy, *supra* note 2, at 77.

⁹² Taylor et al., *supra* note 46, at 1896, 1908; *see also* A. Raymond Randolph, *Originalism and History: The Case of Boumediene v. Bush*, 34 HARV. J.L. & PUB. POL’Y 89 (2011).

⁹³ Wood & Gerber, *supra* note 83, at 443.

⁹⁴ Powell, *Rules for Originalists*, *supra* note 26, at 661.

⁹⁵ Peter Heehs, *Myth, History, and Theory*, 33 HIST. & THEORY 1, 1-2 (1994).

⁹⁶ CHARLES, *supra* note 1, at 85-86.

⁹⁷ This understanding is part of the Standard Model Second Amendment. *See, e.g.*, Randy Barnett, “Constitutionally Speaking” . . . About the Second Amendment, Remarks as Guest on New Hampshire Public Radio (Feb. 22, 2013), *available at* <http://nhpr.org/post/constitutionally-speaking-about-second-amendment> (“The reason why the militia was thought to be essential . . . is in part to protect a country from tyranny. In fact . . . privately armed civilians have . . . been able to resist oppressive governments with organized militaries throughout the world. It is not always pretty and not always successful, but it does raise the cost of tyranny . . .”). For an historical rebuttal to Barnett’s historical claim on this point, *see* Patrick J. Charles, *The Right of Self-Preservation and Resistance: A True Legal and Historical Understanding of the Anglo-American Right to Arms*, 2010 CARDOZO L. REV. DE NOVO 18 (2010).

whether that choice is a conscious or unconscious one.⁹⁸ As historian Edward G. Lengel frames it, this is because individuals make cognitive choices that “reveal more about us”⁹⁹ than they do about what the historical record provides. It is natural for individuals to “define themselves” through their own knowledge and beliefs of history rather than seek historical truth or clarity.¹⁰⁰

An *historical theory* may also be rooted in historical tradition, but unlike historical myths, historical theories are based on an evidentiary record, albeit an incomplete one. To state the premise more succinctly, historical theories essentially facilitate research agendas for other historians to prove or disprove. It is a history in progress so to speak. When an historical claim is categorized as an historical theory it can be due to any number of evidentiary factors. The historical evidence may only be loosely connected, retain significant gaps that require the historian to make large educated assumptions, or the historian may even openly admit he or she has not conducted an exhaustive search of the historical evidence. Whatever the evidentiary deficiency at hand, it creates a scenario where the historian has left the reader with more questions than answers.

One prominent example of what constitutes an historical theory is Charles Beard’s *An Economic Interpretation of the Constitution*. Written in 1913, Beard asserted the framers were primarily motivated by wealth in adopting the Constitution. In doing so, however, Beard admitted his claim was based on an incomplete record and a number of historical assumptions. “The requirement for an economic interpretation of the formation and adoption of the Constitution may be stated in a hypothetical proposition which, although it cannot be verified absolutely from ascertainable data,” wrote Beard, “will at once illustrate the problem and furnish a guide to research and generalization.”¹⁰¹

Where an historical *thesis* distinguishes itself from an historical theory is the level to which the evidentiary record speaks. While an historical theory retains a loose interconnection between pieces of historical evidence, an historical thesis maintains a substantial and intimately woven interconnection between pieces of evidence. Again, as with all historical claims, even an historical thesis requires the historian to make any number of assumptions, at one level or another, because the past can never be fully restored. An historical thesis, however, is built upon accepted historical methodologies intended to elicit context to the greatest detail.¹⁰²

Of the three aforementioned options—historical myth, historical theory, and historical thesis—the one that is closest to an objective historical truth is the historical thesis. Therefore, when it comes to the practice of history in law, historical

⁹⁸ Paul Horwitz, *The Past, Tense: The History of Crisis—and the Crisis of History—in Constitutional Theory*, 61 ALB. L. REV. 459, 505 (1997).

⁹⁹ EDWARD G. LENGEL, *INVENTING GEORGE WASHINGTON: AMERICA’S FOUNDER*, IN MYTH AND MEMORY xviii (Harper 2011).

¹⁰⁰ *Id.*; see also Joseph Mali, *Jacob Burckhardt: Myth, History, and Mythistory*, 3 HIST. & MEMORY 86, 86-88 (1991).

¹⁰¹ CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* 16 (Macmillan Company 1913).

¹⁰² This is not to say the historical methodologies should not be continuously adapted and improved to elicit context to the greatest detail. See, e.g., James T. Kloppenberg, *Thinking Historically: A Manifesto of Pragmatic Hermeneutics*, 9 MOD. INTELL. HIST. 212 (2012).

theses provide the most legitimate foundation from which to legally reason. It ensures jurists are relying on those historical claims that have been proven to a greatest degree of specificity.¹⁰³ This is not to say it is completely illegitimate for jurists to reason from an historical theory. There will be instances where the only answer history can provide to a particular question is theoretical. In fact, a number of historical theories and interpretations may be available, leaving jurists with multiple options from which to choose. In some cases there will be a point of consensus among the competing historical claims, while in others there will be divisive conflict.¹⁰⁴ Whatever the scenario, so long as the jurist acknowledges the existence of the competing historical claims, understands the historical limits of the evidentiary record, and retains historical consciousness when selecting a respective historical account from which to legally reason, the resulting historical foundation can still be legitimate because the jurist is being honest and forthright about his or her choice.¹⁰⁵

Illegitimacy can seep in in those instances where one historical conflict is built on another conflict, and so forth.¹⁰⁶ To assume this approach to history in law is to openly engage in the myth-making process, which in turn leads to an illegitimate foundation for legal reasoning; the justification being historical myth is on the opposite spectrum to achieving an objective historical truth. It is the equivalent of importing an inaccurate statement of facts or relying on hearsay when deciding a criminal case. This does not mean, however, that the use or acceptance of myth for history in law is always illegitimate—an issue this article addresses in the following section.

II. THE LEGITIMACY OF HISTORICAL MYTH IN CONSTITUTIONAL JURISPRUDENCE

There are at least two scenarios (and perhaps others) where historical myth provides an acceptable foundation from which to legally reason. The first scenario takes place when a law or constitutional provision was drafted, enacted, ratified or universally understood under the auspices of a mythical historical narrative or construct. Although history in context informs us this narrative or construct is false, the fact of the matter is it was considered as true to the generation responsible for the law or constitutional provision at issue. It truly is a “necessary fiction” so to speak.¹⁰⁷ The second scenario can take place when the law, as currently constituted, is so reliant on a mythical historical narrative or construct that to correct it, and thereby overturn the legal precedent it established, would have severe consequences. In a

¹⁰³ Julius Goebel, Jr., *Ex Parte Clio*, 54 COLUM. L. REV. 450, 451 (1954) (“The writing of history requires maximum effort in the discovery of evidence and the utmost candor in presentation, for in no other way can the interests of truth be served. Only when these obligations are first discharged should the art of the interpreter be exercised.”).

¹⁰⁴ Some history-in-law commentators argue that jurists should only rely on historical consensus when importing the past for use in the present. *See, e.g.*, Nelson, *supra* note 2, at 1277-83.

¹⁰⁵ This task is not to be confused with merely acknowledging the contradictory historical data and explaining it away. *Compare* Kramer, *supra* note 81, at 402-7, *with* Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, 71 CHI.-KENT L. REV. 909, 917-25 (1996).

¹⁰⁶ CHARLES, *supra* note 1, at 116-18.

¹⁰⁷ Wood & Gerber, *supra* note 83, at 443.

way, the second scenario is very similar to the rules of *stare decisis*. It requires the judiciary to adhere to the previously established foundation even if the historical construct is no longer true.¹⁰⁸

If one applies these two scenarios to the practice of history in law, the instances in which historical myth may provide a legitimate foundation to legally reason are somewhat frequent. Take for instance the Senate's recent debate and vote over the Employment and Discrimination Act that would prohibit workplace discrimination against gay, bisexual and transgender Americans. Those senators that voted in favor of the bill did so by invoking what they perceived to be the spirit of the Declaration of Independence. "[This bill] is certainly about the vision of the Declaration of Independence that has the promise of life, liberty and the pursuit of happiness as the founding motivation," stated Oregon Senator Jeff Merkley.¹⁰⁹

Today, the perception of the Declaration as a bill of equity that offers the promises of equality, natural rights, and happiness is commonplace among politicians and the public.¹¹⁰ To borrow from Pulitzer Prize winning historian Jack Rakove, "The meanings Americans now assign to the Declaration of Independence . . . have relatively little to do with the circumstances of its creation or Thomas Jefferson's purposes, and everything to do with the ideas of equality that, inadvertently or otherwise, it eventually created."¹¹¹ Yet, in the late eighteenth century, the Declaration was neither intended nor understood as affording such a promise. It was the legal means through which the American colonists declared independence to the world.¹¹² Independence was sought for many reasons as was detailed throughout the Declaration's grievances. These grievances were more nominal than real, with the actual impetus being the need to enlist foreign support for the war.¹¹³

¹⁰⁸ See, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

¹⁰⁹ Donna Cassata, *Senate Moves Ahead on Gay Rights Bill; Republican Foes Largely Remain Silent*, STAR TRIBUNE (Nov. 5, 2013), <http://www.startribune.com/politics/230611861.html>.

¹¹⁰ For some scholarly discussions on this point, see Alexander Tsesis, *Self-Government and the Declaration of Independence*, 97 CORNELL L. REV. 693 (2012); SCOTT DOUGLAS GERBER, *TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION* (New York University Press 1995); PETER CHARLES HOFFER, *THE LAW'S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA* 71-80 (University of North Carolina Press 1990); Martin Diamond, *The American Idea of Equality: The View from the Founding*, 38 THE REV. OF POL. 313 (1976).

¹¹¹ Rakove, *supra* note 31, at 578.

¹¹² See, e.g., David Armitage, *The Declaration of Independence and International Law*, 59 WM. & MARY Q. 39, 46-47 (2002). Despite the Declaration of Independence's purpose being expressly stipulated in its title, only one-third of United States eighth graders can restate it. See Ilya Somin, *Justice Sandra Day O'Connor on Political Ignorance*, THE VOLOKH CONSPIRACY (Sept. 6, 2013), <http://www.volokh.com/2013/09/06/justice-sandra-day-oconnor-political-ignorance/>.

¹¹³ See generally PATRICK J. CHARLES, *IRRECONCILABLE GRIEVANCES: THE EVENTS THAT SHAPED THE DECLARATION OF INDEPENDENCE* (Heritage Books 2008).

Despite what the evidentiary record provides about Declaration at the time of its enactment, both its purpose and meaning have evolved from generation to generation.¹¹⁴ When the controversy over slavery and race intensified in the Antebellum Era (1800-1860), the Declaration's pronouncement that "all men are created equal" had become a common talking point among politicians,¹¹⁵ particularly among abolitionists and women's rights activists, who viewed the phrase as a political equalizer and embodiment of the promise of "life, liberty, and the pursuit of happiness" for all.¹¹⁶ Proponents of the societal status quo, however, argued the Declaration did not actually promise civil and political equality. As Stephen A. Douglas stated in a debate with Abraham Lincoln, "[B]ut the signers of that papers did not intend to include the Indian or negro in that declaration . . . for if they had would they not have been bound to abolish slavery in every state?"¹¹⁷ It was this contextual view of the Declaration that Chief Justice Roger Taney espoused in *Dred Scott v. Sanford*:

The general words [of the Declaration of Independence] would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute, that the enslaved African race were not intended to be included . . . for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted . . .¹¹⁸

If history in context matters, it must be admitted the Douglas-Taney view of the Declaration is more in line with the collective views of Thomas Jefferson, the drafting committee, and those enacting members of the Continental Congress. In addition to declaring independence to the world, the Declaration espoused the legal proposition that "life, liberty, and the pursuit of happiness" were the constitutional foundation on which both the state and federal governments were to be based.¹¹⁹

¹¹⁴ See generally THE DECLARATION OF INDEPENDENCE: ORIGINS AND IMPACT (Scott Douglas Gerber ed., 2002).

¹¹⁵ This can be found in various political platforms in the mid nineteenth century. See NATIONAL PARTY PLATFORMS, 1840-1972 5, 13, 18, 27, 32 (Kirk H. Porter & Donald Bruce Johnson eds., 2d ed. 1961).

¹¹⁶ See Strang, *supra* note 10, at 417-23; ALEXANDER TESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY 101-10 (New York University Press 2004); PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 197-200 (Alfred A. Knopf 1997); Linda K. Kerber, *From the Declaration of Independence to the Declaration of Sentiments: The Legal Status of Women in the Early Republic 1776-1848*, 6 HUM RTS. 115, 115-24 (1977).

¹¹⁷ CREATED EQUAL?: THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858 62-63 (Paul M. Angle ed., 1958).

¹¹⁸ *Dred Scott v. Sanford*, 60 U.S. 393, 410 (1856).

¹¹⁹ Patrick J. Charles, *Restoring "Life, Liberty, and the Pursuit of Happiness" in Our Constitutional Jurisprudence: An Exercise in Legal History*, 20 WM. & MARY BILL RTS. J. 457, 458, 464-66 (2011). I have placed emphasis on the word "polity" because the Declaration of Independence is often mistaken as promising "life, liberty, and the pursuit of happiness" to all persons within the territorial jurisdiction of the United States, without regard to whether

What “all men are created equal” meant was that every member of the *polity* is to be afforded “life, liberty, and the pursuit of happiness” on equitable principles.¹²⁰

Still, these historical certainties extinguish neither how the Republicans of the Reconstruction Era (1865-1877) viewed the Declaration, nor how they applied its tenets when proposing legislation to protect those freed by the Thirteenth Amendment.¹²¹ To them, the Declaration embodied a set of principles that government should strive for, particularly as it related to equal civil and political rights.¹²² For instance, during the debate over whether to grant Freedman the political right to vote in the District of Columbia, Illinois Representative John F. Farnsworth called upon the Declaration to rebut those members of Congress who would deny such a right:

Our fathers, when they framed the Declaration of Independence, declared that all men were created equal . . . [what they meant], so far as . . . natural rights were concerned, that one man was equal to any other man. They declared, and made the declaration one of the principles of the Government which they established, that all men inherited the same rights. They declared that all men had the right to life, liberty, and the pursuit of happiness. And they said more than that. They said that Governments were instituted to protect these rights. They said that the just powers of government were derived from the consent of the governed. If that be true, if Governments are instituted among men deriving there just powers from the consent of the governed, will some gentlemen . . . tell me why this body of men who are under the Government have not the same right as I have to participate in it?¹²³

When the Senate took up the equal representation bill, Massachusetts Senator Henry Wilson also invoked the Declaration as embodying “sublime truths” that society has now accepted.¹²⁴ “We stand as the champions of human rights for all men, black and white, the wide world over,” stated Wilson, “and we mean that just and equal laws shall pervade every rood of this nation”¹²⁵ Ohio Representative Samuel Shellabarger echoed these sentiments during a House debate over the same bill. He hoped the equal representation bill would help restore the “spirit” of the framers’ Constitution, which he perceived as having been ignored by the judiciary

“the people” sought to include them. *See, e.g.*, Victor C. Romero, *Our* Illegal Founders*, 16 HARV. LAT. L. REV. 147, 158 (2013). This is an historical myth given the founding generation’s greatest legal minds perceived it to be every nation’s right to include or exclude foreigners in the interest of national self-preservation. *See* CHARLES, *supra* note 1, at 87-92.

¹²⁰ Charles, *Restoring “Life, Liberty, and the Pursuit of Happiness” in Our Constitutional Jurisprudence*, *supra* note 119, at 481-523.

¹²¹ *See, e.g.*, Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 TEMP. L. REV. 361 (1993).

¹²² *See, e.g.*, Michael Kent Curtis, *The Fourteenth Amendment: Recalling What the Court Forgot*, 56 DRAKE L. REV. 911, 933, 985-86 (2008).

¹²³ CONG. GLOBE, 39th Cong., 1st Sess. 205 (1866).

¹²⁴ *Id.* at 344.

¹²⁵ *Id.*

for seventy years.¹²⁶ “I had hoped that the judiciary of the Government would begin to look at the Constitution in the light of the Declaration of Independence, which said, and as truly as gloriously, that ‘all men are created equal,’” stated Shellabarger.¹²⁷

The belief held among members of the Reconstruction Congresses that they must restore the framers’ Constitution was not limited to the concept of equal political representation. When debating the 1866 Civil Rights Bill, Massachusetts Senator Charles Sumner, Illinois Senator Lyman Trumbull, and Minnesota Representative William Windom each invoked the Declaration of Independence as legal authority.¹²⁸ Windom, in particular, viewed the Declaration as a bill of equity:

This [bill], I believe, is one of the first efforts made since the formation of the Government to give practical effect to the principles of the Declaration of Independence; one of the first attempts to grasp a vital reality and embody in the forms of law the great truth that all men are created equal and endowed by the Creator with the inalienable rights of life, liberty, and the pursuit of happiness. If there be any reasonable objection to the bill, it is that it does not go far enough. It assumes only to protect civil rights, and leaves the adjustment and protection of political rights to future legislation.¹²⁹

On April 9, 1866, over the veto of President Andrew Johnson, the Civil Rights Bill was signed into law by Congress as the 1866 Civil Rights Act, and it afforded equal rights to all males “without distinction of race or color, or previous condition of slavery or involuntary servitude.”¹³⁰ Following concerns over the Act’s constitutionality, however, along with the fear that the Act would eventually be nullified upon the Southern States being readmitted into the Union, Republicans pushed for the ratification of the Fourteenth Amendment.¹³¹ Although one may assert that the 1866 Civil Rights Act and Fourteenth Amendment cannot be read in conjunction because they contain different wording and emerged from different political situations,¹³² the evidentiary record strongly suggests that both represented the same body of law,¹³³ particularly as it relates to principles of equality.¹³⁴

¹²⁶ *Id.* at 406.

¹²⁷ *Id.*

¹²⁸ Hon. Charles Sumner, Of Massachusetts, in the Senate of the United States, Feb. 5, 1866, in *BOSTON DAILY JOURNAL*, Feb. 6, 1866, at supplement pg. 1, cols. 1-2; Senator Trumbull, in *BOSTON DAILY ADVERTISER*, Jan. 30, 1866, at pg. 1, col. 2; see also Reinstein, *supra* note 121, at 384 (“The theme that the Civil Rights Act enforced the Declaration’s doctrine of equal rights was expressed across the Republican ideological spectrum.”).

¹²⁹ CONG. GLOBE, 39th Cong., 1st Sess. 1159 (1866).

¹³⁰ Ch. 31, 14 Stat. 27 (1866) (codified as amended at 18 U.S.C. § 242 (2006)).

¹³¹ For a background history on the interrelationship between the 1866 Civil Rights Act and the Fourteenth Amendment, see MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 71-83 (Duke University Press 1986).

¹³² See Garrett Epps, *The Citizenship Clause: A “Legislative History,”* 60 AM. U. L. REV. 331, 353 (2010) (making this line of argument in relation to the definition of national citizenship); Lawrence Rosenthal, *The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation*, 18 J. CONTEMP. LEGAL ISSUES

Hereto, in describing the intentions and purpose of the Fourteenth Amendment, Republicans called upon the Declaration's rhetoric. Illinois Senator Richard Yates was one such Republican, stating: "I would write in the fundamental and unchangeable law of the land, that the Declaration of American Independence was a verity, that all men were created equal; and having the powers which this Congress now has, I would prove my belief by making the Declaration a reality."¹³⁵ Pennsylvania Representative Thaddeus Stevens equally pressed the importance of making the spirit and promise of the Declaration a living reality. In Stevens' words, "[O]ur fathers made the Declaration of Independence; and that is what they intended to be the foundation of Government. If they had been able to base their Constitution on the principles of that Declaration it would have needed no amendment during all time, for every human being would have had his rights, every human being would have been equal before the law[.]"¹³⁶ Then there was Pennsylvania Representative George F. Miller, who described Section 1 of the Fourteenth Amendment as being "so clearly within the spirit of the Declaration of Independence . . . that no member of this House can seriously object to it."¹³⁷ It was a position Vermont Senator Luke Poland echoed when he described Section 1 as "the very spirit and inspiration of our system of government," which was "essentially declared in the Declaration of Independence and in all the provisions of the Constitution."¹³⁸

Taken altogether, what this brief overview reveals is the Fourteenth Amendment was perceived by most Reconstruction Republicans as enshrining the Declaration's promise of equality within the Constitution.¹³⁹ Again, it is worth noting that members of the founding generation may not have perceived the Declaration as guaranteeing such a promise, thus making the Reconstruction Republicans perception more of an historical fiction than reality. It does, however, provide a case in point of utilizing a "necessary fiction" when analyzing the scope of a constitutional provision. This does not mean that the Reconstruction Republicans' rehabilitated understanding of the Declaration modifies its late eighteenth-century meaning and purpose. It simply

361, 382 (2009) (making this line of argument in relation to the incorporation of the Bill of Rights to the States).

¹³³ See Patrick J. Charles, *Decoding the Fourteenth Amendment's Citizenship Clause: Unlawful Immigrants, Allegiance, Personal Subjection, and the Law*, 51 WASHBURN L.J. 211, 225-28, 231 (2011) (showing the 1866 Civil Right Act and Fourteenth Amendment's definition of citizenship were viewed as synonymous); Michael Kent Curtis, *Resurrecting the Privileges Or Immunities Clause and Revising the Slaughter-House Cases Without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1, 51-55 (1996) (showing the 1866 Civil Right Act and Fourteenth Amendment both sought to apply the Bill of Rights to the States).

¹³⁴ See Herman Belz, *The Constitution and Reconstruction*, in THE FACTS OF RECONSTRUCTION: ESSAYS IN HONOR OF JOHN HOPE FRANKLIN 189-218 (Eric Anderson & Alfred A. Moss, Jr. eds., 1991).

¹³⁵ CONG. GLOBE, 39th Cong., 1st Sess. 3037 (1866).

¹³⁶ *Id.* at 2459.

¹³⁷ *Id.* at 2510.

¹³⁸ *Id.* at 2961.

¹³⁹ See Reinstein, *supra* note 121, at 385-92.

means it is constitutionally legitimate for a lawyer, jurist or legal scholar to apply this “necessary fiction” when interpreting the Fourteenth Amendment,¹⁴⁰ that is, so long as one acknowledges the Reconstruction Republicans’ understanding of the Declaration is not one and the same with the founding generation. To do otherwise would advance a Whiggish or illegitimate view of the past.

In addition to the history of the Fourteenth Amendment providing an example of a constitutionally legitimate mythical narrative or construct of the past, it also provides a case in point where jurisprudentially correcting an historical narrative may have severe consequences—the complete resurrection of the amendment’s Privileges or Immunities Clause. The clause stipulates that “[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,”¹⁴¹ and, since the Supreme Court’s 1873 decision in *The Slaughterhouse Cases*, has been jurisprudentially understood as differentiating between rights associated with federal and state citizenship.¹⁴² To this day, despite the breadth of historical scholarship showing the numerous inaccuracies with *The Slaughterhouse Cases*—particularly how the Court failed to incorporate the Bill of Rights to the States through the Privileges or Immunities Clause¹⁴³ as its drafters and ratifiers intended—the protective scope of the Privileges or Immunities Clause remains unaltered.¹⁴⁴ As a jurisprudential alternative the Court has incorporated the Bill of Rights piecemeal through the Fourteenth Amendment’s Due Process Clause, and in doing so, has extended its protections to citizens and non-citizens alike.¹⁴⁵

¹⁴⁰ For a similar line of argument, see Tthesis, *supra* note 110, at 708-9.

¹⁴¹ U.S. CONST. amend. XIV, § 1.

¹⁴² 83 U.S. 36 (1872).

¹⁴³ The breadth of historical scholarship asserting this point is too large to list here, but a few worth mentioning include: Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEO. L.J. 329 (2011); Richard L. Aynes, *Ink Blot or Not: The Meaning of Privileges and/or Immunities*, 11 U. PA. J. CONST. L. 1295 (2009); Richard L. Aynes, *Enforcing the Bill of Rights Against the States: The History and the Future*, 18 J. CONTEMP. LEGAL ISSUES 77 (2009); Michael Kent Curtis, *The Bill of Rights and the States: An Overview from One Perspective*, 18 J. CONTEMP. LEGAL ISSUES 3 (2009); Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866-67*, 68 OHIO ST. L.J. 1509 (2007).

¹⁴⁴ *McDonald v. City of Chicago*, 561 U.S. 742, 758 (2010) (Alito, J.). At least one current Supreme Court Justice, Clarence Thomas, has attempted to correct what many perceive to be an historical wrong. *Id.* at 805 (Thomas, J., concurring). For the importance of Thomas’s concurrence from a jurisprudential standpoint, see David S. Cohen, *The Paradox of McDonald v. City of Chicago*, 79 GEO. WASH. L. REV. ARGUENDO 1 (2010). For the claim that Justice Thomas reinvigorated the Privileges or Immunities Clause, see Randy Barnett, *Privileges or Immunities Clause Alive Again*, SCOTUSBLOG (June 28, 2010, 5:01 PM), <http://www.scotusblog.com/2010/06/privileges-or-immunities-clause-alive-again/>; see also Richard Aynes, *McDonald v. City of Chicago, Self-Defense, the Right to Bear Arms, and the Future*, 2 AKRON J. CONST. L. & POL’Y 181 (2011).

¹⁴⁵ For two notable Due Process Clause incorporation test cases preceding *McDonald v. City of Chicago*, see *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Duncan v. Louisiana*, 391 U.S. 145 (1968).

Herein lies a consequence with jurisprudentially revising or correcting *The Slaughterhouse Cases*—the exclusion of non-citizens from substantive rights.¹⁴⁶ For if the Supreme Court recategorized every incorporated right from the Due Process Clause to the Privileges or Immunities Clause it would prevent any number of rights from extending to non-citizens. As a counter point, those who support revising the jurisprudence of the Privileges or Immunities Clause assert that to ignore its intent and purpose is to deny United States citizens a number of rights from state abridgement, including the Third Amendment right against the quartering of soldiers in homes,¹⁴⁷ the Fifth Amendment right to a grand jury,¹⁴⁸ the Seventh Amendment right to a jury in civil trials,¹⁴⁹ the Eight Amendment right against excessive bails and fines,¹⁵⁰ and potentially any number of unenumerated rights.¹⁵¹ Although this line of argument has proved tempting to many originalists and progressives, it would essentially create a jurisprudential vacuum¹⁵² that not only swallows up the rights of non-citizens, but would also wreak havoc on a number of state laws and regulations, as well as undermine a range of unenumerated rights such as the right to marry, to have children, to use contraception, and perhaps others.¹⁵³

Still, for many originalists and progressives, these concerns are either over exaggerated, mistaken or do not outweigh the benefits of a reinvigorated Privileges or Immunities Clause.¹⁵⁴ Even assuming, though, that revitalizing the Privileges or Immunities Clause will have minimal consequences on existing constitutional jurisprudence, it does present the objectivity dilemma of conflicting history.¹⁵⁵ As I briefly touched on earlier, to jurisprudentially rely on conflicting or dueling history

¹⁴⁶ U.S. CONST. amend. XIV, § 1; see also Dale E. Ho, *Dodging a Bullet: McDonald v. City of Chicago and the Limits of Progressive Originalism*, 19 WM. & MARY BILL RTS. J. 369, 402-14 (2010); Richard A. Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J.L. & LIBERTY 334, 349-53 (2005).

¹⁴⁷ *Engblom v. Carey*, 677 F.2d 957 (2d Cir. 1982).

¹⁴⁸ *Hurtado v. People of State of Cal.*, 110 U.S. 516 (1884).

¹⁴⁹ *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1916).

¹⁵⁰ *Baze v. Rees*, 553 U.S. 35 (2008).

¹⁵¹ See, e.g., Josh Blackman & Ilya Shapiro, *Keeping Pandora's Box Sealed: Privileges or Immunities, The Constitution in 2020, and Properly Extending the Right to Keep and Bear Arms to the States*, 8 GEO. J.L. & PUB. POL'Y 1, 22-44 (2010).

¹⁵² *McDonald v. City of Chicago*, 561 U.S. 742, 859 (2010) (Stevens, J., dissenting) (“The burden is severe for those who seek radical change in such an established body of constitutional doctrine. Moreover, the suggestion that invigorating the Privileges or Immunities Clause will reduce judicial discretion . . . strikes me as implausible, if not exactly backwards.”).

¹⁵³ See Ho, *supra* note 146, at 402-14.

¹⁵⁴ See Timothy Sandefur, *Privileges, Immunities, and Substantive Due Process*, 5 N.Y.U. J.L. & LIBERTY 115 (2010); Brief of Constitutional Law Professors as Amici Curiae Supporting Petitioners, *McDonald*, 561 U.S. 742 (No. 08-1521); David H. Gans, *The Debate Over the Privileges or Immunities Clause Continues*, CONSTITUTIONAL ACCOUNTABILITY CENTER (Feb. 3, 2011), <http://theconstitution.org/text-history/2734>.

¹⁵⁵ Boyce, *supra* note 36, at 33-36.

for constitutional interpretation calls into question the legitimacy of any subsequent legal analysis.¹⁵⁶ This is not to say, however, conflicting history cannot be navigated in a legitimate manner. One option available is to find historical consensus where there is conflict or to follow the historical path of least resistance. What this embodies is relying on those broader facets of the evidentiary record that are not in historical dispute. Here the respective interpreter retains historical consciousness to frame the legal issue in historical terms, but to a lesser degree.¹⁵⁷

The other option available is to choose conflicting history where there is conflict. Indeed, to pick and choose between dueling historical accounts brings us into the arena of “law office history,” however, there are two baseline rules that can mitigate the abuse of the evidentiary record and prevent the interpreter’s own predilections from impacting the conflicting choice. The first rule requires the interpreter to be honest and transparent as to why he or she made the respective historical choice. Essentially what this entails is the retention of historical consciousness by weighing the purposes and consequences of each choice in total historical context. To commit a minor violation of “law office history” is acceptable, but to create a domino chain of conflicting history can have far-reaching consequences. This brings us to the second rule when choosing conflicting history where there is conflict—the interpreter cannot build conflict upon conflict. To state it another way, when the interpreter chooses one conflicting account over another the enterprise should not continue. To do otherwise is to participate in illegitimate mythmaking.¹⁵⁸

If the historically conscious interpreter applies either the ‘choose consensus history when there is conflict’ approach or the ‘choose conflicting history when there is conflict’ approach to the Privileges or Immunities Clause, he or she must conclude its jurisprudential scope is quite limited. For instance, to historically venture into the sphere of unenumerated “privileges or immunities,” such as economic liberties or natural rights, is perilous seeing that there is no historical consensus as to what, if any, rights are included. To state this point in different terms, to historically pronounce that the Privileges or Immunities Clause was generally understood to protect a series of economic or natural rights is to partake in judicial mythmaking because the interpreter must build one conflicting historical account on another.¹⁵⁹

¹⁵⁶ CHARLES, *supra* note 1, at 116.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 116-18.

¹⁵⁹ Boyce has aptly summarized this objectivity dilemma in the constraints of originalist theory, writing:

If the [Fourteenth Amendment’s] framing generation had no common understanding of Section One, it is hardly surprising that a century and a half later there is no consensus among scholars as to its original meaning. Indeed, the quest for a single “original meaning” is a misguided one. The diversity of original understandings presents intractable difficulties that cannot be overcome by the fiction of a single original “objective” meaning that a hypothetical “reasonable observer” would attribute to the text. We are forced to inquire: What are the political and ideological commitments of that reasonable observer? In what contexts does the observer situate the text? What is the observer’s understanding of existing constitutional and legal norms? There is no neutral or objective way of answering these questions. Any attempt to reduce the multiplicity of possible original understandings to a single original meaning is a distortion and ultimately a falsification of history.

A different legitimacy problem presents itself as to the manner in which the Fourteenth Amendment incorporated the Bill of Rights to the States. Although there is an historical consensus that the Privileges or Immunities Clause incorporated the Bill of Rights, there remains scholarly disagreement about the historical era in which those rights should be examined. A number of legal scholars have claimed that a legitimate interpretation of the Privileges or Immunities Clause requires an 1868 understanding or application of the Bill of Rights, not the 1791 understanding of the founding generation.¹⁶⁰ To be clear, there is a contingent of scholars that perceive the ratification of the Fourteenth Amendment as a second founding moment.¹⁶¹ To them, the Fourteenth Amendment not only defines the rules pertaining to national citizenship and apportionment, but also *ipso facto* updates the Bill of Rights from any 1791 understanding to 1868.¹⁶²

This approach to constitutional interpretation may seem well and good to the historically uninformed, but it directly conflicts with what the drafters of the Fourteenth Amendment outright stated in debates and speeches. For one, the aforementioned statements of Reconstruction Republicans concerning the Declaration of Independence and its relationship to the Fourteenth Amendment undermine such an historical theory.¹⁶³ At no point did *any* Republican assert that the Fourteenth Amendment updated the Bill of Rights. To quote, once again, from Pennsylvania Representative Stevens, the purpose of the Fourteenth Amendment was ensure the Constitution was based “on the principles of [the Declaration of Independence] . . . for [then] every human being would have [his or her] rights, every human being would have been equal before the law[.]”¹⁶⁴ Thus, to Stevens, the Fourteenth Amendment was not about updating the scope of constitutional

Boyce, *supra* note 36, at 86.

¹⁶⁰ See Steven G. Calabresi & Nicholas P. Stabile, *On Section 5 of the Fourteenth Amendment*, 11 U. PA. J. CONST. L. 1431, 1439-40 (2009) (applying the 1868 view of the First Amendment’s Free Exercise Clause); AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 231-83 (1998) (applying the 1868 view of rights to a variety of constitutional amendments); Stephen P. Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 GMU L. REV. 1, 18-33 (1981) (applying the 1868 view of the Second Amendment).

¹⁶¹ See Garrett Epps, *Second Founding: The Story of the Fourteenth Amendment*, 85 OR. L. REV. 895 (2006).

¹⁶² See, e.g., Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 979 (2012) (“An originalist who believes that the Fourteenth Amendment incorporated against state governments some or all of the rights protected by the Bill of Rights should, in adjudicating cases under incorporated provisions, be concerned primarily (if not exclusively) with determining how the generation that ratified that amendment understood the scope and substance of the rights at issue.”); see also AMAR, *supra* note 160, at 223 (“Thus in the very process of being absorbed into the Fourteenth Amendment, various rights and freedoms of the original Bill may be subtly but importantly transformed in much the same way the Bill of Rights transformed language that it had absorbed from still earlier sources.”).

¹⁶³ See Greene, *supra* note 162.

¹⁶⁴ CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).

provisions, but about accomplishing what the founding generation could not—a Constitution based on true equitable principles.¹⁶⁵

In 1871, Ohio Representative and Republican, William Lawrence articulated a similar view of the Fourteenth Amendment's purpose, stating, "[I]t must be clear that [it] creates no new right, confers no new privilege, but is *declaratory* of what is already the constitutional rights of every citizen in every State, that *equality* of civil rights is the fundamental rule that pervades the Constitution and controls all State authority."¹⁶⁶ Then there are a number of statements by Ohio Representative and Republican John Bingham, the chief architect of the Fourteenth Amendment.¹⁶⁷ On August 26, 1867, in a speech defending the Fourteenth Amendment against Democrat assaults, Bingham outlined what the Republicans hoped to accomplish—a revival of 1776. "How would [the] pretense of [Democrats] have sounded in 1776," queried Bingham, "when those grand old men assembled in the convention at Philadelphia and issued that new evangel to the nations in which they declared that 'all men are created equal, and endowed by their Creator with the rights of life, liberty and the pursuit of happiness.'"¹⁶⁸ To Bingham and other Republicans, the drafters of the Constitution steered away from these original principles when they compromised over slavery. It was an error Bingham hoped to correct, as well as the notion that state sovereignty was superior or equal to federal sovereignty.¹⁶⁹ Bingham went so far as to criticize those Democrats that would deny the restoration of the framers' Constitution:

These gentlemen say they are for the Constitution, the great Constitution which our fathers gave us. Let them read in the forefront of that instrument, those words that should be written this day upon the lintels of ever door in the land: "We the people of the United States, in order to

¹⁶⁵ *Id.* at 74 (statement of Representative Thaddeus Stevens) ("When the great and good men promulgated [the Declaration], and pledged their lives and sacred honors to defend it, it was supposed to form an epoch in civil government Our fathers repudiated the whole doctrine of the legal superiority of family or races, and proclaimed the equality of men before the law. Upon that they created a revolution and built and Republic. They were prevented by slavery from perfected the superstructure whose foundation they had thus broadly laid. For the sake of the Union they consented to wait, but never relinquished the idea of its final completion. The time to which they looked forward with anxiety has come. It is our duty to complete their work.").

¹⁶⁶ CONG. GLOBE, 42nd Cong., Special Session 151 (1871) (emphasis added).

¹⁶⁷ Richard L. Aynes, *The Continuing Importance of Congressman John A. Bingham and the Fourteenth Amendment*, 36 AKRON L. REV. 589, 591 (2003) ("Bingham's inseparable link with the Amendment makes him worthy of attention from both a legal and an historical view . . . his words may provide meaning or context for what has been termed original intent, meaning or understanding of the Fourteenth Amendment."); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 103 (1993) (discussing the importance of Bingham's views on contemporaries and the first federal courts to apply the Fourteenth Amendment).

¹⁶⁸ THE CINCINNATI DAILY GAZETTE, Aug. 26, 1867, at 1, col. 5.

¹⁶⁹ *See, e.g.*, THE CINCINNATI DAILY GAZETTE, Aug. 12, 1868, at 1, col. 3 (statement of John Bingham) (the Fourteenth Amendment would "forever end the question of the sovereignty of a State being supreme over the sovereignty of the nation, and of the asserted right of State secession and of the right of any State to repeal the laws and the Constitution.").

establish justice, do ordain this Constitution,” etc. I am for the Constitution, too; and equal political rights amongst all natural born citizens, in every station of life, is simple justice. Therefore I am for it, and in standing for it I but imitate the great majority of the people, who, in 1787, formed the Constitution of the Government, and handed it down to us as a nation.¹⁷⁰

Three days later, in a speech delivered before the people of Cincinnati, Ohio, Bingham restated this proposition. The Fourteenth Amendment extended the “imperishable words of the Declaration [of Independence]” to the States, but did not alter the power of State and local governments to govern as the Constitution intended.¹⁷¹ “Let no man for a moment suppose that I, or the party with which I have to honor to act (could find source- is it which I have *the* honor to act?), desire to impair or change that admirable structure of general and local, national and State government, which was framed by those great fathers of the Republic,” stated Bingham.¹⁷² Two years later, after the Amendment’s ratification, Bingham once again described the Fourteenth Amendment in such terms, stating the Amendment was ratified so that the “*original and declared* purpose of the Constitution shall be carried into effect, lest justice shall be established in the land—the justice which secures to every man his due—lest liberty to all shall be secured under the shelter and sanction of American law”¹⁷³

Still, despite the lack of historical evidence showing the Fourteenth Amendment was intended to update the meaning and scope of the 1787 Constitution or the 1791 Bill of Rights, a number of scholars insist otherwise. Take for instance University of Illinois law professor Kurt T. Lash, who writes: “[The Reconstruction] shift in the public understanding of individual liberty suggests that what we are after is not the incorporation of 1787 texts, but the public understanding of 1868 texts—in particular the meaning of Privileges or Immunities and the scope of congressional power to enforce these newly constitutionalized rights.”¹⁷⁴ Then there is Columbia University law professor Jamal Greene, who argues, “There is little reason, in principle, for an originalist to privilege the meaning of an incorporated right circa 1791 over its meaning in any other year prior to 1868.”¹⁷⁵ Although Greene acknowledges there is an argument to be made that the 1791 understanding matters, he finds it to be an implausible interpretation of the Fourteenth Amendment.¹⁷⁶

From a theoretical perspective there is an argument to be made that the Privileges or Immunities Clause *ipso facto* updated the Bill of Rights from 1791 to 1868.¹⁷⁷ If

¹⁷⁰ THE CINCINNATI DAILY GAZETTE, Aug. 26, 1867, at 1, col. 5.

¹⁷¹ THE CINCINNATI DAILY GAZETTE, Sept. 2, 1867, at 1, col. 5.

¹⁷² *Id.*

¹⁷³ THE CINCINNATI DAILY GAZETTE, Aug. 26, 1869, at 1, col. 3 (emphasis added).

¹⁷⁴ Kurt T. Lash, *The Fourteenth Amendment and the Bill of Rights: Beyond Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 447, 449 (2009).

¹⁷⁵ Greene, *supra* note 162, at 988.

¹⁷⁶ *Id.* at 985.

¹⁷⁷ *See, e.g.,* Barnett, *supra* note 29, at 267-68 (arguing the Privileges or Immunities Clause automatically updated the “original meaning” of the Second Amendment from 1791 to 1868).

history in context matters, though, if it truly matters, claims like Lash's and Greene's must be cast out as contradicting the wishes of those who debated and ratified the Fourteenth Amendment. Even if one applies *ad hoc* originalist methodologies—whether it is original intent, original meaning, public understanding or some combination of all three—one will be hard pressed to conclude that the Privileges or Immunities Clause updated the Bill of Rights. Certainly one could quote historical texts or statements by the ratifiers out of context, such as a speech by Massachusetts Senator Charles Sumner proclaiming, “Every constitution embodies the *principles of its Framers*,”¹⁷⁸ and therefore conclude that Sumner believed the Reconstruction Amendments updated the entire Constitution according to 1868 terms. This line of argument, however, is nonsensical after reading Sumner's next sentence, where he declared, “we cannot err if we turn to the *framers*; and their authority increases in proportion to the evidence which they have left on the question.”¹⁷⁹

The writings of constitutional commentators contemporaneous with the ratification of the Fourteenth Amendment do not support Lash's and Greene's approaches to interpreting the Bill of Rights circa 1868 either. Take, for example, the work of Timothy Farrar, a former judge of the New Hampshire Court of Common Pleas, president of the New England Historical and Genealogical Society,¹⁸⁰ and the author of a treatise titled *Manual of the Constitution of the United States of America*.¹⁸¹ Concerning the application of the Bill of Rights to the States, Farrar viewed *Barron v. Baltimore* as being wrongly decided and felt that the Bill of Rights' first eight amendments applied to the States.¹⁸² More importantly, like Bingham, Farrar did not perceive the Privileges or Immunities Clause as updating the Bill of Rights:

In respect to the powers of the government, it is of the same general character as the last. It re-affirms some pre-existing power, but adds no new ones No State shall make or enforce any law which shall abridge the privileges or immunities of the United States This will scarcely be claimed by anybody to delegate any thing new to the government, or to prohibit the States from doing any thing which otherwise they might rightfully do Thus, it will appear, by a minute analysis of the fourteenth Amendment, that it contains no augmentation of the powers of the [State or federal] government.¹⁸³

The underlying point here is not to disparage the history surrounding the Privileges or Immunities Clause, the incorporation of the Bill of Rights or the ratification of the Fourteenth Amendment. Instead it is to illustrate the limits of history in law, the ease in which the evidentiary record can be abused or misapplied,

¹⁷⁸ CONG. GLOBE, 39th Cong., 1st Sess. 677 (1868) (emphasis added).

¹⁷⁹ *Id.* (emphasis added).

¹⁸⁰ Aynes, *The Continuing Importance of Congressman John A. Bingham and the Fourteenth Amendment*, *supra* note 167, at 84-85.

¹⁸¹ TIMOTHY FARRAR, *MANUAL OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* (1867).

¹⁸² See Timothy Farrar, *State Rights*, in *THE NEW ENGLANDER* 695, 711 (1862).

¹⁸³ FARRAR, *supra* note 181, at 401-02, 408.

and the interpretational consequences that may result from engaging in historical mythmaking. It is no secret that the practice of history in law is often portrayed as a legitimate means to preserve the Constitution's integrity and purpose, yet with just a minor misstep one enters into the foray of illegitimate mythmaking. This does not mean that applying historical myth to constitutional interpretation is always an illegitimate enterprise. As was seen with the example of the Declaration of Independence, its reference that "all men are created equal" not only took on a different meaning from the mid to the late nineteenth century, but this meaning was crucial to the drafting and ratification of the Reconstruction Amendments.

The acceptance of historical myth as a jurisprudential foundation is also legitimate where correcting it would have severe consequences. This was seen in the example of a reinvigorated Privileges or Immunities Clause. For one, to reboot over a century of constitutional jurisprudence would have severe consequences on a number of levels. Furthermore, because there is historical disagreement as to what, if any, unenumerated rights were understood to fall within the "privileges or immunities of the citizens of the United States," a fully reinvigorated Privileges or Immunities Clause would end up facilitating historical mythmaking more so than restoring our past. Lastly, it would be redundant to reinvigorate the Privileges or Immunities Clause given that our constitutional jurisprudence already provides a method of incorporating both enumerated and unenumerated rights through the Fourteenth Amendment's Due Process Clause.

Still, there is a compromise worth considering as the jurisprudence of incorporated rights moves forward. When the Supreme Court is again faced with the question of whether to incorporate an enumerated right within the Bill of Rights—such as the Fifth Amendment right to a grand jury, the Seventh Amendment right to a jury in civil trials or the Eighth Amendment right against excessive bails and fines—it could do so through the Privileges or Immunities Clause, albeit with a caveat. This caveat being the restoration of the Privileges or Immunities Clause is merely to right the historical wrong in *The Slaughterhouse Cases*—nothing more, nothing less. This would restore the history of the Fourteenth Amendment to its proper place. In doing so, however, it should be acknowledged that the drafters, framers, and ratifiers of the Fourteenth Amendment were not *ipso facto* updating the respective 1791 right to 1868 terms. They were for all intents and purposes correcting the defects of the framers' Constitution.

III. CONCLUSION

Generally speaking, it is common for members of the legal profession to view the practice of history in law as not all that difficult of a task.¹⁸⁴ It is a view that Justice Antonin Scalia and Bryan Garner recently espoused in the book *Reading Law*.¹⁸⁵ To Scalia and Garner, although the use of historical evidence to adjudicate legal questions may not "always provide an easy answer, or even a clear one," it is the best interpretational approach available.¹⁸⁶ Here, though, what Scalia and Garner classify as history is actually originalism. The two are not one and the same. An

¹⁸⁴ See, e.g., Mark Tushnet, *Constitutional Scholarship: What Next?*, 5 CONST. COMMENT. 28, 31 (1988).

¹⁸⁵ SCALIA & GARNER, *supra* note 10, at 401.

¹⁸⁶ *Id.* at 402. See also *McDonald v. City of Chicago*, 561 U.S. 742, 802-05 (2010) (Scalia, J., concurring).

originalist inquiry is, for the most part, a textually focused examination on “legal meaning” at the time of a law’s drafting, enactment or ratification. In contrast, an historical inquiry is contextually focused or about finding as many objective truths as possible to recreate the past as a whole.

What truly separates an historical inquiry, however, from an originalist inquiry is the degree by which myth consumes fact. Certainly, regardless of whether one is performing an historical or originalist inquiry, the methodological process takes part in generating myth.¹⁸⁷ In terms of where the respective inquiries are to be placed on the spectrum of constitutional mythmaking, however, the standard historical inquiry is far less likely to engage in the process than its originalist counterpart. This is mainly because originalism is not so much about reasoning from known historical truths, but instead about recreating a hypothetical expected legal application of how a hypothetical reasonable interpreter understood legal text at a particular point in time. It does not help matters when originalists ignore how one legal text or doctrine connects intimately with others. One cannot take those portions of a legal past he or she agrees with, discard the others, and proclaim constitutional objectivity and, therefore, constitutional legitimacy.

This is not to say that there are not instances where to legally reason from historical myth is constitutionally legitimate. As was outlined in Part II, there are a number of instances where a law or constitutional provision was enacted or ratified with a false historical narrative in mind. In such cases there is nothing wrong with relying on a mythical construct of the past when legally reasoning. Still, the interpreter should proceed cautiously because even in these instances the mythical construct has historical limitations.

¹⁸⁷ See *infra* Part I.