

## Applying a Usable Past: The Use of History in Law

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### ABSTRACT

This Article explores the controversy over using historical evidence to interpret the law, both in legal practice and in scholarship. I argue that instead of requiring lawyers to wholly incorporate the professional standards of academic historiography, the most likely way (as a practical matter) to increase the quality of “lawyers’ history” is to pay greater attention to principles of evidence law in historical analysis. Many have criticized the practice of writing “law office history,” where lawyers not trained in historical method appeal to the authority of history for the purpose of making persuasive legal arguments. Conversely, others have aimed criticism at the historical profession for cloaking advocacy as scholarship. But the fact is that from judges to law professors, from practicing attorneys to laypersons, and from all areas on the political and ideological spectra, many Americans do conceive of the law in historical terms. Because of this, the use of history in law will never go away.

Historians and legal professionals have also clashed over whether and how history can be used to interpret the law. I conceive of the issue as one of disciplinary “jurisdictional” boundaries, where the legal and historical professions are each faced with the question of what to do when their subject matter overlaps. The apparent tension is easier to understand when it is cast as a contrast between competing professional standards: the historians’ teleological goal of determining truth through objectivity versus the legal system’s goal of arriving at truth through adversarial practice. But advocacy and objectivity—seemingly at cross-purposes—are both in the larger sense

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systemic endeavors to gain the most just and accurate understanding of past events, based on appeals to authority and interpretation. Placing the issue in that framework helps us understand that jurisdiction over historical evidence need not be a turf battle or a zero-sum game, but an overlapping or collaborative venture.

There are several possible approaches for reconciling the standards of history with law, but most that have been suggested before are generally unrealistic or implausible. We already have a workable analytical tool, however, for evaluating historical claims at law: the law of evidence. While one possible approach toward improving the quality of historical evidence might be to use only court-appointed historical experts (in pursuit of objectivity), such a practice might only exacerbate the existing problems associated with using history in law. Rather, the legal system should treat historical evidence just like evidence from other areas of expertise—as facts and interpretations that a party may offer, about which the court can determine whether baseline criteria of professional reliability are satisfied, and then evaluate whether it is admissible, credible, and persuasive. If another party disagrees, it is free to challenge that historical evidence on the merits or to offer its own more persuasive interpretation. A combination of both adversarial and objective historical expertise, constrained by basic principles of evidence law, along with a greater attention to professional historical standards, can give us a workable (if not perfect) framework for using history reliably in legal interpretation. This can be applied in the litigation process and, by extension, in scholarship.

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## I. INTRODUCTION

The legal profession is undeniably fond of history. Lawyers, judges, and legal scholars love to cite historical evidence and to make historical arguments, for many reasons: it conveys a sense of authority and legitimacy; it grounds arguments in continuity with tradition and precedent; and, not least, because the law is in large part about the reconstruction of past events. Indeed, as Richard Posner has stated, "Law is the most historically oriented, or if you like the most backward-looking, the most 'past dependent,' of the professions."<sup>1</sup>

For decades, however, historians and lawyers have debated the appropriateness and the utility of using history to understand the law.<sup>2</sup> Many observers in both professions criticize the way in which

<sup>1</sup> Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573, 573 (2000).

<sup>2</sup> See generally Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119 (1965) (critiquing the use of history in opinions issued by the Warren Court).

lawyers without historical training treat historical evidence.<sup>3</sup> Judges and scholars engaged in constitutional interpretation have had a particularly well scrutinized relationship with the history muse Clio.<sup>4</sup> Within the legal profession, debates have taken place over whether using historical evidence in the resolution of legal questions is a proper normative methodology, or is even a legitimate enterprise.<sup>5</sup> And, in an extended dialogue with historians, legal scholars and practitioners have also grappled with practical and methodological questions concerning the application of historical evidence to law.<sup>6</sup> Some historians and legal scholars question whether it is possible to make legitimate connections between past events and present controversies, arguing that history's salient feature is the uniqueness of the past in its own contexts—"the pastness of the past."<sup>7</sup> Applying history to

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<sup>3</sup> LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 167–68 (1996); Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 554 (1995); Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11, 30–34 (1992).

<sup>4</sup> Neil Richards, *Clio and the Court: A Reassessment of the Supreme Court's Uses of History*, 13 J. L. & POL. 809, 810 (1997). Professor Richards' title references Professor Kelly's seminal article on the study of the use of history in Supreme Court jurisprudence. See Kelly, *supra* note 2, at 809. Indeed, the "Clio and the Court" metaphor has proven quite catchy, as a number of articles examining the effects of historical evidence in law have invoked the Greek muse of history. E.g., Peter Irons, *Clio on the Stand: The Promise and Perils of Historical Review*, 24 CAL. W. L. REV. 337, 354 (1988); Calvin H. Johnson, *Homage to Clio: The Historical Continuity from the Articles of Confederation into the Constitution*, 20 CONST. COMMENT. 463 (2003); Buckner F. Melton, Jr., *Clio at the Bar: A Guide to Historical Method for Legists and Jurists*, 83 MINN. L. REV. 377 (1998); George Rutherglen, *The Improbable History of Section 1981: Clio Still Bemused and Confused*, 55 SUP. CT. REV. 303 (2003); Jay I. Sabin, *Clio and the Court Redux: Toward a Dynamic Mode of Interpreting Reconstruction Era Civil Rights Laws*, 23 COLUM. J.L. & SOC. PROBS. 369 (1990); John C. Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 U. COLO. L. REV. 1169 (1999). Law review authors invoked Clio even before Professor Kelly. See Julius Goebel, Jr., *Ex Parte Clio*, 54 COLUM. L. REV. 450, 451, 483 (1954) (reviewing WILLIAM W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953)).

<sup>5</sup> See, e.g., Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113 (2003) (discussing the controversy over whether it is proper to use historical evidence from notes of the Constitutional Convention to interpret the original meaning of constitutional provisions).

<sup>6</sup> See generally KALMAN, *supra* note 3; Flaherty, *supra* note 3; Larry D. Kramer, *When Lawyers Do History*, 72 GEO. WASH. L. REV. 387 (2003); Jack N. Rakove, *Fidelity Through History (Or to It)*, 65 FORDHAM L. REV. 1587 (1997).

<sup>7</sup> MICHAEL KAMMEN, *SELVAGES AND BIASES: THE FABRIC OF HISTORY IN AMERICAN CULTURE* 116–17 (1987) (noting the shift among academic historians in the mid-twentieth century from searching for a "usable past" to focusing on the "pastness of the past," which means to accept the past on its own terms rather than to transmogrify it into our own contemporary frame of reference"); Stuart Banner, *Legal History and Legal Scholarship*, 76 WASH. U. L.Q. 37, 37 (1998) ("History, or at least history written according to the conventions of late twentieth century professional historians,

contemporary issues would therefore be inappropriately “presentist.”<sup>8</sup> Most significantly, many observers in both professions criticize the way in which non-historically-trained judges and legal scholars use history in their analyses. Critics charge them with writing “law office history,” disregarding the professional standards by which history ought to be written in order to marshal historical authority for the purpose of persuading the reader in favor of the author’s desired result.<sup>9</sup>

Many of those who criticize the use of history by lawyers<sup>10</sup> acknowledge that one of the major problems inherent in the enterprise (beyond the lack of professional training in the standards of historical method among legal practitioners) is the fundamentally different purposes toward which the respective professions are engaged. Both historians and lawyers are, at least ostensibly, engaged in a search for “truth”—an accurate interpretation of past events. But while historians attempt to do this by being (in theory) objective and neutral, in

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with an emphasis on the ways in which the past differed from the present—history as an account of the pastness of the past, as the standard expression goes—enormously complicates the task of legal argument.”); Jonathan D. Martin, *Historians at the Gate: Accommodating Expert Historical Testimony in Federal Courts*, 78 N.Y.U. L. REV. 1518, 1526 (2003) (quoting Richard B. Bernstein, *Charting the Bicentennial*, 87 COLUM. L. REV. 1565, 1568 (1987) (arguing that originalist history fails “to understand the past on its own terms and maintain a respect for its integrity”)). Contrast this modern emphasis on history’s “pastness” with historian Warren Susman’s 1964 lamentation: “How few historians, professional or otherwise, really seem interested in the pastness of the past!” Warren I. Susman, *History and the American Intellectual: Uses of a Usable Past*, 16 AM. Q. 243, 257 (1964).

<sup>8</sup> See KALMAN, *supra* note 3, at 181, 183–84; PETER NOVICK, THAT NOBLE DREAM: THE “OBJECTIVITY QUESTION” AND THE AMERICAN HISTORICAL PROFESSION 12, 99 (1988); Jack M. Balkin & Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 YALE J.L. & HUMAN. 155, 176 (2006); Howard Schonberger, *Purposes and Ends in History: Presentism and the New Left*, 7 THE HIST. TCHR. 448, 448 (1974) (“Presentism is a fighting word within the historical profession.”); *but see* David L. Hull, *In Defense of Presentism*, 18 HIST. & THEORY 1, 2 (1979) (defending “certain forms of presentism” as legitimate).

<sup>9</sup> JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 11 (1996); Flaherty, *supra* note 3, at 554; *see also, e.g.*, Balkin & Levinson, *supra* note 8, at 165; Mitchell Gordon, *Adjusting the Rear-View Mirror: Rethinking the Use of History in Supreme Court Jurisprudence*, 89 MARQ. L. REV. 475, 478 (2006); Amy Kapczynski, *Historicism, Progress, and the Redemptive Constitution*, 26 CARDOZO L. REV. 1041, 1072 (2005); Jed Rubenfeld, *The Paradigm-Case Method*, 115 YALE L.J. 1977, 1981 n.12 (2006).

<sup>10</sup> For the purposes of this analysis, I will often refer throughout the paper to judges, attorneys, and legal scholars collectively as “lawyers” or “legal practitioners.” While the difference between writing legal scholarship, advocating a position on behalf of clients, and judging actual disputes is important, the groups share many of the same challenges and critiques regarding the use of history in law, and my primary intent is to differentiate law professionals as a group from historians as a group.

the legal system the “truth” is (in theory) attained through the adversarial process. Therefore, each lawyer is bound to act as an advocate for one side, interpreting the facts in the light most favorable to her client. Some commentators see this conflict as an argument for restricting the use of history in law, both in the courtroom and, by extension, in scholarship.<sup>11</sup> Others would allow lawyers to “do” history, but only with a strict adherence to or a heightened awareness of the standards of professional historiography.<sup>12</sup> Despite their differences, however, in one larger sense law and history share a similar objective. At bottom, the legal system and the writing of history are both concerned with establishing the facts of past events and with providing interpretations that establish a workable understanding of the truth.

While the normative debate continues over whether we *should* use history in legal adjudication and scholarship, the fact is that the use of history by courts, advocates, and legal scholars has risen sharply in recent years.<sup>13</sup> I believe that we must recognize that law and history are fundamentally intertwined in at least three ways. First, history is essential to understand the meaning of legal text in constitutions, statutes, and other lawmaking materials, both in legal scholarship and in public discourse. On issues ranging from constitutional war powers, to the role of religion in public life, to the protection of private property rights, scholars and commentators regularly turn to history when trying to explain the important questions of the day.<sup>14</sup> Second, our common law traditions of legal practice are bound up with interpreting the legal past in the form of our consideration of precedent. And third, the adversarial litigation system is itself an exercise in historical reconstruction of past events. Recognizing the practical reality that history *is* heavily used in legal arguments and shows no signs of going away, this Article focuses on the latter, methodological issue: when lawyers “do” history, how can we

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<sup>11</sup> See generally LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION (1988) (criticizing the use of history to support legal arguments based on original intent).

<sup>12</sup> E.g., H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987).

<sup>13</sup> See generally G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485 (2002) (discussing alternative explanations for the “turn to history” in constitutional scholarship in the late twentieth century).

<sup>14</sup> See, e.g., James W. Ely, Jr., “Poor Relation” *Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 4 CATO. SUP. CT. REV. 39 (2005) (historical analysis of property rights); Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of its Incorporation*, 8 U. PA. J. CONST. L. 585 (2006) (historical analysis of church/state relations); Robert J. Pushaw, Jr., *The “Enemy Combatant” Cases in Historical Context: The Inevitability of Pragmatic Judicial Review*, 82 NOTRE DAME L. REV. 1005 (2007) (historical analysis of war powers).

make sure that they do it “right”—or, at least, with some minimum degree of legitimacy?

I argue that requiring lawyers to adopt strictly the methodologies of professional academic historiography reflects a salutary but probably unattainable goal. While incorporating the professional standards of historians to the practice of law would be desirable, requiring lawyers to produce academic-quality historiography would prove difficult to achieve in practice and would not necessarily be that helpful to the decisionmakers in actual legal controversies. Given the reality that lawyers will continue to use history, asking lawyers to write academic history would potentially be counterproductive as well, discouraging the conscientious production of “good” lawyers’ history and ceding the field to the “bad” law office histories in the battle to shape public legal understandings.

Instead, a helpful, if imperfect, apparatus already exists by which we can evaluate historical claims and account for some degree of the professional norms of the historical profession: the law of evidence. Using evidentiary rules and principles to evaluate historical claims may not resolve the normative issues. However, the law of evidence is an overlooked, yet potentially effective, way of thinking about how history can be used to illuminate legal issues with a minimum level of reliability, and without doing violence to the professional standards of historians. Evidence law can be a helpful way to assess the use of historical evidence not only in the actual litigation process but, by extension, in legal scholarship as well.

Introducing historical evidence at court will pose challenges for the judge and the jury. One response has been to call for the use only of court-appointed historians under the evidence rules (to the exclusion of expert witnesses proffered by the parties) as a means to increase *objectivity* in the legal process.<sup>15</sup> I contend, however, that this would only exacerbate the methodological and practical problems of history in law. Instead, the rules of evidence for the adversarial process provide a workable system for allowing the court to perform its gatekeeping function and for the jury to evaluate competing claims with some degree of reliability, without the dangers inherent when only one historical interpretation may be considered. A contest of competing historical interpretations may not resolve all historical questions to the standards of professional historiography, but as this Article will show, controversies over the meaning of the past play a

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<sup>15</sup> See, e.g., Martin, *supra* note 7, at 1519 (advocating the use of court-appointed historians as expert witnesses, rather than allowing the parties to present expert historians of their own choosing).

large role in public debate and are also inherent in the historical enterprise itself. The larger point is that evidence law also provides a workable analytical framework for analyzing how history should and can be used in law, both in litigation and in scholarship.

In Part II of this Article, I analyze some of the leading arguments for and against the use of history in legal interpretation, focusing on the apparent cross-purposes of the two professions. This discussion will also chronicle the reality that history is, in fact, heavily used by lawyers of all political and ideological persuasions, and thus the issue shows no sign of going away. In Part III, I examine the supposedly conflicting goals and irreconcilable standards of the two professions, drawing on the sociology of the professions to analyze the conflict in terms of contests for professional jurisdiction. In Part IV, I focus on the apparent distinction between objectivity and advocacy as the key issue in this area of controversy, and also suggest possible weaknesses in the argument that we should necessarily prefer ostensibly “objective” legal history. In Part V, I evaluate several of the possible ways of overcoming or reducing the dangers attendant when lawyers foray into the territory of historians, focusing on the potential application of the law of evidence to evaluate historical claims. I address the question of whether historical truth in law is best attained by the use of court-appointed historians or by competing historical explanations offered through the adversarial process.

The use of history in law is here to stay. Thus, while the normative debate is certainly useful—especially in areas where public understanding of the meaning of the law plays a role in interpretation—it is important to attempt to determine how to account for the standards of professional historiography in the law, and also to craft a workable process for evaluating historical evidence, both in the courtroom and in legal scholarship.

## II. HISTORY IN LEGAL INTERPRETATION: ITS USES AND ITS CRITICS

If the practice of “law office history” is so pervasive,<sup>16</sup> there must be some reason that historical evidence is so appealing to lawyers for supporting their arguments. Critics key in on the perceived difference in the underlying purposes of the respective professions: objectivity versus advocacy. They argue that because of these different

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<sup>16</sup> Flaherty, *supra* note 3, at 524 (“Lawyers, judges, and . . . legal academics regularly turn to history when talking about the Constitution, and not merely as a rhetorical trope.”).



ends, the use of history is irreconcilable with the process of analyzing legal issues. Yet the two professions<sup>17</sup> also have something in common: a basic appeal to *authority*. Historians seek to make authoritative interpretations of the past by properly canvassing and weighing the sources. Lawyers invoke legal authority to support their arguments about how legal issues should be resolved.<sup>18</sup>

Historical evidence is so appealing to lawyers in part because it provides historical authority for legal interpretations.<sup>19</sup> Daniel Farber has noted that “[t]he linkage between past and present is especially central in law.”<sup>20</sup> Common law adjudication is based upon *stare decisis*, meaning that the body of prior caselaw that developed over the course of time must be interpreted to apply to new controversies.<sup>21</sup> Our substantive doctrines of property, tort, and contract have developed over centuries of tradition. In statutory construction, legislative history is often consulted to illuminate the intentions of the law’s drafters.<sup>22</sup> And in American constitutional theory, the past is centrally important both to originalists and nonoriginalists alike.<sup>23</sup> The mythology of the Founding Fathers undoubtedly plays a large role in

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<sup>17</sup> I use the terms “profession” and “discipline” here to describe law and history somewhat more interchangeably than the terms are used in different contexts. History is best described as a discipline within the academic profession, while law is its own profession with academic members. But are law professors members of a discipline within the academic profession or of the scholarly wing of the legal profession? It may depend on whom you ask.

<sup>18</sup> See John Philip Reid, *Law and History*, 27 LOY. L.A. L. REV. 193, 195–96 (1993) (noting, however, that the different understandings of the role of evidence and authority “make the ways that the two professions interpret the past almost incompatible”).

<sup>19</sup> Kramer, *supra* note 6, at 395 (“When lawyers, judges, and legal scholars turn to history, they do so because they believe, and want their readers to believe, that a historical pedigree adds authority to their argument.”).

<sup>20</sup> Daniel A. Farber, *Adjudication of Things Past: Reflections on History as Evidence*, 49 HASTINGS L.J. 1009, 1030 (1998).

<sup>21</sup> Matthew T. King, *Security, Scale, Form, and Function: The Search for Truth and the Exclusion of Evidence in Adversarial and Inquisitorial Justice Systems*, 12 INT’L LEGAL PERSP. 185, 192 (2002); Posner, *supra* note 1, at 593.

<sup>22</sup> Alan G. Gless, *A Simple Country Judge’s Musings on the Use of History by Trial Lawyers*, 7 GREEN BAG 2D 343, 343 (2004) (“History is what trial courts do . . . . The trial court team engages in historical inquiry whenever it searches for and chooses among precedents and interprets statutes and administrative rules.”). *But see* ANTONIN M. SCALIA, A MATTER OF INTERPRETATION (1997) (criticizing the use of legislative history as an interpretive source).

<sup>23</sup> David Thomas Konig, *Constitutional Contexts: The Theory of History and the Process of Constitutional Change in Revolutionary America*, in CONSTITUTIONALISM AND AMERICAN CULTURE: WRITING THE NEW CONSTITUTIONAL HISTORY 3–4 (Sandra F. VanBurkleo et al. eds., 2002) (“[H]istory always has played a major role in constitutional interpretation . . . .”); Rebecca L. Brown, *History for the Non-Originalist*, 26 HARV. J.L. & PUB. POL’Y 69, 72 (2003); Farber, *supra* note 20, at 1031.

understanding the structure of American government for many lay people and professionals (perhaps now more than ever if one is to judge by the wealth of recent popular books on founding-era figures).<sup>24</sup> So does the general sense of fidelity to original meaning or text,<sup>25</sup> or the inherent authority or influence of tradition.<sup>26</sup>

Indeed, the past is itself authoritative to a certain degree in the legal system. Law is at its core based on resolving issues presented by past conduct. The practice of litigation is, to a great extent, an exercise in establishing a certain interpretation of past events. What actually happened? Who is at fault? The outcome of a case may hinge on which side does the best at convincing the court that its *story* about what happened—its version of *historical truth*—is the most accurate. Thus, in spite of the professional differences between law and history, it is the very thing that they have in common (at a certain level of abstraction) that makes history so powerful as a rhetorical and evidentiary device: the appeal to an authoritative explanation of the past. Given its strong appeal and its widespread popularity among practicing lawyers and legal scholars of all ideological stripes, the use of history in law can not—and should not—be prevented.

A. “*Law Office Histories*” *Left and Right*

Methodological debates and disciplinary turf battles often take place completely within the professions involved, or within the academic community. But the issue of history in legal interpretation has entered the wider realm of public consciousness. While courts often appealed to history in making decisions,<sup>27</sup> the debate began to gain wider public recognition in the early 1980s. During the years of the Reagan Administration, to support the appointment of judges with conservative values who would practice “judicial restraint,” prominent conservative politicians called for a “jurisprudence of original inten-

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<sup>24</sup> H.W. Brands, *Founders Chic: Our Reverence for the Fathers Has Gotten Out of Hand*, ATLANTIC MONTHLY, Sept. 2003, at 101.

<sup>25</sup> Rakove, *supra* note 6, at 1587; *see also* Konig, *supra* note 23, at 3 (“Although the concept of coherent and conclusive historical intent is itself ahistorical, a search for some type of historical ‘fidelity’ remains persistently attractive and intellectually legitimate among scholars.”).

<sup>26</sup> Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177, 178 (1993) (arguing that tradition should be valued in legal interpretation more for its pedagogical value than for any inherent claim to authority *qua* tradition).

<sup>27</sup> *E.g.*, *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (holding that the Fourteenth Amendment incorporated the Establishment Clause against the States, and discussing the appropriateness of Thomas Jefferson’s metaphor of a “wall of separation” between church and state).

tion.”<sup>28</sup> “The original meaning of constitutional provisions and statutes,” argued then-Attorney General Edwin Meese, provided “the only reliable guide for judgment.”<sup>29</sup> Judicial fidelity to original intent would supposedly result in interpretations of the Constitution that showed proper deference to the political branches of government, and would limit the degree to which judges decided cases based on their “ideological predilections” or subjective policy preferences.<sup>30</sup>

For the next several years, the debate over originalism raged, and it still continues today (indeed, it has seen something of a revival recently).<sup>31</sup> Justice William Brennan, in response to the originalists, asserted that the Constitution’s meaning is not fixed by the world as it was at the various moments of enactment, but rather in the aspirations it signified.<sup>32</sup> Justice Brennan advocated the metaphor of a “living Constitution.”<sup>33</sup> The nomination and rejection of Judge Robert Bork to the Supreme Court was based in part on controversy over Judge Bork’s originalist judicial philosophy.<sup>34</sup> And in the legal academy, the theory of original intent was treated with considerable derision. Law professors and legal historians penned a barrage of articles discussing the normative and methodological flaws that would plague any attempt to conduct modern jurisprudence according to original intent.<sup>35</sup> Proponents of originalism were charged with placing today’s

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<sup>28</sup> See Edwin Meese III, *Interpreting the Constitution*, in INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 13, 19 (Jack N. Rakove ed., 1990) [hereinafter INTERPRETING THE CONSTITUTION].

<sup>29</sup> INTERPRETING THE CONSTITUTION, *supra* note 28, at 3.

<sup>30</sup> *Id.*

<sup>31</sup> See, e.g., Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7 (2006); Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387 (2005) (reviewing STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005)); John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383 (2007); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 FORDHAM L. REV. 545 (2006); Mitchell N. Berman, *Originalism and its Discontents (Plus a Thought Or Two About Abortion)* (Univ. of Texas Pub. Law Research Paper No. 117, 2007), available at <http://ssrn.com/abstract=957630>.

<sup>32</sup> William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification* (Oct. 12, 1985), reprinted in INTERPRETING THE CONSTITUTION, *supra* note 28, at 23–34.

<sup>33</sup> *Id.*

<sup>34</sup> See ROBERT BORK, *THE TEMPTING OF AMERICA* 267–350 (1991).

<sup>35</sup> See, e.g., James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1 (1986), reprinted in INTERPRETING THE CONSTITUTION, *supra* note 28, at 151 (raising questions about the reliability of founding-era sources about the drafting and ratification of the Constitution); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985), reprinted in INTERPRETING THE CONSTITUTION, *supra* note 28, at 53 (criticizing conserva-

law under the constraints of the irrelevant opinions of long-dead white men, with being mouthpieces of the Reagan administration, or with fundamentally misreading history.<sup>36</sup>

To this day, many people still think of the use of history in constitutional interpretation as primarily an interpretive technique favored by the political right. To be sure, originalism is usually advocated by conservative or libertarian scholars and judges.<sup>37</sup> But regardless of the merits of originalism as a normative theory, prominent scholars from a broad variety of interpretive schools and political persuasions rely on historical support for their legal analyses. Akhil Amar, Bruce Ackerman, Cass Sunstein, and Larry Kramer, to name just a few examples, have published important books that offer historical accounts of the Constitution's meaning.<sup>38</sup> The different perspectives among constitutional theorists continue to engender debate, but increasingly they tend to rely on history.

In fact the modern practice of using history to support legal arguments has had roots on both ends of the political spectrum, both before and after the height of the controversy over "original intent" in the 1980s. In 1965, historian Alfred Kelly wrote an influential article, *Clio and the Court: An Illicit Love Affair*, one of the first prominent academic critiques of "law office history."<sup>39</sup> Kelly charged the Court with wantonly and inappropriately using historical evidence, often in a highly selective manner, in order to achieve results consonant with the Justices' political ideology.<sup>40</sup> Kelly's target, however, was the use of history not by conservative Justices, but rather by the liberal and activist Warren Court.<sup>41</sup>

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tive originalists for relying on the intentions of individual Framers by arguing that the Framers themselves would not have done so).

<sup>36</sup> See, e.g., Powell, *supra* note 35, at 88.

<sup>37</sup> See generally, e.g., RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004); SCALIA, *supra* note 22; Barnett, *supra* note 31; McGinnis & Rappaport, *supra* note 31. Professor Barnett and other scholars advocate a more nuanced version of originalism based on the original *meaning* of the constitutional text in 1787, rather than trying to ascertain the original *intent* of the drafters. See RAKOVE, *supra* note 9, at 7–11 (explicating the differences between interpretive theories based on original intent, original meaning, and original understanding of the Constitution); Kesevan & Paulsen, *supra* note 5, at 1113.

<sup>38</sup> See generally BRUCE ACKERMAN, WE THE PEOPLE: VOL. 2: TRANSFORMATIONS (1998); AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY (2005); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); CASS SUNSTEIN, THE PARTIAL CONSTITUTION (1993).

<sup>39</sup> Kelly, *supra* note 2, at 119.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*; see also Richards, *supra* note 4, at 809.

Kelly was not as concerned about the particular political or ideological uses toward which historical arguments were directed, but rather about the problems inherent in transforming historical facts into legal evidence and about the necessity of choosing to emphasize some facts and deemphasize others—as lawyers must—in the course of shaping a forceful argument.<sup>42</sup> Kelly himself, along with noted southern historian C. Vann Woodward, had assisted then-NAACP counsel Thurgood Marshall in crafting historical interpretations to lend support to Marshall's argument in *Brown v. Board of Education*,<sup>43</sup> and Kelly later expressed some ambivalence about having participated in the shaping of history for advocacy purposes.<sup>44</sup> Well before originalism became prominent in the 1980s, therefore, scholars recognized that using history as a means of attaining desired legal results was a problematic reality, not simply a curious outgrowth of any particular ideological agenda.

In the context of the controversy over original intent, most of the debates about the use of history in law focused on whether using history was appropriate, legitimate, or likely to produce desired results. Even today the normative debate is still visited frequently. Some commentators on both the left and right maintain that history is directly relevant to contemporary constitutional interpretation.<sup>45</sup> Others, including many liberals and even some conservatives such as

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<sup>42</sup> See generally Kelly, *supra* note 2. While the historian must also make choices about which sources and which facts to emphasize over others, the historian's need to do this is less intuitively obvious than the lawyer's, and (perhaps) less driven by the imperative to conform the evidence to a preferred narrative.

<sup>43</sup> 347 U.S. 483 (1954).

<sup>44</sup> See Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 *FORDHAM L. REV.* 87, 118 (1997). Kelly said,

I am very much afraid that . . . I ceased to function as [sic] and instead took up the practice of law without a license. The problem we faced was not the historian's discovery of the truth, the whole truth, and nothing but the truth; the problem instead was the formulation of an adequate gloss on the fateful events of 1866 sufficient to convince the Court that we had something of an historical case . . . . It is not that we were engaged in formulating lies; there was nothing as crude and naive as that. But we were using facts, emphasizing facts, bearing down on facts, sliding off facts in a way to do what Marshall said we had to do . . . .

*Id.* at 118–19 (quoting RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S SEARCH FOR EQUALITY* 640 (1976)).

<sup>45</sup> See, e.g., ACKERMAN, *supra* note 38 (liberal); AKHIL REED AMAR, *THE BILL OF RIGHTS, CREATION AND RECONSTRUCTION* (1998) (liberal); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 *HARV. L. REV.* 1409 (1990) (conservative); Yoo, *supra* note 4 (conservative).

Judge Posner, argue that over-reliance on the historical record is an inappropriate or inefficient way to achieve legal results.<sup>46</sup>

While many legal scholars scathingly derided the originalism movement for its reliance on history,<sup>47</sup> they nonetheless understood intuitively the persuasive power of an appeal to historical authority in legitimizing legal arguments. In the 1980s, several began to advocate an approach to constitutional interpretation that was more consonant with their more liberal political views yet nonetheless was deliberately built upon a historical pedigree.<sup>48</sup> Advocated by Cass Sunstein, Frank Michelman, and others, the theory of “civic republicanism” sought to apply to constitutional theory the insights of classical republican political theory as invoked by members of the founding generation.<sup>49</sup> Based loosely on the work of historians of the founding era, legal advocates of civic republican theory argued that the Constitution should be interpreted not simply as a literal document protecting individual rights and circumscribing government action.<sup>50</sup> They argued that the Constitution should instead be seen as a more holistic mechanism for achieving the community-oriented goals in process and policy that they associated with the classical republican ideology of the revolutionary and founding generations.<sup>51</sup>

While the ensuing debate over this “republican revival” was confined mostly to academic circles, it was a part of the larger normative discussion over the use of history in law—but this time the battle lines were not as clearly determined by political persuasion. Originalism provided an easy target for both liberal legal scholars and left-leaning historians to criticize. It was this “civic republican” version of lawyers appealing to history, however, that generated the most significant and sustained examination of the methodological aspects of using history in law. Because they shared an academic purpose as well as a general political orientation with historians—and because they relied on the historians’ own scholarship—the liberal legal scholars who sought to apply a civic republican approach to contemporary issues had to be taken more seriously.

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<sup>46</sup> Flaherty, *supra* note 3 (citing liberal anti-history critics); Posner, *supra* note 1, at 573.

<sup>47</sup> See, e.g., Powell, *supra* note 35, at 53–54 (arguing that the members of the founding generation itself never intended for future generations to be constrained by their own eighteenth century understandings).

<sup>48</sup> KALMAN, *supra* note 3, at 139.

<sup>49</sup> *Id.*; see also Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

<sup>50</sup> See generally *supra* note 49.

<sup>51</sup> SUNSTEIN, *supra* note 44, at 20–21.

In its standard narrative,<sup>52</sup> the “republican synthesis” in historiography<sup>53</sup> was developed by American historians of the founding era, based largely on the insights first offered by Bernard Bailyn, Gordon Wood, and J.G.A. Pocock.<sup>54</sup> Writing in the 1960s and 1970s, these and other historians contended that the understanding of the intellectual history of the Revolution and Constitution propounded by the then-dominant “liberal consensus school”<sup>55</sup> was an insufficient explanation of the ideology of the founding generation. Consensus historians, such as Daniel Boorstin and Richard Hofstadter, advanced theses that purported to explain broad themes of the American experience.<sup>56</sup> Scholars such as Louis Hartz posited that Americans in the late eighteenth century had a relatively uniform political outlook based largely on the philosophy of John Locke, emphasizing personal rights and liberties more than providing for the collective welfare.<sup>57</sup> Baylin, Wood, Pocock, and others, however, argued in various ways that late-eighteenth century American political theory in fact drew as much or more from the English political tradition variously described as “opposition,” “commonwealth,” or “country” ideology.<sup>58</sup> In their account, Americans were more obsessed with the organic health of their society as a whole than with an individual-rights orientation or with concern for interest-group pluralism.<sup>59</sup>

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<sup>52</sup> Ironically, the “republican synthesis” has a canonical “founding myth” of its own! See *supra* notes 48–51 and accompanying text; see *infra* notes 53–55 and accompanying text.

<sup>53</sup> Robert E. Shalhope, *Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography*, 29 WM. & MARY Q. 49 (1972).

<sup>54</sup> BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787* (1967).

<sup>55</sup> A note on terminology: in the debates over “liberalism” versus “republicanism” as the animating political philosophy behind the Constitution, “liberalism” refers to an emphasis on individual liberties and interest-group pluralism, while “republicanism” refers to the more collective, organic view of the polity prioritizing the “common good.” This obviously has the potential to confuse given the contemporary political orientation of “liberal” as left of center and “republican” as conservative.

<sup>56</sup> See, e.g., DANIEL J. BOORSTIN, *THE AMERICANS: THE NATIONAL EXPERIENCE* (2002); RICHARD HOFSTADTER, *THE AMERICAN POLITICAL TRADITION: AND THE MEN WHO MADE IT* (1989).

<sup>57</sup> LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* 8 (1955). Poor Louis Hartz—for having argued that the U.S. was founded on Lockean individual-rights principles, he now plays the part of the preeminent expositor of the liberal-consensus interpretation, for which he is rewarded with an almost ritual condemnation in most accounts of the historiographical turns toward a republican synthesis.

<sup>58</sup> See generally *supra* note 54.

<sup>59</sup> WOOD, *supra* note 54; see also THE FEDERALIST NO. 10 (James Madison).

Granted, republicanism did not disregard individual liberty as one of the foundations for republican values. But republicanism, according to its latter-day expositors, was primarily concerned with achieving the “common good,” which could only be accomplished through a politics that emphasized “public and private virtue.” The greatest threats to civic life also were couched in moralistic terminology as “corruption” and “tyranny.”<sup>60</sup> In the early 1970s, Robert Shalhope argued that this interpretation of the founding constituted a “paradigm change” in historiography as important as those described by Thomas Kuhn’s model in *The Structure of Scientific Revolutions*.<sup>61</sup> The “republican synthesis” soon became the dominant school for understanding the American founding among historians for the next generation. In fact, more recent scholarship has begun to posit that republicanism did indeed embrace individual rights as a bulwark for advancing the common good; but in the earlier years during which the republican synthesis was advanced, individual liberties had primarily been associated with the allegedly diametrically opposed theory of liberalism or interest-group pluralism that proponents of republicanism sought to dislodge.

Legal scholars began to find these republican ideas congenial to the substantive theories of constitutional interpretation that they advocated. Laura Kalman, in *The Strange Career of Legal Liberalism*, has written the definitive historians’ critique of this “turn to history” in the legal academy.<sup>62</sup> As Kalman writes, liberal legal scholars seized upon the concepts of “civic virtue” and the “common good” as foundational metaphors for understanding the Constitution.<sup>63</sup> By tying the Constitution to republican ideology, they could argue for results based on community-oriented values rather than on an individualistic, content-neutral rights approach—and they could invoke the historical authority of the founding generation in doing so. The “republican revival” in the legal academy generated so much interest that by the late 1980s it was the subject of special symposia in prominent law reviews and historical journals.<sup>64</sup>

While republicanism served as the dominant paradigm among the ranks of professional historians, other prominent historians such as Joyce Appleby, Isaac Kramnick, and John Patrick Diggins also ex-

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<sup>60</sup> WOOD, *supra* note 54, at 36.

<sup>61</sup> See generally THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962); Shalhope, *supra* note 53.

<sup>62</sup> KALMAN, *supra* note 3.

<sup>63</sup> See Michelman, *supra* note 49, at 1504; Sunstein, *supra* note 49, at 1541.

<sup>64</sup> See Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988).



pressed skepticism towards the ascendancy of the republican synthesis in historiography.<sup>65</sup> But then—just as the debate was starting to subside in the historical community—historians got wind of how members of the legal academy were advancing republicanism as an interpretive theory relevant to resolving present-day legal debates.<sup>66</sup> While ordinarily one might expect such borrowing to be flattering—and while the historians often shared the political views of the legal scholars who appropriated republicanism—the historians’ reaction ranged from a tepid distancing from the legal scholars’ arguments to outright condemnation.<sup>67</sup> Even the most avid proponents of the “republican synthesis” as a construct for understanding the intellectual history of eighteenth century Americans were lukewarm at best towards the use of it as a construct for explaining legal and policy issues today.<sup>68</sup>

Rather than being pleased that prominent constitutional theorists were reading and using their work, many historians were upset that the “civic republicans” in the law schools were using their historical findings, out of historical context, to shore up arguments in a contemporary policy debate.<sup>69</sup> Modern civic republicanism appeared to be “law office history” at its worst, disregarding the canons of historical scholarship for the sake of prescriptions on contemporary policy issues.<sup>70</sup> It was easy for historians to write off the conservative originalists.<sup>71</sup> Originalists tended to rely mostly on selected primary evidence from the founding era purporting to show original intent. But the civic republicans, with whose left-leaning politics the historians often agreed, were citing (and thus, implicating) not simply *The Federalist* or Blackstone, but also the scholarly work of the professional historians themselves.<sup>72</sup> In this, the civic republicans sought to invoke the authority not just of historical evidence itself, but also of the pro-

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<sup>65</sup> See generally JOYCE APPLEBY, LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION (1992).

<sup>66</sup> See Rodgers, *supra* note 3. Today most historians understand that there were elements of both liberalism and republicanism present in the founding era. See, e.g., MARC W. KRUMAN, BETWEEN AUTHORITY AND LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA, at xi (1997) (hoping to “transcend the increasingly fruitless debate over whether late-eighteenth- and early-nineteenth-century America was ‘republican’ or ‘liberal’”).

<sup>67</sup> KALMAN, *supra* note 3, at 175.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Flaherty, *supra* note 3, at 554

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

fessional expertise of the historians who interpreted it.<sup>73</sup> In a sense, then, the civic republicans were trying to do the conservative originalists one better by seeking the imprimatur of the modern scholarship in addition to the primary-source evidence from the past.

Kalman criticizes the appropriation not only of the historiography of republicanism by liberal law professors, but also the larger “turn to history” by members of the legal academy as a means of grounding contemporary policy arguments in historical context.<sup>74</sup> Kalman is suspicious of the legal scholars’ attempt to portray a historical pedigree for their “republican” agenda. Despite their disclaimers that they are only appropriating republicanism as a political theory rather than as an authoritative historical account that demands contemporary adherence to historical interpretation,<sup>75</sup> Kalman understands rightly that they nonetheless want to “imbue the past with prescriptive authority.”<sup>76</sup> This is problematic because lawyers’ arguments tend to paint history with a broad brush rather than to situate republicanism in the complexity of its historical contexts. They seek to invoke an appeal to history without accommodating the actual historical development and outcomes of republican ideology.<sup>77</sup> Today, the normative debates over republicanism itself have died down, but it still underlies legal-historical analyses sounding in arguments for “the common good.”<sup>78</sup> And legal scholars of all persuasions are using history more than ever. The charge of inappropriateness, however, lingers.

Today, once again, originalism is hot—several important articles on the subject have recently been published, discussing the norma-

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<sup>73</sup> Kalman, *supra* note 44, at 96.

<sup>74</sup> *Id.*

<sup>75</sup> See generally MICHAEL SANDEL, *DEMOCRACY’S DISCONTENT* (1998); see also Sunstein, *supra* note 49, at 1576.

<sup>76</sup> Kalman, *supra* note 44, at 103.

<sup>77</sup> KALMAN, *supra* note 3, at 175–78.

<sup>78</sup> BREYER, *supra* note 31, at 1; RICHARD A. EPSTEIN, *PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH THE COMMON GOOD* 3 (1998); Jill E. Fisch, *The “Bad Man” Goes to Washington: The Effect of Political Influence on Corporate Duty*, 75 *FORDHAM L. REV.* 1593, 1611 (2006) (“Scholars offer a variety of models of the political process, but at opposite ends of the spectrum are civic republicanism and some form of public choice theory. Civic republicanism conceives of lawmakers as public-regarding, viewing ‘legislatures as forums for public deliberation and civic virtue.’ . . . ‘[C]ivic republicanism portrays government as a moral force for the common good.’” (quoting Jody Freeman, *The Private Role in Public Governance*, 75 *N.Y.U. L. REV.* 543, 562 (2000))); Richard W. Garnett, *The Right Questions About School Choice: Education, Religious Freedom, and the Common Good*, 23 *CARDOZO L. REV.* 1281, 1311–12 (2002).

tive merits of originalism and living constitutionalism,<sup>79</sup> and debates continue on legal scholarship websites, blogs, and news magazines.<sup>80</sup> Because of this resurgence in historical thinking about the law it is more important than ever for us to think about how history is used, and by what methods.

*B. The Uneasy Place of History in Constitutional Interpretation*

The story of the controversy over civic republicanism and the continuing debate over originalism underscores the fact that the use of history in deciding legal issues cannot be tied to or dismissed as the tactic of those of any one particular political persuasion, conservative or liberal. This recognition is important because it moves the debate beyond assigning blame to the other camp (and thereby evading a serious examination of the issue), and because it highlights the fact that regardless of normative debates lawyers will continue to use historical evidence and arguments in the foreseeable future. The fact that advocates from diametrically opposing positions on the ideological spectrum can consult the evidence of history and reach diametrically opposing conclusions may surprise few. It also speaks to one of the underlying questions of the subject: is historical evidence essentially indeterminate when used in legal analysis? Furthermore, the debate over originalism, republicanism, and history in interpretation reveals that historians and legal scholars have become concerned not just with those normative questions of whether we can or should use

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<sup>79</sup> See generally, e.g., Randy E. Barnett, *supra* note 31; Ethan J. Leib, *Why Supermajoritarianism Does Not Illuminate the Interpretive Debate Between Originalists and Non-Originalists*, 101 NW. U. L. REV. 1905 (2007); McGinnis & Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383 (2007); John O. McGinnis & Michael B. Rappaport, *Original Interpretative Principles as the Core of Originalism*, 24 CONST. COMMENT (2007); Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551 (2006); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545 (2006); Lee J. Strang, *Originalism, the Declaration of Independence, and the Constitution: A Unique Role in Constitutional Interpretation?*, 111 PENN ST. L. REV. 413 (2006); William Michael Treanor, *Original Understanding and the Whether, Why, and How of Judicial Review*, 116 YALE L.J. POCKET PART 218 (2007), <http://thepocketpart.org/2007/01/09/treanor.html>; Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. (forthcoming 2008).

<sup>80</sup> E.g., Jack M. Balkin, *Alive and Kicking: Why No One Truly Believes in a Dead Constitution*, SLATE, Aug. 29, 2005, <http://www.slate.com/id/2125226/>; Dahlia Lithwick, *Reasons to Go On Living: Does Anyone Believe in a "Living Constitution" Anymore?*, SLATE, Aug. 23, 2005, <http://www.slate.com/id/2124891/>; Posting of Jack M. Balkin, *Confusion About Originalism?*, to Balkinization, <http://balkin.blogspot.com/2006/08/confusion-about-originalism.html> (Aug. 19, 2006, 5:07 PM); Posting of Lawrence B. Solum, *The Fourth Amendment in the Blogosphere and Constitutional Theory*, to Legal Theory Blog, [http://lsolum.typepad.com/legaltheory/2006/08/the\\_fourth\\_amen.html](http://lsolum.typepad.com/legaltheory/2006/08/the_fourth_amen.html) (Aug. 19, 2006, 1:59 PM).

history, but also with the methodological question of how it can be done in light of the different, and often contradictory, standards of the two professions.

### 1. Critiques of History in Law

There is no shortage of scholars who question the use of history-as-applied by courts and legal scholars—their targets range from the Rehnquist Court to political originalists to left-leaning civic republicans in the academy.<sup>81</sup> As discussed above, the rise of originalism in the 1980s was met with a torrent of criticism on both normative and methodological grounds.<sup>82</sup> Even as the focus shifted away from conservative original-intent originalism in the 1990s, the use of history in law continued to draw scrutiny. Martin Flaherty published an influential article in 1995 titled *History “Lite” in Modern American Constitutionalism* raising methodological concerns.<sup>83</sup> As the title suggests, Professor Flaherty argues that when applying historical arguments to questions of constitutional theory, there is a tendency with lawyers—even with some of the most acclaimed legal scholars—to present a version of history that is often watered-down and meagerly supported: that is, history “lite.”<sup>84</sup> Whether or not their assertions may be supportable by historical inquiry, Flaherty contends, the “habits of poorly supported generalization—which at times fall below even the standards of undergraduate history writing—pervade the work of many of the most rigorous theorists when they invoke the past to talk about the Constitution.”<sup>85</sup>

Some prominent scholars have argued that because historical inquiry can lead to diametrically opposing or ambiguous conclusions, historical evidence should itself be treated with extreme caution. Suzanna Sherry, who has herself written from a civic republican perspective,<sup>86</sup> argues that lawyers should be wary of consulting history to reveal authoritative determinations of specific legal issues: “professional historians do not attempt to answer the questions . . . because they recognize that history is indeterminate.”<sup>87</sup> Historian James

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<sup>81</sup> See KALMAN, *supra* note 3, at 134–36, 175.

<sup>82</sup> See *supra* Part II.A.

<sup>83</sup> Flaherty, *supra* note 3, at 523.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 526.

<sup>86</sup> See generally Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, (1986); Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131 (1995).

<sup>87</sup> Suzanna Sherry, *The Indeterminacy of Historical Evidence*, 19 HARV. J.L. & PUB. POL'Y 437, 441 (1995).

Hutson has raised doubts about “the integrity of the documentary record,” showing that some of the leading sources of historical evidence about the Framing—such as Madison’s oft-cited notes of the Constitutional Convention—may themselves be unreliable, or at minimum a less-than-accurate transcription, to the extent that determining original intent “may be an impossible hermeneutic assignment.”<sup>88</sup>

From the conservative side, Judge Posner—famous for his advocacy of judging based on pragmatic principles such as wealth-maximization, rather than on theories that appeal to external sources of authority<sup>89</sup>—is likewise skeptical of the practicability of using historical evidence.<sup>90</sup> In Posner’s view, history has three potential purposes in legal arguments: rhetorical, normative, and informational.<sup>91</sup> History is troublesome as a rhetorical device, according to Posner, because the “indeterminacy of most historical inquiries” allows a judge to appropriate historical rhetoric as “a useful mask for decisions reached on other grounds.”<sup>92</sup> Posner rejects outright the normative justification for history.<sup>93</sup> Though still to be pursued cautiously, Judge Posner seems to believe the only legitimate use of historical evidence is to fill informational gaps when deciding cases based on precedent. In such instances, history is consulted because of the “path-dependence” of common law reasoning and has “nothing to do with a veneration of the past” itself.<sup>94</sup> Regarding the consultation of the work of academic historians to interpret the law, Posner argues that it is unacceptable unless there is a clear scholarly consensus on the issue among historians: “Legal professionals are not competent to umpire historical disputes.”<sup>95</sup>

## 2. Learning to Live with the Historical Turn

Other scholars, while counseling caution and often rejecting the claim that judges must be strictly constrained by the framers’ intent or by original meaning, still believe there is a proper role for historical inquiry in constitutional analysis. According to Rebecca Brown, history is important for non-originalists because “[o]nly by looking at

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<sup>88</sup> Hutson, *supra* note 35, at 152 (advocating a more sophisticated “original meaning originalism,” rather than relying primarily on original intent); *but see* BARNETT, *supra* note 37.

<sup>89</sup> See RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* (1989).

<sup>90</sup> Posner, *supra* note 1, at 580.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 593.

<sup>93</sup> *Id.* at 588–92.

<sup>94</sup> *Id.* at 583, 591.

<sup>95</sup> *Id.* at 595.

our history . . . can we hope to gain a sense of what values must be credited in striking the balance of ordered liberty for our own times.”<sup>96</sup> Larry Kramer has written that history is normatively important because constitutional law is essentially “the end product of historically evolving understandings of the text.”<sup>97</sup> Neither does the indeterminacy of historical evidence, nor the contested nature of historical argument, thwart scholars such as Barry Friedman and Scott Smith from consulting history: “[h]istory is also contested, but the proper role of the constitutional interpreter is to address this contest over deeper commitments.”<sup>98</sup> Not surprisingly (though not inappropriately), some professional historians counsel for greater attention to the academic historiography. Kalman, after her extended critique of the “turn to history,” nonetheless concludes that historical inquiry, when done right, can serve useful purposes in illuminating constitutional issues.<sup>99</sup> Elsewhere, Kalman has argued that both “historians’ legal history” (objective legal history written according to the standards of professional historians) and “lawyers’ legal history” (historical interpretations offered for the purpose of making legal arguments) can be both legitimate and useful to scholars and practitioners if done with a certain level of professionalism.<sup>100</sup>

Historian Jack Rakove, addressing the fact that judges are generally not trained in the professional standards of historians, nevertheless acknowledges that history can have a role in illuminating legal questions: “[s]kepticism about the limits of judicial reasoning does not require a blanket dismissal of the possibility that historically grounded approaches . . . might indeed yield fruitful results.”<sup>101</sup> Professional historiography may not necessarily point to ultimate conclusions on legal issues, but historians can help in “narrowing and ranking the available range of meanings, or perhaps more important, [in]

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<sup>96</sup> Brown, *supra* note 23, at 77; *see also* Brown, *supra* note 26, at 180 (“[T]he Constitution should be viewed as part of a body of tradition that can teach present and future generations the principles that will allow society not merely to change, but to mature.”).

<sup>97</sup> Kramer, *supra* note 6, at 388; *see also* Larry Kramer, *Fidelity to History—and Through It*, 65 *FORDHAM L. REV.* 1627, 1627 (1997) (“[H]istory is essential to constitutional theory because our understandings, our values, and the actual structure of our government are constantly, inevitably, changing.”).

<sup>98</sup> Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 *U. PENN. L. REV.* 1, 87 (1998).

<sup>99</sup> KALMAN, *supra* note 3, at 236.

<sup>100</sup> Kalman, *supra* note 44, at 114–15; *see also* Richard B. Bernstein, *Charting the Bicentennial*, 87 *COLUM. L. REV.* 1565, 1578 (1987) (noting, and criticizing, the disparity between “lawyers’ legal history” and “historians’ legal history”).

<sup>101</sup> Rakove, *supra* note 6, at 1588.

demonstrating the sheer implausibility of particularly egregious misreadings of the text.”<sup>102</sup> William Forbath agrees: “[t]he historians’ role is to scold the law scholars for doing law-office history, for ‘getting it wrong,’ ironing out context and discontinuity to muster the past into present service.”<sup>103</sup>

These scholars’ approaches to history in law are much more realistic. The use of history in legal discussions has increased greatly over the last generation.<sup>104</sup> As Larry Kramer proclaimed, invoking Jefferson tongue-in-cheek, “[w]e are all originalists, we are all non-originalists.”<sup>105</sup> The use of history has seemingly won the day, or at least its opponents have temporarily withdrawn from the field. And many acknowledge that the quality of some work in the area has greatly improved its accordance with historiographical standards.<sup>106</sup> This might ameliorate, if not eliminate, the risks inherent in lawyers’ doing history. However, the old debates over originalism are resurfacing. A number of recent and forthcoming articles by major scholars promise to revive the public debate over whether and how historical meaning should interpret contemporary legal interpretation.<sup>107</sup>

### C. *Clio in the Courthouse*

The historical turn in law is not limited to the pages of the law reviews. In actual litigation, history is discussed frequently. The Justices of the Supreme Court engage in historical analysis all the time. Most of the current Justices have cited *The Federalist* in an opinion, for

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<sup>102</sup> *Id.* at 1589.

<sup>103</sup> William E. Forbath, *Constitutional Change and the Politics of History*, 108 YALE L.J. 1917, 1917 (1999).

<sup>104</sup> Richards, *supra* note 4, at 834.

<sup>105</sup> Larry D. Kramer, *Madison’s Audience*, 112 HARV. L. REV. 611, 677 (1999). Interestingly, this turn of phrase has become so popular as to be attributed not only to Dean Kramer, but also to Lawrence Tribe, see Emery G. Lee III, *Overruling Rhetoric: The Court’s New Approach to Stare Decisis in Constitutional Cases*, 33 U. TOL. L. REV. 581, 585 (2002) (citing Laurence H. Tribe, *Comment*, in SCALIA, *supra* note 22); Sanford Levinson, see Richard B. Saphire, *Doris Day’s Constitution*, 46 WAYNE L. REV. 1443, 1445 (2000) (citing Sanford Levinson, *The Limited Relevance of Originalism in the Actual Performance of Legal Roles*, 19 HARV. J.L. & PUB. POL’Y 495, 496 (1996)); and Ronald Dworkin, see Jeffrey Rosen, *Translating the Privileges or Immunities Clause*, 66 GEO. WASH. L. REV. 1241, 1243 (1998) (citing Ronald Dworkin, *Comment*, in SCALIA, *supra* note 22 (distinguishing different forms of originalism)). I take this preponderance of distinguished potential authors as evidence that the sentiment is generally accepted among many leading constitutional theorists.

<sup>106</sup> KALMAN, *supra* note 3, at 239.

<sup>107</sup> See Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 (2007); Balkin, *supra* note 79; see also Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. (forthcoming 2008) (discussing the current state of the originalism-vs.-living constitutionalism debate).

example, to invoke historical authority from the founding era.<sup>108</sup> It is a frequent occurrence for one opinion to invoke historical evidence as authority for a decision (such as whether Congress has the power to pass a certain law), and then be opposed by an opinion from a dissenting Justice with an equally engaging discussion of how the majority misreads history.<sup>109</sup>

One of the classic examples of this phenomenon was the 1997 decision *Printz v. United States*.<sup>110</sup> Justice Scalia wrote for the majority in *Printz* holding the Brady Handgun Violence Prevention Act<sup>111</sup> unconstitutional.<sup>112</sup> Justice Scalia examined the historical understanding of federalism, citing *The Federalist* over twenty times.<sup>113</sup> In dissent, Justice Stevens cited *The Federalist* ten times;<sup>114</sup> Justice Souter went even further, stating that “it is *The Federalist* that finally determines my position,” citing Publius ten times in directly challenging Justice Scalia’s historical interpretations.<sup>115</sup> *Printz* shows how attractive historical evidence is to legal decisionmakers, especially historical evidence that invokes the founders. Opinions of the Supreme Court from the last decade are positively rife with historical citations, not only in structural cases such as *Printz* but also in cases in the individual-rights area, including First Amendment speech and religion issues,<sup>116</sup> Fourth and Fifth Amendment criminal procedure issues,<sup>117</sup> the death penalty,<sup>118</sup> and the historical meaning of individual prop-

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<sup>108</sup> Buckner F. Melton, Jr., *The Supreme Court and The Federalist: A Citation List and Analysis, 1789–1996*, 85 Ky. L.J. 243, 253–54 (1996); Buckner F. Melton, Jr. & Jennifer J. Miller, *The Supreme Court and the Federalist: A Supplement, 1996–2001*, 90 Ky. L.J. 415, 417–18 (2001).

<sup>109</sup> Compare, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997) (Kennedy, J.) (citing *The Federalist*), with *id.* at 549 (O’Connor, J., dissenting) (citing *The Federalist*); compare *Printz v. United States*, 521 U.S. 898, 910–14, 919–24 (1997) (Scalia, J.) (citing *The Federalist*), with *id.* at 943–47, 959 (Stevens, J., dissenting) (citing *The Federalist*) and *id.* at 971–76 (Souter, J., dissenting) (citing *The Federalist* and stating that he finds it determinative to his decision).

<sup>110</sup> *Printz*, 521 U.S. 898.

<sup>111</sup> Brady Handgun Violence Prevention Act, Pub. L. 103-159, 107 Stat. 1536 (1993) (commanding state and local law enforcement officers to conduct background checks on prospective handgun purchasers and to perform certain related tasks).

<sup>112</sup> 521 U.S. at 934–35.

<sup>113</sup> *Id.* at 909–35.

<sup>114</sup> *Id.* at 939–70 (Stevens, J., dissenting).

<sup>115</sup> *Id.* at 971–76 (Souter, J., dissenting).

<sup>116</sup> E.g., *Van Orden v. Perry*, 545 U.S. 677 (2005).

<sup>117</sup> E.g., *Wyoming v. Houghton*, 526 U.S. 295 (1999).

<sup>118</sup> E.g., *Roper v. Simmons*, 543 U.S. 551 (2005).



erty rights,<sup>119</sup> to name just a few. The Court's cases often result in opinions based on historical interpretation that, in turn, inspire public debate over the meaning of the Constitution.<sup>120</sup>

Historical interpretation often takes place in the lower appellate courts as well. One example is Second Amendment litigation. There is a circuit split over whether there is an individual or only a collective right to keep and bear arms, and therefore whether certain gun control measures violate the Constitution. The Ninth<sup>121</sup> and Fifth Circuits<sup>122</sup> split over this issue as a historical matter, and in 2007 the D.C. Circuit weighed in on the side of the individual rights interpretation—an interpretation that the U.S. Supreme Court has reviewed based in large part on history.<sup>123</sup> All three Circuit Courts and the U.S. Supreme Court engaged in historical analyses of what the Second Amendment has been interpreted to mean throughout its history. Nor is the increase in judicial use of history found only in the federal appellate context. As one state judge noted, “more and more state courts are turning to history to support their decisions as to the meaning of their constitutions.”<sup>124</sup> Nor is it confined to courts of appeal: history is also litigated at trial, sometimes even involving historians as expert witnesses.<sup>125</sup> As noted, a trial is itself in a very great sense a tribunal convened precisely to render a judgment based on a historical reconstruction of past events.

The question, then, is whether we should throw up barriers to using history, in order to avoid the risk of doing it incorrectly, or should we recognize the undeniable fact of its pervasive, irresistible appeal and increasing use, and try to help lawyers apply history well? If there is hope for the application of history to law (or even if not,

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<sup>119</sup> *E.g.*, *Kelo v. City of New London*, 545 U.S. 469, 511–14 (2005) (Thomas, J., dissenting).

<sup>120</sup> *E.g.*, *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063–64 (2007) (discussing history of remedies at law); *Clark v. Arizona*, 126 S. Ct. 2709, 2719–22 (2006) (discussing history of criminal law); *Roper*, 543 U.S. at 560–64 (discussing historical meaning of Eighth Amendment); *Kelo*, 545 U.S. at 511–14 (Thomas, J., dissenting) (discussing history of property rights).

<sup>121</sup> *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002) (holding that the Second Amendment protects only a collective right to bear arms).

<sup>122</sup> *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001) (upholding the individual-rights interpretation of the Second Amendment).

<sup>123</sup> *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007) (upholding the individual-rights interpretation based on a historical reading of Second Amendment). The Supreme Court has since granted certiorari. *District of Columbia v. Heller*, 128 S. Ct. 645 (U.S. Nov. 20, 2007) (No. 07-290).

<sup>124</sup> Honorable Jack L. Landau, *A Judge's Perspective on the Use and Misuse of History in State Constitutional Interpretation*, 38 VAL. U. L. REV. 451, 451 (2004).

<sup>125</sup> *See infra* Part V.C.2.

given the fact that lawyers are going to do it anyway) the next questions, then, involve understanding what these referred-to professional standards are, and how they might be applied across the disciplinary boundary. To the extent that history-in-law is going to be done, we should attempt to find a framework for doing it as well as possible, in order to provide analysis and interpretations that are valuable for both scholars and policymakers.

### III. PROFESSIONAL STANDARDS, "JURISDICTION," AND BORDER PATROLS

#### A. *Maintaining Professional Jurisdictions*

To most historians and legal scholars, this debate seems to revolve around the substantive areas where history is applied to questions of law (often involving constitutional interpretation or other questions of public law) and the methodological standards for interpreting history correctly, as best exemplified in the debates over originalism.<sup>126</sup> Beyond the norms of law and history, however, an inquiry into the literature on the sociological history of the professions suggests a more subtle issue that might be underlying this dialogical contest: an inter-professional struggle for "jurisdiction" over knowledge. This literature on the professions has not been adequately studied by scholars seeking to understand the relationship between other academic fields and law, especially considering the popularity of interdisciplinary legal scholarship.<sup>127</sup>

In the study of the professions, leading scholars have pointed out that one of the defining characteristics of a profession is that it has "jurisdiction" over certain areas of skill or knowledge.<sup>128</sup> Eliot Freidson's model posits that a "profession" is characterized by certain traits that combine to allow its members to "make a living while controlling their own work."<sup>129</sup> The status of an occupation as a "profession" depends on whether it meets these certain characteristics.<sup>130</sup>

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<sup>126</sup> See generally INTERPRETING THE CONSTITUTION, *supra* note 28.

<sup>127</sup> See, e.g., Anthony D'Amato, *The Interdisciplinary Turn in Legal Education* (Northwestern University Pub. Law Research Paper No. 06-32, 2006), available at <http://ssrn.com/abstract=952483> (critiquing the popularity of interdisciplinary scholarship in the legal academy).

<sup>128</sup> ELIOT FREIDSON, PROFESSIONALISM: THE THIRD LOGIC (2001). One of the other leading paradigms has been the "functionalist" model associated with Talcott Parsons. See generally TALCOTT PARSONS, THE SOCIAL SYSTEM (1951); TALCOTT PARSONS, THE STRUCTURE OF SOCIAL ACTION (1937).

<sup>129</sup> FREIDSON, *supra* note 128, at 17.

<sup>130</sup> *Id.*

Freidson contrasts professionalism with two other ideal-typical occupational models: the free market, and the rational-legal bureaucracy theorized by Max Weber.<sup>131</sup> Freidson's general model for professionalism has five characteristics: (1) it engages in specialized work in an established field that involves theoretical knowledge; (2) it requires a high degree of formal training; (3) the profession has exclusive *jurisdiction* over the type of work it performs and over its members; (4) it has a sheltered position that is protected by the specific credentials required for membership and by the profession's exclusive ability to provide both the training and the credentials; and (5) each profession has its own professional "ideology" that involves a devotion to the process and applications of specific professional standards to the area of expertise it governs.<sup>132</sup> A profession's ideology claims specialized knowledge that is *authoritative*.<sup>133</sup> A common thread running through these traits is the ethic of service—a commitment to the quality and public service of the work performed.<sup>134</sup> Law and history can both be treated as professions under Freidson's model.<sup>135</sup> Law, of course, along with medicine and the ministry, has for centuries been regarded as one of the traditional professions.<sup>136</sup>

The existence of academic history and law as separate professions in our society may help explain in part the controversies over using historical evidence in law. According to Freidson's model, the essence of a profession lies in its ability to operate with autonomy and to exercise control over its members. Some scholars described in the previous section, such as Professors Kalman, Rakove, and Forbath, seemed to accept the use of history by lawyers, but only when super-

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<sup>131</sup> *Id.*; see also FROM MAX WEBER: ESSAYS IN SOCIOLOGY 295–301 (H. H. Gerth & C. Wright Mills eds. & trans., 1958) (theorizing three types of authority in human experience: (1) traditional authority; (2) charismatic authority; and (3) rational-legal bureaucracy).

<sup>132</sup> FREIDSON, *supra* note 128.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 108.

<sup>135</sup> Law overall is generally regarded as one of the traditional professions, but it is not clear whether academic historians constitute a "profession" or simply a "discipline" within the larger scholarly profession. I do not attempt to resolve that question but assume for the issues discussed in this paper that the translation of the products of history to the practice of law at some level constitutes a crossing of professional boundaries.

<sup>136</sup> ELLIOT A. KRAUSE, DEATH OF THE GUILDS: PROFESSIONS, STATES, AND THE ADVANCE OF CAPITALISM I (1996). Other traditional professions include engineering and the university professoriate; in the modern era the concept of professionalism has also been applied to accounting, the military, and managers in public or corporate bureaucracies. See HAROLD PERKIN, THE THIRD REVOLUTION: PROFESSIONAL ELITES IN THE MODERN WORLD I (1996).

vised to some degree by members of the *historical profession*.<sup>137</sup> In other words, historians are perhaps troubled to see non-professional historians (i.e., lawyers) appropriating their work without appealing to the professionals for approval in assessing the standards or the nature of the history they produce. This is a challenge to the historians' *control* over the services they provide. Professor Kalman describes her own critiquing of law office history as an exercise in "border patrol."<sup>138</sup> This is consistent with Freidson's observation that professionalism is based partly on control over knowledge.<sup>139</sup>

I do not mean to suggest that historians have somehow consciously conspired to foreclose all nonhistorians' prerogative to interpret history and to thus threaten historians' monopoly over providing historical interpretations.<sup>140</sup> But historians' professional interests might help explain why they have such concern over this issue. They see laymans' history done all the time: in the media, by politicians, by lay writers for popular audiences, and others. Indeed, the historical profession has clearly—and to a great degree deliberately—distanced itself from the writing of popular history for the masses.<sup>141</sup> While academic historians often disregard popular histories written by nonacademic historians (such as military histories, celebratory biographies, or History Channel television fare), they are more likely to criticize the popular histories on the merits than they are to challenge the nonacademic writers' very right to try to interpret the past.

But lawyers' use of history is more problematic because it is a more direct challenge to the historians' control over the subject matter. When a court interprets history, its version becomes "official" and (legally) authoritative.<sup>142</sup> The court's historical interpretation may become part of the findings of fact, determine the outcome of the case, be entered in the official public records, become available for citation as binding precedent, and even establish a form of "official" public meaning of laws or of the Constitution itself.<sup>143</sup> In other

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<sup>137</sup> See *supra* Part I.B.2; see also Reid, *supra* note 18.

<sup>138</sup> Kalman, *supra* note 44.

<sup>139</sup> FREIDSON, *supra* note 128, at 96 ("What gives [professional schools' faculty] and the profession of which they are a part the capacity to preserve and even expand their jurisdiction is the fact that in addition to teaching, their faculties can devote themselves to systematizing, refining, and expanding the body of knowledge and skill over which the profession claims jurisdiction.").

<sup>140</sup> However, the tension between scholarly or academic history and popular or amateur history is a longstanding issue in the historical profession.

<sup>141</sup> PETER CHARLES HOFFER, *PAST IMPERFECT* (2003).

<sup>142</sup> See generally Richards, *supra* note 4.

<sup>143</sup> See Gordon Morris Bakken, *The Promise of American History in Law*, 24 CAL. W. L. REV. 277, 285 (1988).

words, lawyers and judges can create an authoritative interpretation of the past that stands as an official government record, which can have real-world effects.

When the Supreme Court makes historical analyses, the effects are even more far-reaching. Supreme Court opinions not only become nationwide legal precedent, but can even in turn shape our collective public memory about the meaning of the past. One need look no further than the Court's First Amendment Establishment Clause jurisprudence, for example, where the Court in 1947 took Thomas Jefferson's letter to the Danbury Baptists advocating a "wall of separation" between church and state and turned it into a constitutional doctrine that operates to guide courts' interpretation of the original meaning of the First Amendment.<sup>144</sup> This metaphor has proven powerful not only in jurisprudence but also in the public imagination because of its historical pedigree, coming from Jefferson himself, and its implicit historical authority. Regardless of its normative merits, Professor Kelly in 1965 pointed to the *Everson* case and the church-state cases in general as an example of particularly bad law office history by lawyers and by the courts themselves.<sup>145</sup>

Likewise, the Court's Eighth Amendment jurisprudence depends on our collective sense of history because "evolving standards of decency" are contrasted with the supposedly fixed 1789 standards for what constitutes cruel and unusual punishment.<sup>146</sup> The blockbuster federalism cases of the Rehnquist Court, such as *Printz*, *City of Boerne v. Flores*, and others, all rested in part on the Justices' historical understandings of constitutional structure.<sup>147</sup> No matter where the chips fall in terms of results, it is clear that the stakes for using history in law are especially high because legal decisions establish an interpretation of truth for past events.

Returning to the sociology of the professions, Andrew Abbott offers a different paradigm—though one no less revealing to the present question. Like Freidson, Abbott focuses on a profession's ability to maintain its power and control.<sup>148</sup> Abbott, however, opposes the

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<sup>144</sup> See *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947); see also *Van Orden v. Perry*, 545 U.S. 677, 708 (2005); *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 878 (2005).

<sup>145</sup> Kelly, *supra* note 2.

<sup>146</sup> See U.S. CONST. amend. VIII; *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>147</sup> *Printz v. United States*, 521 U.S. 898 (1997); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>148</sup> ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR* 86–91 (1988).

synthetic nature of Freidson's model and argues instead that we should study the work the profession actually does as the best way to understand how it operates. The most important of Freidson's characteristics in this context is the concept of "jurisdiction."<sup>149</sup> According to Abbott, professions compete with rival occupations for recognition of their cognitive claims and for the exclusive right to deal with specific types of problems.<sup>150</sup> The definitions of tasks (e.g., what constitutes historiography) and the patterns of jurisdiction (e.g., who gets to write history) are contingent, varying with changing social circumstances.<sup>151</sup> Control over professional jurisdiction is therefore the key to maintaining professional autonomy.<sup>152</sup>

The concept of "jurisdiction" is an interesting one to apply to this discussion because of its obvious particular meaning for lawyers. Of course, the issue of legal jurisdiction of courts and government bodies has a particular meaning in law. Jurisdiction, in law, means power—power to decide a case, power to order the legal rights and status of persons and property in a certain domain.<sup>153</sup> The concept of "jurisdiction" of different professions and the boundaries of their subject matter and methods may seem less clear and more constructed than traditional legal jurisdiction, but that is not necessarily the case. I think, however, that this underscores the point perfectly. Because again, if we look at the legal history of the United States, we can see that legal jurisdiction itself is a constructed, and contested, concept.<sup>154</sup> The jurisdictional framework of American law demon-

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> JAMES FLEMING, JR., ET. AL., CIVIL PROCEDURE 55 (5th ed. 2001). Or, as I tell my students, it is a concept of authority exemplified in the classic car-chase movie scenario, where the local sheriff stops his pursuit at the state or county line due to a perceived lack of jurisdiction (and notwithstanding any doctrine of hot pursuit). *But see* SMOKEY AND THE BANDIT (Universal Pictures 1977) (Jackie Gleason as Texas Sheriff Buford T. Justice continues pursuit of Burt Reynolds as "The Bandit" from Texas to Georgia, despite repeated assertions against his jurisdiction from other law-enforcement agencies).

<sup>154</sup> *See, e.g.,* *Burnham v. Superior Court*, 495 U.S. 604 (1990) (holding that it was not a violation of due process for a state to exercise jurisdiction over a nonresident defendant, but splitting 4-4-1 over the rationale for upholding jurisdiction). In *Burnham*, Justice Scalia's opinion emphasized the historical foundations of jurisdictional theory based on sovereignty, *id.* at 609-11, while Justice Brennan's concurrence argued that the "minimum contacts" test of fair play and substantial justice should govern the inquiry into whether allowing jurisdiction was consistent with due process. *Id.* at 630. Neither opinion commanded a majority, leaving us an unsettled jurisdiction doctrine. *Id.* at 609-15, 623-27, 629-34. This underscores the notion that jurisdiction, even in the legal sense, is something that is developed by authorities

strates this with different jurisdictional mandates for different levels and bodies of government and for different courts, all set forth by constitutions and statutes and interpreted in case law. Why do states have sovereignty in some areas but not others?<sup>155</sup> Why do the federal courts have exclusive jurisdiction to hear certain cases based on the subject matter? In other cases, different levels of government or different courts of the same sovereign have concurrent jurisdiction. There is no foreordained jurisdictional framework; it was and is a constructed system. It is the result of how we have collectively decided—through the ratification of the Constitution and through our legislators—to set jurisdictional rules as a means of finding the best balance under the circumstances. Specific choices were made in the Constitutional Convention and the 1789 Judiciary Act<sup>156</sup> and were refined over time to establish the actual framework of jurisdictional rules that govern our legal system. This framework is the result of particular choices that were seen as the best way to adapt principles to reality. Our particular structure of jurisdiction in U.S. courts was crafted and tweaked to reflect decisions about the proper distribution of power and authority to determine questions of law.

We are faced with a similar question in discussing the use of history in law. Rather than fall back on the disciplinary boundaries that the legal and historical professions constructed for themselves, we ought to work toward an accommodation that recognizes the reality that the subject matter is going to overlap in the minds of Americans. Outside the academy, people tend to think of history and law together in understanding the foundations of our common society and government. We should recognize that the *de facto* lines of jurisdiction are going to be contingent on our collective decisions, and will also be sometimes obscure.

Furthermore, according to Professor Abbott, academic knowledge is also subject to this sort of interprofessional rivalry over “intellectual jurisdiction.”<sup>157</sup> Indeed, in arguing that the standards of academic history are not necessarily applicable in the legal environment,

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on a case-by-case basis to resolve actual disputes over the assertion of power in an area. See also William Gallie, *Essentially Contested Concepts*, 56 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 167 (1956) (introducing the idea that some philosophical concepts are “essentially contested”).

<sup>155</sup> Compare *Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004) (holding that Title II of the ADA did validly abrogate state sovereignty), with *Bd. of Tr. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (holding that Title I of the ADA did not abrogate state sovereignty).

<sup>156</sup> Judiciary Act of 1789, ch. 20, §§ 9–16, 1 Stat. 73.

<sup>157</sup> ABBOTT, *supra* note 148, at 75.

Professor Tushnet contends, “[t]he criteria for evaluating [law-office history] . . . must be drawn from legal practice rather than from historical practice.”<sup>158</sup> I agree, and will elaborate on this observation in arguing for the application of evidence law rather than academic historical methodology in evaluating historical claims at law.<sup>159</sup> Framing the debate over the use of history in law as that of a sociological contest for control over the jurisdiction of historical knowledge provides a useful analogy for thinking about what may be at stake, or why members of the respective professions should care.

*B. Translating Standards Across the Disciplinary Divide*

I turn now to the question of interdisciplinary scholarship to see what insights can be gained for applying the methods and theories of one body of knowledge to another.<sup>160</sup> Since Kelly wrote his critique of the Court’s attempts at history in 1965, interdisciplinary scholarship has increased dramatically in the legal academy.<sup>161</sup> Perhaps this phenomenon derives from the common observation that lawyers are “natural scavengers”;<sup>162</sup> perhaps it is because legal scholars tend to assay into other fields without compunction, begetting what one scholar has called the “lawyers-as-astrophysicists” phenomenon;<sup>163</sup> perhaps it is part of a larger academic trend in the wake of postmod-

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<sup>158</sup> Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, 71 CHI.-KENT L. REV. 909, 934–35 (1996).

<sup>159</sup> See *infra* Part V.C.

<sup>160</sup> Having just completed a discussion of law and history as “professions,” treating them here as “disciplines” might sound different. However, it is not my intent to determine whether law and history are more properly characterized as professions or disciplines. I described them as “professions” above for the light it potentially sheds on the contest behind the debate; I describe them as “disciplines” here because my inquiry regards the narrower question of how academic knowledge can be applied from one area of academic study to another. This risks confusing the practice with the scholarship of law, but, as noted above, I treat them as essentially similar enterprises for the purposes of this paper.

<sup>161</sup> See Richards, *supra* note 4, at 809.

<sup>162</sup> See Rodgers, *supra* note 3, at 33; see also Kathryn Abrams, *Law’s Republicanism*, 97 YALE L.J. 1591, 1591 (1988) (“Legal scholars are natural scavengers.”). Of course, in this Article I am guilty of “scavenging” from several disciplines including U.S. history, sociology, and political science, as well as a variety of fields of legal scholarship.

<sup>163</sup> Mark Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1338 n.140 (1979) (quoted in Melton, *supra* note 4, at 384). Tushnet complained that some legal scholars seemed to think “that the generalist training of lawyers allows any lawyer to read a text on astrophysics over the weekend and launch a rocket on Monday.” *Id.* at 1338 n.140.



ernism and cultural studies;<sup>164</sup> or perhaps there is some other reason. Whatever the cause, the result has been not only an increase in the number of professionally-trained legal historians, but also a recognition of the problems that come with applying the standards of one discipline to the work of another, as a parade of “law-and-” has pervaded the academy—law and economics, law and philosophy, law and literature, law and political science, as well as law and history.<sup>165</sup> To understand how history might be applied to law, we can find insights by reviewing other discussions about whether and how to conform to the standards of another external discipline while engaging in “law and . . .” studies: the intersection of law and social science.

Other prominent scholars have discussed the application of social science methods to legal scholarship. Political scientists Lee Epstein and Gary King contend that legal scholars attempting to conduct empirical studies should adhere to the professional standards for empirical research in the social sciences.<sup>166</sup> They argue that legal scholars who purport to engage in empirical research fail, with alarming regularity, to pay due attention to those disciplinary standards for empirical analyses—the “rules of inference.”<sup>167</sup> According to Epstein and King, the empirical research process must be conducted according to general guidelines of scholarly inquiry.<sup>168</sup> They contend that legal scholars frequently overlook important rules that govern how social scientists form research questions, select evidence for observation, summarize data, and make both descriptive and causal inferences.<sup>169</sup> Epstein and King paint a dim picture of the state of legal scholarship and advocate a heightened self-consciousness of methodology by both the producers (the legal academy) and the consumers (attorneys and judges) of legal research.<sup>170</sup> It may be arguable that the state of affairs has improved in the last several years with the progress of the Empirical Legal Studies movement,<sup>171</sup> but undoubtedly Epstein and King’s critique points to a serious issue.

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<sup>164</sup> Or perhaps it is because when one does interdisciplinary scholarship, one is usually writing partly outside the expertise of any given reader—with the potential to be fooling half of the audience.

<sup>165</sup> See KALMAN, *supra* note 44, at 91.

<sup>166</sup> Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002).

<sup>167</sup> *Id.*

<sup>168</sup> *See id.*

<sup>169</sup> *See id.*

<sup>170</sup> *Id.* at 12.

<sup>171</sup> *See, e.g.*, Theodore Eisenberg, *Why do Empirical Legal Scholarship?*, 41 SAN DIEGO L. REV. 1741 (2004); Lee Epstein et al., *On the Effective Communication of the Results of Empirical Studies, Part I*, 59 VAND. L. REV. 1811 (2006); Tracey E. George, *An Empirical Study of Empirical Legal Scholarship: The Top Law Schools*, 81 IND. L.J. 141 (2006).

To analogize the theory of Professors Epstein and King to the debate over the methodological standards of history, one might argue that any lawyer who wants to invoke historical evidence or authority ought to learn and apply all of the rules of academic history. While the specific methods differ from those of political or social science, historians are similarly charged with making valid and reliable assessments constructed around a chain of inferences based on the available evidence. And like lawyers researching political science, lawyers consulting history might be required to adopt the historian's standards of objectivity and reliability for evaluating primary and secondary sources, weighing historical evidence, making descriptive inferences, and for attempting to explain historical causation. This would be undoubtedly a good goal toward which legal studies of history should strive, and we should certainly encourage it to the maximum extent possible. We should applaud the application of these standards when done properly, putting aside the question of whether such application is practically feasible to expect from lawyers and judges with limited time and without historical training. Professors Epstein and King's critique is certainly well-taken, and provides a valuable caution to those attempting to use historical evidence in law.

But it may not necessarily be a complete indictment of the basic reliability of lawyers' histories, however, if they fail to achieve completely these professional historians' standards. Returning to the empirical social science analogy, Jack Goldsmith and Adrian Vermeule argue—in a response to Professors Epstein and King—that requiring strict adherence to the rules of inference is appropriate for empirical legal scholarship per se, but that such strict adherence is misplaced in the vast body of legal scholarship that has normative, interpretive, and doctrinal purposes, rather than simply empirical ones.<sup>172</sup> In support of their argument, Goldsmith and Vermeule comment that “[l]egal scholars often are just playing a different game than the empiricists play, which means that no amount of insistence on the empiricists' rules can indict legal scholarship—any more than strict adherence to the rules of baseball supports an indictment of cricket.”<sup>173</sup> In particular, those who study legal questions face “tradeoffs between rigor and accuracy, on the one hand, and timeliness, relevance, and utility, on the other.”<sup>174</sup> These tradeoffs are especially important for the law, which is “professionally and practically in-

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<sup>172</sup> Jack Goldsmith & Adrian Vermeule, *Empirical Methodology and Legal Scholarship*, 69 U. CHI. L. REV. 153, 153–54 (2002).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 154.

involved in the business of courts and other governmental institutions that must constantly reach decisions despite profound empirical uncertainty.”<sup>175</sup>

More particularly, Goldsmith and Vermeule argue that the claim that legal scholarship must be “objectively” correct overlooks the possibility that, when viewed systematically, the institution of legal scholarship is in fact well equipped to sort out arguments and reach an approximation of truth.<sup>176</sup> They write that “the contest of ‘particular versions’ of truth ventilated by legal articles that are tendentious when taken separately may, at the systemic level, produce increasingly accurate approximations of truth.”<sup>177</sup> In other words, while the standards of another discipline (such as history) toward objectivity would in theory be nice to replicate, in practice legal analyses depend more on the adversarial process: “[I]t is the premise of our litigation system, that the aggregate effect of individual tendentiousness is a fully rounded picture of the truth . . . . In both the academic and courtroom settings, there is a system-level justification for the competitive production of evidence . . . .”<sup>178</sup> Thus, drawing on Goldsmith and Vermeule, the adversarial nature of legal inquiry might serve as an adequate mechanism to systemically protect the integrity of the historical record when discussed by legal scholars through the production and evaluation of competing versions of historical evidence. This difference is reflected in the prevailing norms of publishing in the respective fields: while historical (and most other humanities and social science) journals are peer-reviewed and ostensibly objective, law reviews are famously student-edited, wide-ranging in subject matter and points of view presented, and more given to debates, to response articles, and symposia to further the exchange and debate of ideas.

In the law, therefore, we might in fact prefer to have competing historical accounts from which to develop a fuller picture of the past through the process of considering and weighing the actual historical evidence on its merits, rather than to try to rely solely on one purportedly authoritative interpretation. This idea mitigates the concern that in the legal system advocates develop arguments for various positions. In fact, it turns that critique on its head by pointing out that

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<sup>175</sup> *Id.* In addition, the demand for up-to-date relevance in legal scholarship may have led to the professional norm of publishing quickly and often in the legal academy. See Flaherty, *supra* note 3, at 552–55.

<sup>176</sup> See Goldsmith & Vermeule, *supra* note 172, at 156.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

the very purpose of the competing adversarial accounts is to have the court—or the legal academy as a whole—establish a reliable interpretation of the past by assessing and weighing the arguments and evidence from different versions. And it reaffirms that the ultimate end of both the legal and historical processes is to determine the truth to the best extent possible within the inherent limitations of their respective missions.

The eminent constitutional historian John Phillip Reid, however, takes a less tolerant view of the potential problems of historical evidence in an adversarial system.<sup>179</sup> “[T]he crossing of history with law,” he writes, “is a mixture containing more snares than rewards, as it risks confusing rules of evidence basic to one profession with canons of proof sacrosanct to another.”<sup>180</sup> Reid believes that what appears to many as “a similarity between the methodology of law and the methodology of history”<sup>181</sup> in reality is simply that “[t]he lawyer and the historian . . . go to the past for evidence, but there the similarity largely ends.”<sup>182</sup> The fundamental difference between the approaches is that the historian’s duty is to “the logic of evidence,” while the lawyer seeks “the logic of authority,” in order to settle the legal question.<sup>183</sup> These different “logics” produce different meanings, and the adversary ethic of the legal process is what leads to the production of “law office history.”<sup>184</sup> Reid, like other scholars, argues for a watchdog role for academic historians when lawyers attempt interdisciplinary historical studies: “We have to learn to harass historical jurisprudence, not reject it,” because professional historians, unlike lawyers, are versed in “the academic canons of the historical method.”<sup>185</sup> I believe that legal scholars should welcome historians to perform this watchdog role and to collaborate whenever possible, but that ultimately it is our own responsibility to arrive at historical analyses that are both well-grounded and contribute to the advancement of legal interpretation. Or, to put it another way, we should not completely cede jurisdiction over the application of history to law.

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<sup>179</sup> See generally Reid, *supra* note 18.

<sup>180</sup> *Id.* at 193.

<sup>181</sup> *Id.* at 193–94.

<sup>182</sup> *Id.* at 195.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 197.

<sup>185</sup> Reid, *supra* note 18, at 204–05.

#### IV. ADVOCACY AND OBJECTIVITY IN THE PROFESSIONAL STANDARDS OF LAWYERS AND HISTORIANS

What, in fact, are these “standards” to which the commentators keep referring, when critiquing the attempts of lawyers to “do history”? As noted above, the fundamental tension seems to be between the historian’s supposed creed of objectivity and the lawyer’s duty of advocacy. This presumed objectivity-versus-advocacy “tension” is itself worth analyzing. In this Part, I will undertake a brief inquiry into several particular aspects of the professional standards of law and history. In examining “standards,” I am not referring to the actual techniques of historical method or legal practice, of working in the archives, canvassing the sources, making causal inferences, and so on. Nor am I purporting to offer a comprehensive assessment of the norms of the respective professions. Historical methodology is contested, and historians are notoriously reluctant to describe any definitive set of “standards” for their craft.<sup>186</sup> I use the term here to refer to the general theoretical orientation of the work that historians and lawyers do. The objectivity/advocacy issue is not new, but it has tremendous relevance to the debates over history in law, given the sociological distinctions discussed above. For historians, I will analyze the longstanding debate over whether “objectivity” is an attainable goal.<sup>187</sup> For lawyers, I examine whether “lawyers’ legal history” should even be subject to the standards of professional historiography.

##### A. *Objectivity: The Historians’ Canon for Discovering Truth*

The critics who assert that there is a tension in making historical arguments to interpret legal issues seem to assume that because the historian’s professional posture is one of objectivity, historical evidence should not be deployed by those whose role is advocacy. Advocacy, they claim, risks distorting the historical record, which, to be accurate, requires more explanation of context and a better understanding of its differences from our world today than can be provided in the situation of a discrete trial or legal controversy. Advocates, of course, seek to marshal favorable evidence in order to persuade, and the implications for “objective” historical truth are obvious. Or, as Kalman puts it, “[w]here lawyers focus on text and continuity in order to prescribe, we [historians] concern ourselves with context and

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<sup>186</sup> See Martin, *supra* note 7, at 1533. Indeed, the idea that there is any established, undisputed methodological canon to which all historians advert is just the kind of reductive assumption about their profession that infuriates them.

<sup>187</sup> See generally NOVICK, *supra* note 8.

change over time with an eye to explaining.”<sup>188</sup> Some contend that interpreting historical events should be left to those committed to doing so with neutrality, with a solid grounding in the methods of weighing various sources, and with no personal stake in the outcome of the inquiry.<sup>189</sup> The conventional wisdom behind the critique does not resolve the matter in favor of exclusion, however, for three reasons: (1) the concept of objectivity in scholarship is open to debate in the historical profession itself; (2) historians have, willingly or not, increasingly become participants in the culture wars; and (3) recent events have shown that history, like any other profession, is subject to rare, but serious, cases of academic dishonesty.

### 1. Objectivity in Scholarship

The standard critique of “law office history” proceeds from the observation that lawyers, by their very professional orientation, are essentially not objective. This critique assumes—by implication—that historians, to the contrary, are objective in their work. But historians themselves have cast doubt on the very notion of objectivity in their own profession.<sup>190</sup> What is “objectivity” for a historian? According to historians Paul Conkin and Roland Stromberg, the concept can be applied only in a limited context, “when the term ‘objective’ has a practical and very restricted meaning” and not as a quest for absolute truth: “[i]f it has any bearing on history at all, ‘objectivity’ means that the clearly cognitive (truth-claiming) parts of a historical narrative must specifically refer to and be inferable from some perceptual evidence of a public sort, and that the cognitive claim must go no further.”<sup>191</sup> In other words, to be objective, historians must strictly limit their interpretations to that which is directly supportable by the evidentiary record as a whole.

The most well-known account of the troubled relationship of American historians to the ideal of objectivity is Peter Novick’s *That Noble Dream: The “Objectivity Question” and the American Historical Profes-*

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<sup>188</sup> Laura Kalman, *The (Un?)Bearable Liteness of E-Mail: Historians, Impeachment and Bush v. Gore*, 4 THEORETICAL INQUIRIES L. 579, 594 (2003).

<sup>189</sup> See generally Martin, *supra* note 7 (arguing that only court-appointed historical experts should be permitted in litigation to mitigate concerns over historians testifying on behalf of the parties); see also THOMAS L. HASKELL, OBJECTIVITY IS NOT NEUTRALITY (1998).

<sup>190</sup> See HOFFER, *supra* note 141.

<sup>191</sup> PAUL K. CONKIN & ROLAND N. STROMBERG, HERITAGE AND CHALLENGE: THE HISTORY AND THEORY OF HISTORY 192 (1989).

sion.<sup>192</sup> Novick chronicles the professionalization of historiography in the U.S. and the longstanding controversy over the profession's norms.<sup>193</sup> The first major American historians, such as George Bancroft, tended to write celebratory narratives that were esteemed more for their didactic value in fostering patriotic virtue than for their historical analysis.<sup>194</sup> Then, in the late nineteenth century, armed with Ph.D.s from European universities, a new cadre of American historians began to develop a new professional identity.<sup>195</sup> In reacting to the overtly patriotic and romantic history of predecessors such as Bancroft and Francis Parkman,<sup>196</sup> the new American historical profession prided itself on its grounding in modern social science techniques and standards and its commitment to objectivity—a commitment that, according to Novick, would eventually turn out to be only a “noble dream.”<sup>197</sup>

According to Novick, the idea that historians can practice their craft with true objectivity suffered two major assaults in the twentieth century.<sup>198</sup> First came the post-World War I realization that American historians had been guilty of subordinating their principles in support of nationalist propaganda—in other words, engaging in advocacy.<sup>199</sup> And historians from nations on both sides of the War had done this, suggesting that perhaps one could not truly transcend the biases of one's nationality, class, or race to write history objectively.<sup>200</sup> In World War II and the early Cold War, the moral certitude of the times enabled historians to once again craft a consensus and con-

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<sup>192</sup> NOVICK, *supra* note 8; *see also generally* MARY O. FURNER, *ADVOCACY & OBJECTIVITY: A CRISIS IN THE PROFESSIONALIZATION OF AMERICAN SOCIAL SCIENCE, 1865–1905* (1975); GEORG G. IGGERS, *HISTORIOGRAPHY IN THE TWENTIETH CENTURY: FROM SCIENTIFIC OBJECTIVITY TO THE POSTMODERN CHALLENGE* (1997); MARK C. SMITH, *SOCIAL SCIENCE IN THE CRUCIBLE: THE AMERICAN DEBATE OVER OBJECTIVITY AND PURPOSE, 1918–1941* (1994); *OBJECTIVITY, METHOD AND POINT OF VIEW: ESSAYS IN THE PHILOSOPHY OF HISTORY* (W.J. Van Der Dussen et al. eds., 1991).

<sup>193</sup> NOVICK, *supra* note 8, at 1–17.

<sup>194</sup> *E.g.*, GEORGE BANCROFT, *HISTORY OF THE UNITED STATES OF AMERICA, FROM THE DISCOVERY OF THE AMERICAN CONTINENT* (1899). Note that the idea that history is important for its pedagogical value survives today, albeit in vastly different form. *See, e.g.*, Brown, *supra* note 26, at 181.

<sup>195</sup> *See* NOVICK, *supra* note 8, at 47–60.

<sup>196</sup> *See, e.g.*, FRANCIS PARKMAN, *THE OREGON TRAIL: SKETCHES OF PRAIRIE AND ROCKY-MOUNTAIN LIFE* (Dodd, Mead & Co., Inc. 1964) (1849).

<sup>197</sup> *See* NOVICK, *supra* note 8, at 259, 269. The phrase “that noble dream” comes from the title of progressive historian Charles A. Beard's 1934 seminal essay in the *American Historical Review*, in which he satirized the objectivity ideal. *See* Charles A. Beard, *That Noble Dream*, 41 *AMER. HIST. REV.* 1, 74–87 (1935).

<sup>198</sup> *See* NOVICK, *supra* note 8, at 111, 415.

<sup>199</sup> *Id.* at 111.

<sup>200</sup> *Id.* at 113–16.

vince themselves that they were objectively expressing universal principles.<sup>201</sup> But the upheaval of the 1960s fractured the profession.<sup>202</sup> The methodological orthodoxy of the traditional focus on political history was challenged by new schools of historiography such as social history and other “new history” movements. Other disciplines offered postmodernist and critical theory perspectives that attacked the very concept of objective truth. This turmoil left the profession in its current state of fragmented agendas and disparate tactics.<sup>203</sup>

Novick’s account is filled with stories of how individual historians have grappled with the possibility that their work, rather than offering an objective account of history, actually has been tainted by subtle bias, if not outright advocacy.<sup>204</sup> Novick seems to believe that the very ideal of objectivity for the historical profession is now obsolete, but not all historians agree. Thomas L. Haskell instead argues for “continuing to honor the ideal [of objectivity], meanwhile ridding it of unwanted connotations.”<sup>205</sup> Haskell believes that a proper amount of professional detachment will enable historians to pursue valuable research without unnecessarily fetishizing political “neutrality” on normative questions.<sup>206</sup> We need not decide between Novick’s and Haskell’s conceptions of objectivity; it is enough to note for our purposes that, within the historical profession itself, there are serious debates over whether “objectivity” is something that can or should be achieved, and that understanding the context of that debate should give us pause before assuming that if we, as lawyers, simply defer any judgment on historical issues to members of the historical profession, it will automatically resolve the age-old advocacy-vs.-objectivity issue. We can see that the historical profession has itself been engaged in a struggle to understand these issues.

It would seem, therefore, that if one moves beyond the standard critiques of law office history, one would find that the historical profession itself is far from having a consensus on the actual achievement or applicability of the objectivity ideal. This does not necessarily mean that the asserted “tension” between the underlying values of the two professions does not exist, or that historians are not generally

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<sup>201</sup> *Id.* at 281–82.

<sup>202</sup> *Id.* at 415.

<sup>203</sup> See HOFFER, *supra* note 141.

<sup>204</sup> See generally NOVICK, *supra* note 8.

<sup>205</sup> See HASKELL, *supra* note 189, at 148.

<sup>206</sup> *Id.* at 150 (“My conception of objectivity (which I believe is widely, if tacitly, shared by historians today) is compatible with strong political commitment.”).



more oriented toward objectivity than lawyers.<sup>207</sup> It does suggest that the issue of applying history in law may not be so easily reducible to simply positing a fundamental, irreconcilable conflict between objectivity and advocacy. At any rate, scholars from both professions who participate in the debate over history in law are well aware of the fraughtness of any claims to objectivity as the sine qua non of professional history.<sup>208</sup> Those who call for leaving history to the historians—based on historians' presumably more impartial, dispassionate, objective stance in interpreting history—should bear in mind the problems that the historical profession itself has had with the concept of objectivity.

## 2. Scholars as Advocates

Indeed, many historians themselves might say that the idea that they are objective, authoritative arbiters of the meaning of the past is an outdated, somewhat romanticized conception of the historical profession that went the way of the passenger pigeon with the displacement of postwar "consensus history." Since the 1960s historians have increasingly become diversified and specialized in their fields of study.<sup>209</sup> The profession has moved towards concentrating on social history, and towards relating the stories of previously oppressed or underrepresented groups.<sup>210</sup> It has been influenced by and has borrowed from postmodernism, critical theory, and other interdisciplinary currents. Indeed, historians might be much more likely today to conceive of their own scholarly agendas as providing "narratives" of certain peoples, groups, or events rather than as attempting to render an "objective," synthetic, comprehensive account.

Some historians even view their scholarship as being essentially "activist" in orientation; even those who do not still find themselves participating in political and cultural controversies on occasion. Peter Hoffer, in *Past Imperfect*, has chronicled how in the past generation individual historians have participated in such "culture war" issues as the debate over Columbus Day, the National History Standards, the display of the *Enola Gay* at the Smithsonian, and the impeachment of

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<sup>207</sup> Reuel Schiller, *The Strawhorsemen of the Apocalypse: Relativism and the Historian as Expert Witness*, 49 HASTINGS L.J. 1169, 1169 (1998) ("Reports of objectivity's demise, at least within the historical profession, are premature.").

<sup>208</sup> See Rakove, *supra* note 6, at 1607; see also Farber, *supra* note 20, at 1010; Kramer, *supra* note 6, at 396; Posner, *supra* note 1, at 592; Schiller, *supra* note 207, at 1169–72; Cass R. Sunstein, *The Idea of a Useable Past*, 95 COLUM. L. REV. 601, 601 (1995).

<sup>209</sup> HOFFER, *supra* note 141, at 15.

<sup>210</sup> *Id.*

President Clinton.<sup>211</sup> Historians furthermore have inserted themselves collectively into controversial public policy issues such as impeachment and the *Bush v. Gore* decision by issuing group statements expressing opinions purportedly based on their professional expertise.<sup>212</sup> Most recently, the American Historical Association—the primary professional organization for historians of all fields in the U.S.—issued a resolution condemning the Iraq War.<sup>213</sup>

This sort of advocacy regarding hot-button political and cultural issues may or may not be agreed upon by all members of the historical profession, but it should at a minimum disabuse us of the notion that historians are necessarily above the fray when it comes to advocating certain points of view to achieve preferred policy outcomes. While there is a clear distinction between this sort of advocacy and the writing of scholarship, one can just as easily make the same distinction between lawyers' advocacy and legal scholarship, or judicial opinion-writing. We are left with the reality that there are different ideas and ideologies animating individual members of the historical profession, and this may in turn influence historians' approaches to, revisions of, and debates over history and its application. Thus, the idea that lawyers can advert to any source of academic historiography as a singular authoritative interpretation of historical meaning may itself be a mistaken idea of what the historical profession means to provide; it may be a foreign concept to many historians.<sup>214</sup>

Other scholars have noted the “subjectivization” of professional historiography, as successive interpretations seek to challenge and revise previous ones in a polemical dialogue. Buckner Melton advises lawyers to turn to historiography to find support for and weaknesses in competing positions. Melton understands the reality that in most disputes either side can be buttressed by historical interpretation, noting John Hope Franklin's assessment that “[i]n virtually every area where evidence from the past is needed to support the validity of a

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<sup>211</sup> HOFFER, *supra* note 148, at 93–130.

<sup>212</sup> Kalman, *supra* note 197, at 599 (expressing caution over the seeming ease with which historians of all fields signed on to these statements, regardless of whether or not they had particular expertise on the issues discussed).

<sup>213</sup> American Historical Association, *Resolution on United States Government Practices Inimical to the Values of the Historical Profession*, PERSPECTIVES, Feb. 2007, available at <http://www.historians.org/perspectives/issues/2007/0702/0702aha3.cfm> (last visited March 28, 2008) (The Resolution was approved by a vote of 76 percent to 24 percent in electronic voting March 1–9, 2007.); see also Scott Jaschik, *Historians Vote to Condemn War in Iraq*, INSIDE HIGHER ED., Mar. 13, 2007, <http://www.insidehighered.com/news/2007/03/13/iraq>.

<sup>214</sup> Kalman, *supra* note 188, at 592 (“Historians appreciate the pastness of the past.”).

given proposition, an historian can be found who will provide the evidence that is needed.”<sup>215</sup> Melton advises lawyers to utilize the work of academic historians because, as he quotes Peter Irons, in the final analysis, “scholarship is a form of advocacy.”<sup>216</sup>

### 3. Academic Dishonesty and Its Implications

Critics charge that lawyers doing history should adhere to the standards of the historical profession or else rely exclusively on professional historians. But while the focus of this critique is toward getting history “right,” relying on historians’ work may not always be a failsafe plan. As certain scandals in recent years have shown, there is always the possibility that some historians themselves may not be applying the rigorous standards demanded by their profession. Not only has objectivity as a goal of historians been questioned, thus weakening the argument that academic historians have exclusive professional jurisdiction over issuing objective interpretations of the past, but the actual practice of certain historians has come under fire too. Scandals have erupted over the use or misuse of sources or fabrication of stories by several prominent historians, including Stephen Ambrose, Doris Kearns Goodwin, and Joseph Ellis.<sup>217</sup> While these instances of academic dishonesty only involve an infinitesimally small proportion of the historical profession, their attendant controversies caution us from overreliance on importing expertise from another discipline as an automatic panacea for our concern over objectivity.

The now-paradigmatic example, which has had concrete implications for constitutional law and social policy, is the familiar case of Michael Bellesiles. His book *Arming America: The Origins of a National Gun Culture* was praised by historians and awarded the 2001 Bancroft Prize.<sup>218</sup> Bellesiles’s research seemed to indicate that relatively few Americans through the late nineteenth century actually owned firearms, and he concluded that the historical evidence does not support the myth of a historical American gun culture.<sup>219</sup> Current gun-control debates draw a great deal from competing claims about whether the Framers intended that the Second Amendment guaran-

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<sup>215</sup> Melton, Jr., *supra* note 4, at 426 (quoting John Hope Franklin, *The Historian and the Public Policy*, in *RACE AND HISTORY: SELECTED ESSAYS, 1938–1988* (1992)).

<sup>216</sup> *Id.* at 425 (quoting Irons, *supra* note 4, at 354).

<sup>217</sup> See HOFFER, *supra* note 141, at viii–ix.

<sup>218</sup> MICHAEL A. BELLESILES, *ARMING AMERICA: THE ORIGINS OF A NATIONAL GUN CULTURE* (2000).

<sup>219</sup> *Id.*

tee an individual right to keep and bear arms, or instead only the collective right of States to equip their militias.<sup>220</sup>

At the time, Bellesiles's thesis was poised to become the dominant academic paradigm in public discourse over the meaning of the Second Amendment and in policy debates over gun control. Controversial appellate interpretations recently have split the federal circuit courts, each opinion relying on historical interpretations of the original meaning of the Second Amendment.<sup>221</sup> Bellesiles himself even signed an amicus brief advocating the collective-rights interpretation as a matter of historical fact in one of the appellate cases.<sup>222</sup> Because Bellesiles's argument bears directly on a high-profile question of constitutional meaning, his work received much publicity. That publicity in turn led to intense scrutiny of the evidentiary basis for his assertions by groups with a stake in the outcome of the current policy debates on which the book touched.<sup>223</sup> Critics challenged his evidentiary support, including notes that Bellesiles later claimed to have lost in an office flood and nineteenth-century California probate records that in fact were destroyed in the 1906 San Francisco earthquake.<sup>224</sup>

Despite an initial circling of the wagons around Bellesiles by academic historians and Bellesiles's own response seeming to blame the critiques on right-wing gun nuts,<sup>225</sup> the critics' arguments proved meritorious and led to further investigations by scholars. Eventually,

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<sup>220</sup> SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* (2006); see also Sanford Levinson, *The Embarrassing Second Amendment*, 99 *YALE L.J.* 637 (1989).

<sup>221</sup> See *Parker v. District of Columbia*, 438 F.3d 370 (D.C. Cir. 2007) (holding, based partly on historical analysis, that the Second Amendment guarantees both a collective and an individual right to bear arms), *cert. granted, sub nom.* *District of Columbia v. Heller*, 128 S. Ct. 645 (U.S. Nov. 20, 2007) (No. 07-290); *Silveria v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002) (holding, based partly on historical analysis, that the Second Amendment does not guarantee an individual right to bear arms, but rather only that the of the States to collectively arm their militias), *cert. denied*, 124 S. Ct. 803 (2003); *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001) (holding, based partly on historical analysis, that the Second Amendment guarantees both a collective and an individual right to bear arms).

<sup>222</sup> Brief for Ad Hoc Group of Law Professors and Historians as Amici Curiae Supporting Appellant (the "Yassky Brief"), *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001) (No. 99-10331).

<sup>223</sup> See Michael A. Bellesiles, *Disarming the Critics*, NEWS OF THE ORG. OF AM. HISTORIANS, Nov. 2001, available at <http://www.oah.org/pubs/nl/2001nov/bellesiles.html> (responding to criticisms of his methodology).

<sup>224</sup> James Lindgren, *Fall From Grace: Arming America and the Bellesiles Scandal*, 111 *YALE L.J.* 2195, 2230 n.206 (2002); James Lindgren & Justin L. Heather, *Counting Guns in Early America*, 43 *WM. & MARY L. REV.* 1777, 1826 (2002).

<sup>225</sup> Bellesiles, *supra* note 223.

Bellesiles's employer, Emory University, retained a panel of eminent historians to investigate the allegations, and while their report stopped short of finding intentional fraud, it was clear that Bellesiles had unacceptably deviated from professional norms in producing scholarship that could not be supported by any reliable evidence.<sup>226</sup> His Bancroft Prize was subsequently revoked,<sup>227</sup> and Bellesiles eventually resigned his position at Emory.<sup>228</sup> One wonders if the desire to prove the correctness of his theory and the high political stakes of the question led Bellesiles to abandon the historian's fidelity to facts and evidence.

It is worth noting that the reason Emory had to rely on an ad hoc panel was that the American Historical Association had gotten out of the business of policing academic dishonesty among historians shortly before the Bellesiles scandal broke.<sup>229</sup> However, the ad hoc panel approach worked not only for Emory, but also for the University of Colorado when controversial ethnic studies professor Ward Churchill came under fire for his alleged plagiarism, falsification, and fabrication in his scholarship after his criticisms of victims of the September 11th attacks achieved notoriety.<sup>230</sup>

The Bellesiles scandal rocked the historical profession, and rightly so. Because the work of nearly all historians is above reproach in terms of ethics, historians rightly felt that Bellesiles's fraud undermined the integrity of the profession. The scandal plays a necessary part in this discussion not to impugn historians' scholarship but rather to remind us that in any legal context, relying on one source

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<sup>226</sup> REPORT OF THE INVESTIGATIVE COMM. IN THE MATTER OF PROFESSOR MICHAEL BELLESILES (2002), [http://www.news.emory.edu/Releases/Final\\_Report.pdf](http://www.news.emory.edu/Releases/Final_Report.pdf). The distinguished historians on the panel were Stanley Katz, Janna Gray, and Laurel Thatcher Ulrich. *Id.*

<sup>227</sup> Announcement by the Columbia University Board of Trustees (Dec. 13, 2002), *available at* <http://hnn.us/articles/1157.html> (announcing the revocation of Bellesiles's Bancroft Prize).

<sup>228</sup> News Release, Emory University, Michael Bellesiles Resigns from Emory Faculty, (Oct. 25, 2002), *available at* <http://www.news.emory.edu/Releases/bellesiles1035563546.html>.

<sup>229</sup> HOFFER, *supra* note 141, at 165, 238–39.

<sup>230</sup> REPORT OF THE INVESTIGATIVE COMM. OF THE STANDING COMM. ON RESEARCH MISCONDUCT AT THE UNIV. OF COLORADO AT BOULDER CONCERNING ALLEGATIONS OF ACADEMIC MISCONDUCT AGAINST PROFESSOR WARD CHURCHILL (2006), *available at*: <http://www.colorado.edu/news/reports/churchill/churchillreport051606.html>.

The investigative committee found unanimously that Churchill committed "serious research misconduct," but split as to whether termination or suspension was the more appropriate sanction. *Id.* The University fired Churchill on July 24, 2007. See Berny Morson, *CU Regents Fire Churchill*, ROCKY MOUNTAIN NEWS, July 25, 2007, *available at* <http://www.rockymountainnews.com/news/2007/jul/25/cu-regents-fire-ward-churchill/>.

alone, without “cross-examining” that source through the ventilation of opposing accounts or interpretations, bears risks. We continue to expect historians to produce accurate and reliable interpretations of the past. On the whole, historians are indeed best equipped to assess evidence and make inferences as to causation and meaning of historical information. But as with the objectivity question, it may be too simplistic to assert that by definition historians are objective and get history right, while lawyers are mere advocates and only manipulate history to serve their partisan ends.

*B. Advocacy: The Law’s Process for Determining Truth*

The professional standards of practicing lawyers regarding their posture toward a given legal issue, on the other hand, are fairly easy and straightforward to describe: in general, lawyers who represent clients in legal controversies are duty-bound to act as advocates for the clients’ interests.<sup>231</sup> And we should not want it any other way. Indeed, the lawyers’ duty is often referred to as one of “zealous advocacy.”<sup>232</sup> However, despite the duty of advocacy, lawyers are constrained by certain ethical standards that require their work product to meet a minimum threshold of truth and reliability. A lawyer may not distort the evidentiary record; may not make claims that are factually untrue; may not make frivolous claims; and may not ignore evidence that is damaging to his client’s position.<sup>233</sup> Thus, while lawyers are engaged in advocacy, by their own professional standards lawyers are no less obligated to adhere to the truth and to respect the evidence than are historians. Lawyers are thus in theory no more entitled to distort or abuse historical evidence, or make unsupportable historical claims, than are historians.

In reality, of course, no sane observer would argue that most individual lawyers prioritize reaching the abstract truth, except perhaps at a systemic level, than they do about competently representing their clients’ interests. The nature of the adversary process and the professional obligation to serve their clients can seem to be the dominant forces influencing lawyers’ conduct. But a refresher in professional ethics reminds us that lawyers are indeed obligated to serve the larger

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<sup>231</sup> See MODEL RULES OF PROF’L CONDUCT R. 3.1 cmt. 1 (1998) (“The advocate has a duty to use legal procedure for the fullest benefit of the client’s cause . . .”).

<sup>232</sup> See, e.g., Shannan E. Higgins, Note, *Ethical Rules of Lawyering: An Analysis of Role-based Reasoning from Zealous Advocacy to Purposivism*, 2 GEO. J. LEGAL ETHICS 639 (1999). We should rightly be more concerned if historians characterized the bases of their particular historical interpretations as driven by “zeal.”

<sup>233</sup> See, e.g., MODEL RULES OF PROF’L CONDUCT R. 3.1, 3.3 (1998).

ends of the legal system, which demands respect for evidence and procedural standards and does not allow for arguments that are flatly untrue. At least in theory, lawyers could be subject to court sanctions under most court rules<sup>234</sup> and to professional bar discipline under the various state bar rules of professional conduct for improper treatment of historical evidence.<sup>235</sup> I freely acknowledge that a professional disciplinary action against a lawyer for “misusing” history would be extremely unlikely to happen (in fact, I have found no such cases). The problem is that the scope of the rules is intentionally broad, and the range of “acceptable” historical assertions is practically limitless. But a reminder that a lawyer’s abuse of evidence—historical or otherwise—is just as unethical as a historian’s, and is specifically prohibited by ethical rules, serves the purpose of putting the question of professional jurisdiction to use history in a broader context.

The role of judges and courts (and, secondarily, of legal scholars) is more compelling. Are judges, unlike the parties and their advocates, more “objective”? The court system’s assignment of the adversarial roles to the attorneys is designed to produce between them the legal approximation of “truth” in the courtroom. Are judges—who are so often the subject of criticism for the way in which they use history in deciding cases—more like impartial arbiters of the interpretation of historical fact, in the sense that historians are supposed to be impartial? Probably so. In general, both judges and historians are charged with the responsibility of reviewing the factual record in its entirety, of weighing all of the evidence, and of rendering an interpretation of the “truth” as accurately as possible. In fact the comparison between the role of the historian and that of the judge “has had a lasting life,” according to eminent historiographer Carlo Ginzburg.<sup>236</sup> Ginzburg acknowledges that the roles have much in common: “[w]e can conclude, therefore, that the tasks of both the historian and the judge imply the ability to demonstrate, according to specific rules, that  $x$  did  $y$  . . .” while noting that in the end, “histori-

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<sup>234</sup> *E.g.*, FED. R. CIV. P. 11 (requiring truthfulness by attorneys in making representations to court in pleadings); FED. R. CIV. P. 37 (providing for sanctions against attorneys who fail to cooperate in discovery—i.e., the process by which both sides gather evidence to support arguments about truth).

<sup>235</sup> *See, e.g.*, TEX. DISC. R. PROF’L CONDUCT 3.01 (requiring attorneys to make only meritorious claims and contentions); TEX. DISC. R. PROF’L CONDUCT 3.03 (requiring candor toward the tribunal).

<sup>236</sup> Carlo Ginzburg, *Checking the Evidence: The Judge and the Historian*, in *QUESTIONS OF EVIDENCE: PROOF, PRACTICE, AND PERSUASION ACROSS THE DISCIPLINES* 290, 291 (James Chandler et al. eds., 1994) (citing historian-judge comparisons dating back to Henri Griffet in 1769 and Hegel).

ans and judges traditionally have had widely divergent aims.”<sup>237</sup> Does this qualified similarity mean, then, that judges ought to be allowed to “do” history, since they are institutionally free to consider history objectively? That is a tougher question. Having a neutral posture is only half of the problem. The other half is the contention, pointed out by Professor Rakove and others, that judges are not trained in the methods of professional historians.<sup>238</sup>

Some prominent commentators argue, however, that we should not prevent judges, or for that matter, legal scholars, or even practicing lawyers, from engaging in historical analysis merely because they are not experienced in the professional standards of academic historiography. Mark Tushnet and Cass Sunstein, in advocating civic republicanism as an aspirational interpretive theory, have argued that the historical accounts written by lawyers have fundamentally different purposes from those of the professional historians and should not be held to the same standards.<sup>239</sup> Nor must they necessarily be sneered at as inferior “law office history” or “history lite.”<sup>240</sup> This is because “the historian and the constitutional lawyer have legitimately different roles . . . and what a constitutional lawyer finds from history may, for legitimately different reasons relating to that purpose and role, be quite different from what a historian finds there.”<sup>241</sup>

For Sunstein, the lawyer’s role is to make “the best constructive sense out of historical events” in order to provide a “useable past.”<sup>242</sup> Tushnet agrees that the purposes of what he calls “history-in-law” are not the same as those of academic history. Rather than give us actual information about the past or provide determinative authority, “lawyers’ history” is intended to shed light on how we think about legal issues. Under this reasoning, calls to require the professional “standards” of historians when lawyers engage in historical inquiry are misplaced: “[l]aw-office history is a legal practice, not a historical one.”<sup>243</sup> And from the conservative side of the spectrum, even Judge Posner seems to agree that, because the use of history in interpreting legal issues (in the limited universe of cases where he would find it acceptable) has a fundamentally different purpose than that of aca-

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<sup>237</sup> *Id.* at 295–96.

<sup>238</sup> Rakove, *supra* note 6, at 1588 (noting that “there is good historical evidence that jurists rarely make good historians” (citing the work of Charles A. Miller, Leonard W. Levy, and William E. Nelson)).

<sup>239</sup> Sunstein, *supra* note 208; Tushnet, *supra* note 158.

<sup>240</sup> Sunstein, *supra* note 208, at 603.

<sup>241</sup> *Id.* at 602.

<sup>242</sup> *Id.*

<sup>243</sup> Tushnet, *supra* note 158, at 934.



demographic history, the same standards should not be required.<sup>244</sup> Finally, from the ranks of the historians, Kalman—while steadfastly refusing to allow any compromise on requiring the maximum amount of methodological rigor possible—also agrees that “lawyers’ legal history” is a different enterprise, with different purposes, than “historians’ legal history.”

## V. POTENTIAL SOLUTIONS FOR USING HISTORY RESPONSIBLY IN LAW

The foregoing has shown that while the use of historical arguments or evidence is often criticized for normative and methodological reasons, lawyers of various ideological persuasions rely on history more than ever. In attempting to strike a balanced approach to evaluating methodological questions when lawyers “do history,” it is useful to examine the phenomenon in terms of the dialogues over disciplinary and professional standards. The debates over the appropriateness of judges, attorneys, and legal scholars using historical analysis cannot be easily resolved, but—as the adversarial process itself fleshes out truth through the airing of competing views—the debates over history in law can help us understand the central issues.

In this Part, I examine some of the possible practical measures through which the problems inherent in using history in legal interpretation might be addressed. While many of these measures have been suggested by others, in practice most have proven unrealistic. Adding historians or a level of systemic professional historical review to the legal system would interfere with the prerogatives of the advocates. But this discussion helps us understand how the professional standards of historians could theoretically be applied across jurisdictional lines to the law. In the final analysis, the best, most usable framework for incorporating minimum standards of historical reliability in the law already exists in the form of evidence law and theory. Greater attention to the rules of evidence will improve how history is used in court, and legal scholars studying history can profit from thinking in terms of evidence law as well.

### A. *Institutional Solutions*

#### 1. Historical Expertise on the Courts

One of the potential solutions is to create some sort of formal mechanism for the participation of professional historians in the

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<sup>244</sup> Posner, *supra* note 1.

court systems. Possibilities include employing official court historians or special courts to decide historical questions. These institutional solutions are purely theoretical; any such attempt would require fundamental changes to our judicial system such that it would be highly unlikely that they would ever be implemented. But it is a useful thought exercise for considering the theoretical problems of history in law in light of the practical realities. In trying to flesh out some pragmatic middle ground in the debate over applying historical standards to legal interpretation, it is worth considering these ideas.

Leonard Levy suggested the establishment of an official Office of Supreme Court Historian.<sup>245</sup> Professor Levy was long known as one of the harshest critics of the Supreme Court's use of history.<sup>246</sup> He suggested the idea of employing an official historian in his foundational *Original Intent and the Framers' Constitution*.<sup>247</sup> Though unrealistic as a practical matter, it is an interesting idea coming from one of the most prominent American constitutional historians. The benefit of this institution would presumably be the ability of the Justices to consult the advice of a professional historian steeped in the standards and methodological norms of academic history. This could result in "better" judicial history (measured against professional historiography) entering the volumes of the Supreme Court Reporter. But there are potential drawbacks as well.

First of all, one might question whether it is desirable for the Supreme Court's historical interpretations to gain even more legitimacy than they already have. One of the leading concerns about the Justices' historical interpretations is that the version of history set forth in a Court opinion attains a degree of official authoritativeness. The very presence of an official Historian on the Court's staff would imply that the historical pronouncements of the Justices bear the stamp of professional approval by a historian, and thus could become even more authoritative than they currently are. Given the problems discussed above, do we really want the Court's version of history to seem even more authoritative? The Court's jurisprudence of the First, Fifth, Eleventh, and Fourteenth Amendments, to name just a

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<sup>245</sup> LEVY, *supra* note 11. Note that Levy's suggested Court Historian was not intended to be like other governmental in-house historians who do research on the institutions where they are lodged. Levy's Supreme Court Historian would actively participate in the business of the Court by evaluating historical arguments made in actual cases and providing historical advice to the Justices.

<sup>246</sup> See Gordon Morris Bakken, *The Promise of American History in Law*, 24 CAL. W. L. REV. 277, 285 (1988) ("Levy . . . deplores the uses of history by the Supreme Court leading to disastrous ends.").

<sup>247</sup> LEVY, *supra* note 11.

few, has produced enough quasi-authoritative “history” as to give advocates of either side of any issue ample fodder for their arguments. The same is the case with structural constitutional questions such as sovereign immunity or federalism. Especially for those critics uncomfortable with the use of history by the courts, there is good reason to hesitate at the prospect of an even weightier imprimatur being lent to the description of “Framers’ intent” by a Justice Black or a Chief Justice Rehnquist or a Justice Souter resulting from their ability to run their opinion drafts by an official Court Historian (or not).<sup>248</sup>

Nor would the presence of a Court Historian resolve controversies over whether the Eighth Amendment was meant to fix the meaning of “cruel and unusual” by the standards of 1789 or according to “evolving standards of decency”; nor whether the Second Amendment was meant to protect an individual or a collective right. These issues in the contemporary debates have a purpose that has more to do with our collective memory of constitutional meaning than with specific historical interpretations of discrete provisions based on evidence. Moreover, they are so entwined with contemporary issues in the culture wars that any perceived input from a Court Historian would be unsatisfactory to one side and would only draw greater attention to the potential for partisan influence in scholarship. Putting a historian on the staff of the Court could even undermine the legitimacy of the historical profession in the public’s eyes by seeming to place the profession in the service of reaching particular contemporary policy outcomes, thus compromising the very objectivity that might make it seem at first glance like a helpful idea.

Furthermore, having an official historian on the staff would not likely push the Justices to undertake any more of a rigorous, methodological approach to consulting history. Many Justices might think they understand history without the aid of a consultant. Chief Justice Rehnquist authored several books on legal history during his tenure.<sup>249</sup> Does anyone really think that a Justice Scalia or a Justice

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<sup>248</sup> See, e.g., *Printz v. United States*, 521 U.S. 898, 971–76 (1997) (Souter, J., dissenting) (stating that his historical view of *The Federalist* controlled his decision); *Wallace v. Jaffree*, 472 U.S. 38, 91–114 (1985) (Rehnquist, J., dissenting) (arguing that the leaders of the founding generation intended a closer relationship between religion and government); *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (Black, J.) (declaring that the Framers established a “wall of separation between Church and State”).

<sup>249</sup> See generally WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* (1998); WILLIAM H. REHNQUIST, *CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876* (2004); WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENT OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* (1992). As of this writing, Chief Justice Roberts has not appeared to show much of a historical bent in his opin-

Souter—to take two Justices who often make historical inquiries in their opinions—would call the Court Historian into his office and say, “I have absolutely no idea what the founders thought about issue X. Can you help me consult the historical evidence?” Of course not. The legal realists among us would likely suspect that judges get a rough sense of how to decide the case first, and only thereafter do they review historical or other evidence to help construct a persuasive, well-reasoned opinion. And this highlights one of the underlying tensions we have identified with using history in law: the different purposes for which lawyers and historians use evidence. Finally, this proposal would do little to rebut the critique of professional history itself as a less than purely objective endeavor, at best, or subordinated to political or polemical goals at worst. Would a conservative Justice rely on the input of a liberal historian, or vice versa?

Adrian Vermeule has recently suggested that we consider the idea of “lay Justices,” that is, the appointment of Supreme Court Justices who are not lawyers.<sup>250</sup> Vermeule argues that it would enable the Court to have Justices with expertise in fields other than law—including history.<sup>251</sup> This argument takes Levy one better by offering the possibility of one or more historians not just on the Court’s staff, but as voting (and, perhaps more importantly for our discussion, opinion-writing) members of the Court itself. Of course, Vermeule does not expect this to happen, but it is a useful exercise in how to think about bringing historical expertise to bear on legal questions at the highest level.<sup>252</sup>

Another structural possibility, in theory, is the establishment of special courts or special judges to decide questions of historical meaning, presumably staffed by judges with more expertise in law and history. While American courts are mostly general-purpose courts, or divided only broadly into criminal and civil dockets, we do have some courts with special functions that allow the judges to develop expertise in the subject matter. Bankruptcy courts, family courts, and the Court of Federal Claims are examples of courts that have jurisdiction over cases that present certain types of issues. Even

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ions—in fact he may take a more limited approach toward applying external evidence than his predecessor and former mentor—but it was also well publicized during his confirmation hearings that he won prizes for his work as a history major at Harvard. See John G. Roberts, Jr., [http://www.oyez.org/justices/john\\_g\\_roberts\\_jr/](http://www.oyez.org/justices/john_g_roberts_jr/) (last visited March 28, 2008).

<sup>250</sup> Adrian Vermeule, *Should We Have Lay Justices?*, 59 STAN. L. REV. 1569 (2007).

<sup>251</sup> *Id.* at 1570 (“[I]t would be a good idea . . . to appoint a historian, economist, doctor, accountant, soldier, or some other nonlawyer professional to the Court.”).

<sup>252</sup> *Id.*

if there are other issues in a given case, the specialty court hears the entire case based on the specialty subject matter at issue. And there is a recent trend among the states to develop more special courts to hear specific types of cases. However, having specialty courts that deal with particular questions tends to be a more regular feature of inquisitorial court systems found in other countries. Because the establishment of special courts to determine historical meaning would fundamentally tamper with the existing court structure and is, at any rate, completely theoretical, I will not discuss it in detail except to note that the benefits and drawbacks would be analogous to those associated with Levy's suggestion. But the logic behind this idea is valid and prompts a comparative review of inquisitorial or civil law systems.<sup>253</sup>

Finally, there is one other possibility for providing judges with historical expertise: the appointment by courts (rather than by the parties) of historical expert witnesses to testify in specific cases. This idea, while the most realistic, still leaves the judge and the historian susceptible to many of the controversies discussed above, and is in the final analysis unsatisfying. It will be discussed in greater detail below.

## 2. Comparative Law and Pragmatic Truth

Another aspect of the conventional critique of history in law is that the adversarial nature of the legal process results in a less-than-complete picture of actual historical truth. What if our legal system was less adversarial and more like the inquisitorial systems that some European countries employ? If litigation was driven less by the parties and a stronger role was given to the courts in ferreting out and establishing facts and evaluating evidence, we might get to a more accurate picture of historical truth. If the adversarial nature of the American legal process is the problem, a brief comparison with other judicial systems will be instructive.

The difference between our American judicial system and certain civil law systems in how they might approach historical evidence is twofold. First, as Judge Posner points out, adjudicating the common law is by definition more past-dependent than construing a code because the common law depends on interpreting the legal precedent as it has evolved over time and resolving legal issues according to *stare decisis*. This is consonant with the finding by Lee Epstein and others that the average age of judges is much higher in the

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<sup>253</sup> See *supra* Part IV.

United States than in most European legal systems.<sup>254</sup> As Judge Posner notes, while this is partly because in those systems judgeship is a separate career track that lawyers enter at an early stage, it also might implicitly reflect the intuition in the U.S. that older judges, due to the breadth and depth of their experience, may be much better able to have a perspicacious understanding of the array of sources that can influence common-law judging, including history and precedent.<sup>255</sup>

Matthew King examines another comparative difference between the U.S. and other legal systems that has potential implications for interpreting history in law: their different understandings of “truth.”<sup>256</sup> Inquisitorial systems, according to King, engage in a “teleological” quest for “absolute Truth.”<sup>257</sup> As discussed above, the American court system is structurally designed to get at the best understanding of truth through the adversarial process.<sup>258</sup> King refers to this as “pragmatic truth.”<sup>259</sup> The two systems differ in how they use and regulate evidence. In comparing how the two systems treat evidence that was illegally obtained, King finds that exclusionary rules operate as key elements in adversarial systems but are less emphasized in inquisitorial systems.<sup>260</sup> Because adversarial systems such as ours ultimately favor certain rights and values over absolute truth, our courts are willing to accept for decisional purposes a version of truth that they know is less than factually accurate or complete.<sup>261</sup>

Our evidence regime therefore mediates between fact and law: between absolute factual truth and external legal concerns. The classic example of how American courts can favor systemic concerns for rights over absolute truth is the exclusionary rule. If a defendant’s guilt in a crime, while real in fact, can be established in court only by evidence that was obtained illegally, the use of that evidence will not be allowed. Suppose a defendant had actually committed a murder, but the only evidence for the prosecution was a handgun obtained in a warrantless search of the defendant’s home, in violation of the Fourth Amendment.<sup>262</sup> An American court would find a constitutional violation and not allow the evidence to be used.

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<sup>254</sup> Lee Epstein, Jack Knight & Olga Shvetsova, *Comparing Judicial Selection Systems*, 10 WM. & MARY BILL RTS. J. 7, 22–24 (2001).

<sup>255</sup> Posner, *supra* note 1, at 593.

<sup>256</sup> King, *supra* note 21, at 187.

<sup>257</sup> *Id.* at 187–88.

<sup>258</sup> See *supra* note 254 and accompanying text.

<sup>259</sup> King, *supra* note 21, at 189.

<sup>260</sup> *Id.* at 191–92.

<sup>261</sup> *Id.*

<sup>262</sup> U.S. CONST. amend. IV.

In inquisitorial systems, however, the application of exclusionary rules is rare. The court's main priority is to reconstruct an accurate, objective account of the Truth.<sup>263</sup> The inquisitorial court could remain free to consider the illegally-obtained handgun. Individual procedural rights are subordinated to the actual truth of innocence or guilt. While in the U.S. the court would be barred from considering the illegally-obtained handgun, an inquisitorial court could allow the evidence if it assisted in reconstructing the truth of past events.<sup>264</sup> In the U.S., a defendant can be acquitted despite the existence of illegally-obtained, but excluded, evidence that establishes actual guilt in fact.

American courts, therefore, are willing to settle for something less than perfect accuracy in declaring a legally binding interpretation of events, due to our commitment to systemic and procedural values which we think override the need for absolute truth. This would seem to support the contentions of Tushnet, Sunstein, and others that the rigorous methodological standards of historians might not be appropriate for legal consultation of history.<sup>265</sup> Legal inquiry might have a fundamentally different purpose: to construct the best *working* version of "truth" as it can under the circumstances in order to interpret the legal issues properly at hand.

An analogous concept can be borrowed from basic tort law. In tort, the law instructs the court to draw a line where we are willing to assign liability for acts that caused damage. To find that a given factor is the proximate cause for the injury requires a higher standard of culpability than mere causation-in-fact.<sup>266</sup> As we know, sometimes a factor that *actually* caused an injury is deemed by the law to be too attenuated to assign blame to a party. The classic torts case *Palsgraf v. Long Island Railroad Co.* illustrates the difference between what actually caused an event in fact and what the law will accept as legal causation for use in determining legal questions.<sup>267</sup> In *Palsgraf*, as any first-year torts student knows, the railroad company's employee actually caused the damage to plaintiff by pushing another passenger onto the moving train.<sup>268</sup> But the company was held not liable because it

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<sup>263</sup> King, *supra* note 21, at 187.

<sup>264</sup> *Id.*

<sup>265</sup> See *supra* notes 158–59, 239–43.

<sup>266</sup> See ARTHUR BEST & DAVID W. BARNES, BASIC TORT LAW: CASES, STATUTES AND PROBLEMS 242 (2d. ed. 2007) ("A torts plaintiff must do more than show that a defendant's conduct was a cause-in-fact of the plaintiff's harm. The plaintiff must also satisfy the requirement of *proximate cause*.").

<sup>267</sup> *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

<sup>268</sup> *Id.* at 340–41.

was not a foreseeable risk that the passenger was carrying a package of fireworks that when he fell would explode and knock over scales at the far end of the platform, which would in turn fall on the plaintiff.<sup>269</sup> In other words, the actual truth of what caused the accident was not enough to assign fault as the “proximate” true cause under the law.

Historians, too, weigh evidence and make causal inferences to explain historical phenomena. But the legal determination that an act is not the “proximate cause” of an injury that it nonetheless *actually* caused is a legal fiction, a line-drawing exercise in accord with a higher principle (i.e., that liability should not fall on those who do not breach a duty to avoid foreseeable risk),<sup>270</sup> that the historian is not called on to perform. Historical truth is not so much subordinated in the legal process as it is expected to be working in unison with other rules and norms that constrain the courts and govern the resolution of the actual cases. It is therefore easy to understand why historians can be so unsatisfied with the historical interpretations made by courts in litigation.

My purpose here is not to defend any sort of watered-down version of historical truth, no matter how poorly done, as “good enough for government work.” But it must be kept in mind that our justice system holds certain values—especially those individual procedural rights guaranteed by the federal and state constitutions—to be more important than the determination of factual certitude.<sup>271</sup> This is not the same as willful blindness to the truth. Indeed, as the classic example of the exclusionary rule shows, the judge and the parties—and in some cases the public at large—know exactly what the illegally-obtained evidence is and what it purports to show.<sup>272</sup> Despite some cases where we *know* a defendant is in fact guilty of the crime, we nonetheless exclude the evidence necessary to convict. Similarly, sometimes we refuse to assign tort liability for an act that we *know* actually caused an injury in fact.<sup>273</sup> But this does not mean the truth is not known; it is simply deemed to be outside the decisional parameters of the issues before the court. The *historical* truth is thus often on

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<sup>269</sup> *Id.* at 340–47.

<sup>270</sup> PROSSER & KEETON ON TORTS 281 (William Lloyd Prosser et al. eds., 5th ed. 1984).

<sup>271</sup> U.S. CONST. amends. IV–VIII.

<sup>272</sup> *See, e.g.,* *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926) (Cardozo, J.) (noting, in famously rejecting the exclusionary rule, that the rule would provide that “[t]he criminal is to go free because the constable has blundered.”).

<sup>273</sup> *See, e.g.,* *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).



the record, even though it is not considered determinative in resolving the case at bar.

*B. Evaluating Law by Historians' Standards: Translational Solutions*

Returning to the critical view for the moment—the argument that lawyers engaging historical evidence should indeed be required to apply the professional standards of academic historians—the practical question remains: given that most lawyers lack formal training in history, how can we achieve the effective translation of the standards of one profession to another? There is a certain myth that lawyers are sort of junior-varsity historians, or that a substantial percentage of lawyers were undergraduate majors in history and thus might be prepared for the challenge.<sup>274</sup> One scholar's informal review indicates, however, that less than ten percent of current law students actually majored in history, a percentage too small for us to rely on comfortably to show any significant level of historical training across the legal profession.<sup>275</sup> But the larger point is that an undergraduate educational background would not by itself qualify a lawyer to authoritatively engage in professional historiography.<sup>276</sup>

Perhaps increasing the amount of legal history taught at American law schools would help. But this is not practically possible—curricular demands are many and resources often stretched; furthermore, law schools do not require students to take a course in legal history because for most students the essence of legal education is learning the ability to practice the law as it is today (at the behest of clients who generally do not care to pay lawyers' hourly rates to learn the complex historical reasons why they can or cannot take some practical action under the current law).<sup>277</sup> And even if more legal history was taught, many legal history courses cover only narrow topical areas, and even fewer provide thorough grounding in graduate-level historical methodology. It is far from certain that a few extra legal history offerings would have any effect toward producing a generation of lawyers steeped in the norms of professional historiography.

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<sup>274</sup> See Chief Justice Randall, *Foreword—The Importance of History to Modern Lawyering*, 68 IND. L.J. (1993).

<sup>275</sup> Melton, *supra* note 4, at 386 n.41 (determining that during a given period, less than ten percent of incoming law students at the University of North Carolina Law School were undergraduate history majors, and concluding that this percentage is too small to generalize any academic historical competency across the legal profession).

<sup>276</sup> Flaherty, *supra* note 3, at 526.

<sup>277</sup> See Melvin I. Urofsky, *Courts, Legislature and History: Having Faith in Time*, 27 CUMB. L. REV. 941, 942 (1996).

A more likely scenario is the one discussed at various points above,<sup>278</sup> that of directly appealing to lawyers and judges who consult history to learn about and apply the standards of professional historians to the best extent possible. While the majority of commentators usually arrive at this suggestion as a concluding thought when attempting to reconcile the normative question of using history in law, at least two scholars have written to provide practical advice to lawyers on the effective and appropriate ways to use history—though with decidedly different attitudes.

In one of the leading articles from the height of the controversy over originalism, H. Jefferson Powell attempts to prescribe “Rules for Originalists.”<sup>279</sup> Of course Powell, who made one of the first and most famous critiques of originalism as a normative enterprise,<sup>280</sup> offered this purported “rulebook” tongue-in-cheek. But after going through his litany of rules, lecturing would-be originalists on points from “[h]istory itself will not prove anything nonhistorical,” to “[h]istory never obviates the necessity of choice,”<sup>281</sup> Powell indicates that his historical standards are not meant simply to debunk originalism, but also are a serious way of understanding the proper approach to historical inquiry. He concludes that there is a legitimate role for consulting history in interpreting the Constitution, but only when lawyers go about it with the close attention to the norms and limits of the historical method he prescribes.<sup>282</sup>

Buckner Melton better accommodates the reality that history is and will be used in legal arguments. He provides a more practical, user-oriented aid for lawyers attempting to grapple with historical method in his article *Clio at the Bar: A Guide to Historical Method for Legists and Jurists*.<sup>283</sup> Melton does not weigh in on the normative debates. He writes for the lawyer or judge who is faced with the practical reality of having to marshal evidence in support of legal arguments.<sup>284</sup> Accepting the fact that history has become an increasingly important factor in legal interpretation, Melton attempts to provide the practitioner with a usable guide to historical method.<sup>285</sup> He offers a summary of historical method and its potential applications, an in-

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<sup>278</sup> See *supra* Part V.A.

<sup>279</sup> Powell, *supra* note 12.

<sup>280</sup> Powell, *supra* note 35.

<sup>281</sup> Powell, *supra* note 12, at 662–91.

<sup>282</sup> *Id.* at 695.

<sup>283</sup> Melton, *supra* note 4.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 381–83.

roduction to historiography and its potential uses for lawyers, and an extended review of historical standards for locating and evaluating sources and making causal inferences.<sup>286</sup> In short, Melton's *Clio at the Bar* is the most sophisticated and successful attempt to undertake the nuts-and-bolts effort, suggested by others, at translating the methodological standards of professional history to the practicing legal community. By focusing on lawyers and judges, rather than on scholars and theorists, as his intended audience, Melton has also taken the approach that has the greatest potential to reassure the historical profession that its standards can be observed even in the context of adversarial litigation.<sup>287</sup>

The bottom line is that it is probably unrealistic and impractical to expect lawyers and judges to meet the standards of academic historians and produce professional-quality historiography.<sup>288</sup> I heartily endorse the notion that lawyers should strive to approximate these standards as an aspiration.<sup>289</sup> It will not always happen, but we can hope for incremental improvements. Indeed, the interdisciplinary application of history by legal scholars may have improved over the last generation.<sup>290</sup> More importantly, we must keep in mind that the legal process requires expertise from many different fields other than history—fields with which lawyers and judges have as little or less experience than they do with history. Yet we do not banish categorically all evidence that relates to other fields just because the lawyers are not experts. Instead, we apply legal standards to review and evaluate that evidence. This can be done with history, too.

C. *Evaluating History by Lawyers' Standards: The Law of Evidence*

This Article, like most of the commentary and debate over the use of history in legal and constitutional interpretation, has focused on the question of conforming legal inquiries in history to the professional standards of historians. This focus is entirely appropriate because precisely what gives observers pause is the perception that untrained lawyers and judges are constructing historical interpretations that do violence to the actual historical record painstakingly crafted by professional historians. Yet it is also possible to ask the converse

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<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> Kramer, *supra* note 6, at 391.

<sup>289</sup> Landau, *supra* note 124, at 486 (arguing that "judges who turn to history must commit themselves to doing it right").

<sup>290</sup> KALMAN, *supra* note 3, at 224.

question: do the standards of the law offer anything that might help reconcile the legal use of history with the concerns of historians?

The use of history in law is at bottom a question of evidence. And there is one set of basic procedural rules which governs litigation and already operates—at least in theory—to allow for the review of historical arguments according to the professional standards of history: the law and rules of evidence.<sup>291</sup> The Federal Rules of Evidence and the generally similar state evidence codes provide the framework for (impartial) judges to assess the admissibility and relevance of the evidence offered by the (adversarial) parties to litigation.<sup>292</sup> I contend that the rigorous application of the evidence rules to scrutinize proffered historical evidence can mitigate some of the methodological concerns that the commentators have expressed. This will admittedly affect only a subset of the areas in which historical inquiry has been identified as problematic: namely, court cases at the trial level where specific historical issues are being litigated and specific historical evidence is being offered.

Yet it is precisely this setting—the trial courtroom—where history-in-law is the most troubling and has the potential to set on the record an erroneous but authoritative interpretation of historical fact. And given the traditional appellate deference towards a trial court's findings of fact,<sup>293</sup> getting the story right at that level is extremely important. Legal scholars can also profit from extra attention to the canons of evidence law when exploring the past. I am not claiming that the rules of evidence will solve all the problems of history in law, especially in the highly controversial cases that command public attention. But in an area of such well-worn debate, incremental improvements can be very helpful. Evidence law gives us a framework for understanding how history can work within the parameters of the legal system to provide useful information for solving cases, while maintaining reliability under the standards of the historical profession.

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<sup>291</sup> While each state has its own law of evidence, the majority of states conform to the Model Rules of Evidence, which are similar to the Federal Rules of Evidence. Since constitutional litigation is a federal issue and will likely end up in federal court, the Federal Rules will be discussed for the purposes of this paper.

<sup>292</sup> FED. R. EVID. art. IV (“Relevancy and its Limits”).

<sup>293</sup> U.S. CONST. amend. VII (stating that “no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law”).

### 1. Historical Evidence and Relevance

Another facet of the critique of history in law is that in the litigation process, historical arguments may seem to draw attention away from the central issues in the contemporary dispute.<sup>294</sup> But historical evidence, like any other kind of evidence, must be judged relevant to be admitted. Article IV of the Federal Rules pertains to relevancy.<sup>295</sup> To consider its possible application to historical evidence, the logic of the Rules is simple. Rule 401 defines “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”<sup>296</sup> Rule 402 mandates that all relevant evidence is admissible to be heard by the court and that all irrelevant evidence is inadmissible.<sup>297</sup>

A judge, then, has the authority to question the relevance of offered historical evidence, and if she determines that it does not have any relation to facts bearing on the elements of the proponent’s case, that evidence can and should be excluded.<sup>298</sup> Furthermore, Rule 403 requires the exclusion of evidence that, although relevant, might cause unfair prejudice or mislead the jury.<sup>299</sup> Evidence that is not relevant to the legal claims or defenses in the actual case must be excluded.<sup>300</sup> Statements that are offered only to try to sway the jury without any bearing on the issues before the court are not admissible.<sup>301</sup> This underscores the previously described key difference between the professions: the arbiters of legal truth (courts) are constrained to drawing inferences about the past only from evidence that is relevant to the cases and controversies that are properly before the tribunal.<sup>302</sup> Historians, on the other hand, are even less constrained in this regard: they can construct their narratives of the past from whatever information is available, even if unrelated to a specific inquiry.

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<sup>294</sup> Farber, *supra* note 20, at 1013

<sup>295</sup> FED. R. EVID. art. IV (“Relevancy and its Limits”).

<sup>296</sup> FED. R. EVID. 401.

<sup>297</sup> FED. R. EVID. 402 (providing that relevant evidence is admissible except where prohibited by the Rules of Evidence or other law).

<sup>298</sup> *See id.*

<sup>299</sup> FED. R. EVID. 403. The rule requires a balancing to determine whether the probative value of the evidence is “substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” *Id.*

<sup>300</sup> FED. R. EVID. 402.

<sup>301</sup> FED. R. EVID. 403.

<sup>302</sup> U.S. CONST. art. III.

Returning to the church-state context as an example, imagine that a party offers at trial as an assertion of purported historical fact a statement that “the Founding Fathers intended America to be a Christian nation.”<sup>303</sup> If the judge scrutinized the proposition under Rule 401, she would have to determine whether it related in any way to a fact central to the proponent’s case. That determination would depend on the parameters of the legal issues properly before the court. If the proponent of the evidence was suing over the denial on environmental grounds of a zoning variance for church construction, it might be unlikely that the assertion (based on a fact-specific inquiry, of course) would have any relevance, and therefore it could be excluded under Rule 702.<sup>304</sup> If, instead, the proponent was suing for an injunction to prevent the removal of the Ten Commandments from the local courthouse, then the assertion might indeed be deemed relevant (whether or not it is in fact true) and admitted into evidence.<sup>305</sup> Admissibility of evidence, of course, does not mean that the court will ultimately accept it as true—it means only that the court may consider it. The court can hear testimony on historical evidence that it ultimately decides is not credible, not reliable, or not pertinent to the issues before it. Even if the court decides to hear the testimony asserting “the United States is a Christian nation,” it can later decide that the assertion was not persuasive, was false, or was disproved by competing evidence.

In other words, the judge or jury may treat historical evidence just like evidence proffered from any other cognate field. I believe that rather than exclude history from the courtroom out of a fear that lawyers, judges, and jurors lack scholarly expertise in that field, we should prefer a world in which competing historical interpretations may be aired and then sorted out by the court’s gatekeeping function for relevance, admissibility, credibility, and persuasiveness under the law of evidence.

## 2. Historians as Expert Witnesses for the Parties

At the crux of the debate over incorporating standards of expertise in history is the assumption that professional historians possess,

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<sup>303</sup> A different example of a historically debatable proposition would be that the founders intended to create a “wall of separation”; however, this metaphor has been constitutionalized, according to Kelly, by the law office history of Justice Black. *See* Kelly, *supra* note 2.

<sup>304</sup> FED. R. EVID. 702.

<sup>305</sup> *See, e.g.,* *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005).

and are guardians of, the locus of *expertise* in interpreting history. And in their role as guardians of expertise, it can be argued, historians seek to assert *authority* over the production of historical knowledge. Another interesting section of the Federal Rules of Evidence pertaining to historical evidence is the series of rules governing opinions and expert testimony. Rule 702 allows expert witnesses, provided that minimum standards of reliability are met:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.<sup>306</sup>

There is a trend in the courts toward the regular use of expert witnesses.<sup>307</sup> The evidentiary rule for expert testimony can easily be applied to professional historians. The application of Rule 702 to historian expert witnesses, unfortunately, has been nearly ignored in the debates over history in law.<sup>308</sup> While this will not help constrain random sweeping historical generalizations of the sort described above, it can provide a means by which the professional standards of academic historians can be accounted for when using history in the courtroom.

When, for example, a party offers a witness claiming to be an “expert” in religious history to testify on the historical practice of posting the Ten Commandments in public buildings, the court can inquire into that witness’s qualifications.<sup>309</sup> If she holds a doctorate in religious history and serves on the faculty of a history department teaching religious history or serves on the faculty of a divinity school, she will likely qualify as an expert witness by training, and then the court will have to scrutinize the sufficiency of the chain of inferences in her testimony. If she is a historian by profession, but working in a different field and without expertise in religious or constitutional history, the court will have to make a judgment call based on the judge’s determination of whether the proffered expert is qualified and

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<sup>306</sup> FED. R. EVID. 702.

<sup>307</sup> Farber, *supra* note 20, at 1013.

<sup>308</sup> *But see* Martin, *supra* note 7.

<sup>309</sup> FED. R. EVID. 702.

whether her testimony will be helpful in determining the outcome of the case.<sup>310</sup>

If the purported expert in religious history is not an academic but is a local minister, or an avocational church historian, he may not qualify based on academic training alone. But he may qualify, indeed, if the subject of his testimony—say, the particular church history of the county or region—is deemed within the realm of his expertise through experience and if that expertise relates to the issues presented in the case. For example, in the case of a denial of a zoning permit challenged under the Religious Land Use and Institutionalized Persons Act,<sup>311</sup> the court may determine that the particular local church history is relevant to determining the historical pattern of land use or the motives behind the zoning decision. Thus, Rule 702 allows courts to weigh and evaluate the claims to be made by historians by inquiring into their professional expertise and credentials. In other words, questions of law take into account the standards of the historical profession.

The reason the Rule incorporates a high degree of flexibility, and does not set forth any specific criteria for what confers “expert” status, is that the courts—and the legal system—are not thought fit or competent to prescribe such standards or to make rulings on the norms and rules that are wholly internal to other disciplines, such as science and history. The structure of American evidence law recognizes that it is not the province of the courts to pass legally binding judgment on the standards of other professions, but rather only to make rulings based on the evidence relevant to the specific cases and controversies before them.<sup>312</sup> The structure of the judicial system serves only to allow litigants advocating alternative explanations to offer experts to comment on the cases and offer authority to persuade the courts. The decision lies with the court on how to judge the purported expert’s credentials, knowledge, and credibility—just like with any other witness—and on whether or not to ultimately find the expert’s testimony persuasive. Because of this flexibility, the courts are equipped to evaluate experts’ opinions on competing truth claims while remaining above the fray on disciplinary border controversies.<sup>313</sup>

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<sup>310</sup> FED. R. EVID. 703.

<sup>311</sup> Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified as amended in scattered sections of 42 U.S.C.).

<sup>312</sup> U.S. CONST. art. III.

<sup>313</sup> Kalman, *supra* note 44.



The rules governing expert testimony allow historians to exercise the influence over legal questions appealing to history which some feel is necessary. But does this mean the only way to appeal to professional history is by producing a historian in the courtroom? Must Jack Rakove or Gordon Wood get haled into court every time there is a question of historical interpretation? Of course not. Melton provides an effective outline for how lawyers can appeal to professional historiography in briefs and arguments.<sup>314</sup> Judges can evaluate these claims as to their probative value as well when deciding the case. Often, however, historians do play a direct role in actual litigation, such as in *Brown v. Board of Education*,<sup>315</sup> or in similar situations such as in testifying before Congress, or even in occasional events such as “truth commissions.”<sup>316</sup>

The problematic part of historians serving as expert witnesses derives from the advocacy-versus-objectivity issue. When historians are called as expert witnesses, however, it is generally because they are called by one of the parties to the actual litigation.<sup>317</sup> As with expert witnesses from other fields, historians can then become entangled in a battle of experts. A historian, like other experts, can be influenced by external or internal pressures to offer testimony that favors the side that hired him.<sup>318</sup> This can cast doubt on the ability of a historian expert witness—retained by one of the advocates, who has a particular historical interpretation redounding in its favor—to render neutral, objective historical testimony. Courts and scholars must therefore be aware of such influences and can especially profit from analyzing competing historical explanations offered by the advocates—or by scholars with differing views—to advance their competing theories of history, in order for the court (or, by analogy, the larger scholarly community) to weigh the different interpretations and find the version that is most persuasive as the one approximating historical truth.

### 3. Court-Appointed Expert Historians

A similar aspect of the critique is the charge that even when actual historians are consulted and relied on as experts, their testimony

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<sup>314</sup> Melton, *supra* note 4.

<sup>315</sup> 347 U.S. 483 (1954).

<sup>316</sup> See generally Charles S. Maier, *Doing History, Doing Justice: The Narrative of the Historian and of the Truth Commission*, in *TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS* 261 (Robert I. Rotberg & Dennis Thompson eds., 2000).

<sup>317</sup> Martin, *supra* note 7, at 1536.

<sup>318</sup> Farber, *supra* note 20, at 1011.

and historical interpretations should be viewed skeptically when given in the service of a party in interest because their expert testimony for a party may blur the line between advocacy and objectivity. But what if historical experts were not offered by the parties, but rather appointed by the courts? One final example from the Federal Rules worth discussing in this regard is Rule 706, which allows the court to appoint an expert witness for the court on its own initiative.<sup>319</sup> The judge has discretion to consult the expertise of a professional historian to resolve a difficult or indeterminate question of historical interpretation. The question Rule 706 raises for our purposes is whether to favor the use of expert historians offered by the adversarial parties or to prefer instead historians appointed as experts by the decision-making court.

This scenario highlights perfectly the issues presented by using history in law: the question of advocacy versus objectivity in historical interpretation, and the intraprofessional contest concerning jurisdiction over historical knowledge. Having the courts, rather than the parties, appoint historians as expert witnesses would seem to have many advantages. Most obviously, it would seem to mitigate some of the concern that the expert would feel pressured to offer historical testimony that favored the position of the party that retained him.<sup>320</sup> Instead, it would seem, a historian appointed by the court would have no pressure other than to offer an objective historical interpretation to assist the judge and jury.<sup>321</sup> In other words, using Rule 706 or its state-law analogues would seem to place the historian within the ambit of the court's role as the objective truth-seeker in the adversarial process.

But there are other concerns with expert historical testimony that Rule 706 will not solve. These concerns are chiefly those that would be imported from the historical profession itself. First is the question whether historians or historiography can truly be objective.<sup>322</sup> While the objectivity question has been prone to being overstated as a controversy,<sup>323</sup> it nonetheless casts doubt on the notion of

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<sup>319</sup> FED. R. EVID. 706.

<sup>320</sup> Farber, *supra* note 20, at 1011–12.

<sup>321</sup> Martin, *supra* note 7, at 1544–46.

<sup>322</sup> NOVICK, *supra* note 8, at 7 (likening the pursuit of objectivity to “nailing jelly to the wall”).

<sup>323</sup> Schiller, *supra* note 207, at 1170 (“[F]inding a genuinely ‘subjectivist historian’ is rather like searching for a unicorn. . . . I have yet to meet a historian who claimed that his scholarship was nothing more than fiction or that his ‘version’ of the events he studied was not an attempt to ascertain the truth. The historical profession is, at its core, profoundly committed to a search for truth about the past.”).

court-appointed historians as a panacea. The point of having a court-appointed expert would be to place the expert in a position to render the most objective testimony possible based on her expertise. If historians themselves question whether historical objectivity is possible, this rationale becomes suspect. Even if a historian is not working for one party or the other, his testimony may nonetheless reflect any presumptions or biases that inform his own historical work.<sup>324</sup> At an even more basic level, the fact that (as in any scholarly discipline) historians disagree with one another, belong to different schools of interpretation, and apply different methodologies to their work, undermines the notion that any one historian might be able to step into the courtroom and render expertise that speaks for the entire historical profession.

A related problem with court-appointed historians is that the testimony of a professional historian—as with that of other non-scientific experts—is based on the expert’s apparent professional *authority*, signaled through credentialed expertise, rather than on reason or empirical method. A court-appointed historian, unchallenged, might appear to the jury and judge as offering an undisputable interpretation of history based on the expert’s authority, and not necessarily from the substantive correctness of his interpretation. Granted, the persuasiveness of non-scientific expert witnesses in general can depend more on authority than on demonstrable, empirical methodologies.<sup>325</sup> But the court-appointed historian might not be challenged by the presentation of evidence that might provide contravening or alternative explanations. Even if challenged by an expert offered by one of the parties, the court-appointed historian would enjoy a tremendous advantage in credibility simply from the perception that he works “neutrally” for the judge. Thus, the expert’s cloak of authority might obscure the fact that there may be real controversies in the field, or that the expert’s interpretation is tendentious or only one of several acceptable or plausible explanations of the past. Any foray into the literature on the historical profession, as well as common sense observations of the controversies over the public meaning of history, will reveal that history is highly contested and its meaning is ever evolving, both in the public discourse as well as within the scholarly discipline.<sup>326</sup> But a

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<sup>324</sup> HOFFER, *supra* note 141, at 126–27.

<sup>325</sup> See, e.g., *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

<sup>326</sup> NOVICK, *supra* note 8, at 1, 6 (alluding to the work of philosopher W.B. Gallie in calling objectivity an “essentially contested concept”).

court's reliance on a single, authoritative expert to explain history might fail to account for history's complexity.

The appointment of a seemingly neutral historian would seem to assuage the fear that a historian-for-hire might tend to offer testimony favorable to the party that retained her.<sup>327</sup> But there is also the problem that having a single historian appointed by the court could tend to limit the scope of possible interpretations that would be offered. As Peter Hoffer amply shows, the historical profession itself is prone to a degree of ideological conformity, not only in its members' policy views, but in the practice of the scholarly discipline itself, in the predominant methodologies used, and even in the choice of subject matter to be studied (for example, "new history" and bottom-up social history have for a generation predominated over now-unfashionable political, diplomatic, or military history).<sup>328</sup>

Thus, if a court were exposed to only the interpretation of one historian, her interpretation would likely be one that is constrained by the currently leading paradigms of the historical profession.<sup>329</sup> A wider range of possible historical explanations would be excluded. An interpretation that is a minority view but is nonetheless plausible according to academic history standards might well be persuasive to the court. Conversely, if the court-appointed historian represented a minority view among historians on a certain issue, the court might never be made aware of the existence of the majority view. And it is the adversarial parties who are best equipped to scan the range of professional views and present such competing explanations to the court for its consideration.<sup>330</sup> Indeed, there are even history litigation consultants available to assist lawyers in finding the best historical ex-

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<sup>327</sup> This common critique of expert witnesses fails to contemplate that the expert might feel countervailing pressure to avoid censure from her academic colleagues, as happened in the controversy over the historians' expert testimony in the famous Sears gender discrimination case. See Thomas Haskell & Sanford Levinson, *Academic Freedom and Expert Witnessing: Historians and the Sears Case*, 66 TEX. L. REV. 1629 (1988);

<sup>328</sup> See HOFFER, *supra* note 141, at 62–85; AMERICAN POLITICAL HISTORY: ESSAYS ON THE STATE OF THE DISCIPLINE (John F. Marszalek & Wilson D. Miscamble eds., 1997).

<sup>329</sup> Of course, there is a certain advantage to knowing that an expert's opinion is consonant with the majority opinion in the discipline of expertise. But this notion, which had been incorporated in the regime under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), was rejected in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), for the less restrictive test that allowed for the testimony of experts, even if not within the "majority" opinion, as long as their opinion is scientifically reliable. *Kumho Tire* extended this to nonscientific expert testimony. *Kumho Tire*, 526 U.S. 137.

<sup>330</sup> Schiller, *supra* note 207, at 1176.

pertise and research in preparation of their cases.<sup>331</sup> By allowing both sides to proffer expert historical testimony in their support, the use of expert witnesses from “adversarial” perspectives gives the judge and jury the opportunity to hear different views of historical facts and interpretation, rather than to hear only one version of history.

Perhaps the best practice to follow for courts contemplating history, then, would be to use court-appointed historians where the judge deems it appropriate, but in conjunction with historical experts offered by the parties. This would allow for a range of interpretations to be available but would also give the court a nonpartisan voice to consider for comparison. While the arguments of those who call for the exclusive use of court-appointed historians under Rule 706 have considerable force, a careful study of the professional standards of both law and history as undertaken in this Article cautions against overreliance on any one point of view, no matter how seemingly authoritative.

Methodologically, the desirability of adversarial expert historical testimony in addition to court-appointed historians does not mean that we should have to countenance “junk” history that is unsound. The rules of evidence, if used wisely, equip the court and the parties with the tools to prevent the airing of junk history in the courtroom. Careful attention to vetting the parties’ historians under the Supreme Court’s framework for evaluating nonscientific experts set forth in *Kumho Tire* can help mitigate, if not totally obviate, the risk of junk history (and as the history scandals show, even the most highly-regarded professional historiography can nonetheless be based on “junk” methodology or evidence).

Greater attention to historical method on the part of judges and lawyers, of course, will help enforce higher scrutiny for ensuring that expert historians—even adversarial ones—still meet minimum standards of qualification, admissibility, and reliability.<sup>332</sup> Judges can evaluate and incorporate professional standards for ruling on expert historians’ qualifications and on the relevance, admissibility, and persuasiveness of historical evidence.<sup>333</sup> Advocates can increase their sophistication in offering, challenging, and cross-examining professional historians.<sup>334</sup> Unqualified historians can be challenged under

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<sup>331</sup> See, e.g., The History Associates, Inc., <http://www.historyassociates.com> (last visited Mar. 28, 2008).

<sup>332</sup> Melton, *supra* note 4.

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

the standards of Rule 702,<sup>335</sup> and tendentious testimony can be undermined on the merits.<sup>336</sup> Despite critics' legitimate concerns about using history in law, a greater awareness of the applicability of traditional evidence law to historical evidence is probably the best approach towards ensuring that when lawyers do history, they do so responsibly.

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As acknowledged above, the evidentiary rules will apply only in the small percentage of cases on courts' dockets where historical claims are made. Many instances where litigants make appeals to history consist of broad assertions during argument, and these are often more for anecdotal and persuasive effect than for proving a specific element of any claim or defense. Because of this, however, it is in a sense easier to reconcile the alleged problem of the seeming cross-purposes of law and history in evaluating and using evidence. Lawyers appealing to history for the purpose of argument are subject both to rules of professional conduct that require a modicum of honesty and, more importantly, to rules of evidence that allow the judge and jury to evaluate the relevance, credibility, and persuasiveness of the claim in assessing truth. The rules of evidence give the court the flexibility to consider—but not the duty to adopt—the claims of any expert proffered as an authoritative source on historical matters. The operation of both advocacy and objectivity in the courtroom is merely an assignment of roles. The ultimate purpose of the American judicial system is, similar to the historical profession (and however imperfect), to ascertain an operative understanding of the truth.

#### 4. Are Historians Any Different from Other Experts?

I believe this inquiry is worth further study, and not simply because of the scope of its potential impact. The reason this previously unexplored application of the debate over history and law is so compelling is that Judge Posner and other critics who castigate courts for using history seem to charge that because neither lawyers nor judges are “qualified to resolve historical disputes” they should not entertain them at all.<sup>337</sup> Along those same lines, however, it could just as accurately be said that neither are judges qualified to act as forensic scientists, psychologists, environmental chemists, land-use planners, sociologists, engineers, or experts in any of the other areas of

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<sup>335</sup> FED. R. EVID. 702.

<sup>336</sup> Schiller, *supra* note 207.

<sup>337</sup> See generally Posner, *supra* note 1.

professional expertise of which courts nonetheless regularly avail themselves, all mediated through the law of evidence. Yet no one claims that these experts should be barred *categorically* from the courthouse door because judges are not certified or up to speed with those experts' internal professional standards in forensic science, psychology, and other disciplines.

It is safe to say that most judges are not scientifically competent personally to perform the forensic laboratory testing to determine to a degree of scientific certainty the identity of a criminal or the innocence of a death-row inmate based on DNA analysis lifted from a twenty-year-old cigarette butt.<sup>338</sup> Yet we do not expect our judges to be so trained, nor do we bar such evidence from consideration merely for the courts' lack of scientific expertise. Courts have to decide cases and controversies that involve questions from many professional areas in which the judge may not be a trained expert. There is no reason courts should be deemed qualified to make decisions based on expert scientific evidence, presented to the court according to generally acceptable professional standards,<sup>339</sup> but then categorically prohibited from entertaining similar disputes regarding historical interpretations.<sup>340</sup> In fact, the *Kumho Tire* doctrine explicitly contemplates nonscientific expert evidence, and historical evidence falls rather easily into this framework. If we step back from the law-and-history context and think of history simply as one of many cognate fields that can be brought to bear on legal questions, we might be less concerned as long as generally-applicable evidence law is complied with. None of this is meant to imply, of course, that the law is not rocket science.

#### D. Evidence Law and History in Legal Scholarship

This Article has sought to address general critiques of the use of history in law by examining the phenomenon both in legal scholarship and in litigation. I started this analysis by examining the uses of history by legal scholars of different ideological persuasions<sup>341</sup> and then compared the scholarly issues to using history in the courtroom

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<sup>338</sup> See Andrew P. Thomas, *The CSI Effect: Fact or Fiction*, 115 YALE L.J. POCKET PART 70 (2006), <http://www.thepocketpart.org/2006/02/thomas.html> (discussing the "CSI Effect," where prosecutors have argued that juries have higher expectations for the level of scientific proof in a case because of popular television shows such as the forensic investigator program *CSI*).

<sup>339</sup> See *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

<sup>340</sup> Nor are courts in fact so constrained, according to the Supreme Court's *Kumho Tire* doctrine. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149–150 (1999).

<sup>341</sup> See *supra* Part II.

through the prism of evidence law.<sup>342</sup> Now let us bring the analogy back to academia. The foregoing has shown that the application of evidence law to historical arguments in actual cases and controversies makes sense, in part because the rules of evidence, by definition, govern the litigation process. My argument is that using evidentiary rules and standards rigorously to evaluate historical claims in the courtroom is an idea that has been underemphasized in both theory and practice and can to some degree assuage concerns about parties' offering competing versions of the past to persuade the decision-makers in the court system.

The remaining question to address, then, is how this might apply to legal scholarship, where scholars are not bound per se by the rules of evidence. It is essentially a matter of encouraging individual scholars to incorporate the ideals and the norms of evidence law when engaging in what would be considered historical analysis. The law of evidence that applies to historical arguments (as well as to those involving any other area of professional subject-matter expertise) provides a mechanism to ensure that historical evidence, when offered by a party to a controversy, will be relevant and reliable. This principle can be a guideline for legal scholars investigating the meanings of the past. Legal scholars should take care to ensure that their historical evidence is relevant, reliable, contextually appropriate, and faithful to the historical record.

For legal scholars, using evidence law as a framework to guide historical analysis in law is, like nearly all academic canons, largely a matter of self-regulation. To the extent that this serves as an exhortatory guideline, I contend that it is nevertheless one that can be both effective and reasonably feasible in practice. Indeed, I believe it would be much easier to ask legal scholars to think in terms of evidence law than it would be to try to instill grounding in the disciplinary norms and methodologies of the historical profession, whose members spend years cultivating the expertise that applies to their work. Many legal scholars who need to analyze historical evidence or arguments might more easily be able to think in terms of evidence law than historical method, and I believe that we would end up with "better" lawyers' histories as a result.

In the area of scholarship, the argument that a rigorous application of evidence law could lessen our concern over the fact that advocates may offer competing historical accounts in the litigation context is applicable at the broadest, systemic level. Evidence law provides

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<sup>342</sup> See *supra* Part V.



that a neutral, “objective” arbiter—the court, comprised of judge and jury—will evaluate all of the proffered historical evidence and assess its credibility and persuasiveness in rendering the court’s interpretation of the past. Analogizing the court’s role in litigation to that of the broader scholarly academic community—including both legal scholars and historians—in judging the accuracy and persuasiveness of various interpretations, we can understand that historical arguments can make valuable contributions to understanding the law without necessarily sacrificing all disciplinary safeguards.

I must emphasize that I do not contend that it is permissible for legal scholars to shape their historical arguments in the light most favorable to their ultimate position on an issue. An academic thesis is most emphatically not a scholar’s “client.” We still may (as we usually do) end up with astoundingly different historical accounts from different legal scholars. However, this is not necessarily a bad thing. Just as the judge and jury evaluate historical arguments according to the law of evidence, the larger scholarly community can evaluate different claims and interpretations, offer competing hypotheses, synthesize various approaches, and move toward consensus or continue to debate legitimate differences. Thinking in terms of evidence law will help ensure that regardless of whether legal scholars disagree over history, the arguments offered will be evaluated for their reliability and their relevance to the legal issues at hand. Historians, furthermore, can contribute to this process.

As with subject-matter expert testimony in court, the possibility of competing scholarly accounts of the past does not mean that we must excise categorically all forms of historical evidence deployed in support of legal arguments simply because of the professional status or credentials of the interpreter. Professional historians may indeed be best equipped in the abstract to study and interpret history. But lawyers by nature must work with information from many different fields, ranging from the hard sciences and technology, to economics and social science, to culture and history. Because resolving questions about the past is central to the study and practice of the law, advocates and legal scholars necessarily will have to look to history at times. And, as Goldsmith and Vermeule point out, legal academic arguments can be examined, discussed, and aired out in the broader academic discourse.<sup>343</sup> Indeed, because of the nature of legal scholarship, with literally hundreds of academic journals engaging in continuous debate over the meaning of the law, it may even be more

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<sup>343</sup> Goldsmith & Vermeule, *supra* note 172, at 156.

likely in law than in other academic disciplines that poorly-done history will be exposed, discussed, and repudiated.

We still rely on individual scholars to behave ethically and to avoid offering false, fabricated, or tendentious historical evidence in support of a given position. But evidence law principles show that there can be some degree of systemic review for historical arguments made at law.<sup>344</sup> At a minimum, the risks inherent in allowing members of the legal profession to engage in serious historical inquiry are outweighed by the benefits gained from using history to inform the law. In a sense, asking scholars to evaluate historical arguments according to the standards of evidence law is no different from applying professional norms and ethics to scholarship in any other area of legal scholarship. And these norms are, of course, already practiced widely. A simple matter of increasing the consciousness of the standards of evidence when working with history will likely have a salutary effect.

## VI. CONCLUSION

While the normative debates over the issue are interesting and useful, the use of history by lawyers, judges, and legal scholars is on the rise and shows no signs of going away. The law is intimately entwined with history, and the current dominance of historical interpretations in legal interpretation and in public debates about law underscores our collective need to look to the past to explain our current law and politics. The sociology of the professions shows how this trend poses challenges to traditional disciplinary jurisdictions over production and evolution of historical and legal knowledge. The canons of objectivity and advocacy seem to posit an additional problem for using history in law. In practice the law of evidence allows us to account for differing professional standards and offers us a workable, if imperfect, system for responsibly evaluating historical evidence offered by the parties or by expert witnesses.

The best practice for courts would be to use court-appointed historical experts in addition to—but not to the exclusion of—those proffered by the parties. Additionally, lawyers and judges (as well as legal scholars) who give due attention to historians' methods will have a substantial advantage in offering, countering, analyzing, or evaluating historical evidence. If we invite historians to "scold the law scholars for doing law-office history, for 'getting it wrong,' ironing out context and discontinuity to muster the past into present ser-

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<sup>344</sup> See Martin, *supra* note 7; *supra* Part V.C.

vice,”<sup>345</sup> we will end up with better and more accurate history in the law. Legal scholars should strive to understand and adhere to historians’ professional norms when doing historical analysis. Legal advocates should be aware of the historians’ standards in making their historical arguments both ethically and effectively, yet adhere vigorously to the law of evidence in crafting legal arguments. And courts should know these standards and apply them rigorously under the rules of evidence to evaluate historical claims.

Perhaps the best approach for courts and for scholars is an imperfect, but workable, muddling through. I believe that looking to history to interpret and understand the meanings of law is both valuable and necessary. And I believe that there is indeed hope that we can promote the reasonable, reliable application of history to law. Regardless, we must recognize the reality: from the Supreme Court on down, and throughout the legal academy, many in the legal profession are “doing history” and will continue to do so. We should therefore be engaged across disciplines and with the public so that the undertaking of historical study can be done as competently and in as fully informed a manner as possible. Scholars and practitioners from both professions should continue their methodological dialogue and try to suggest and evaluate other ways in which we can better accommodate professional standards when history is applied to law.

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<sup>345</sup> Forbath, *supra* note 103, at 1917.