JUST WHAT ARE YOU TRYING TO PROVE?

THE RELEVANCE OF HISTORY TO CONSTITUTIONAL THEORY AND PRACTICE[†]

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INTRODUCTION

It is my great pleasure to be included on this series inspired by Jack Balkin's forthcoming book, *Memory and Authority: The Uses of History in Constitutional Interpretation*.[1] When he invited me to participate, Jack stressed that we might use his book as a jumping-off point to express our own views, and I am taking him at his word. This Essay builds upon the framework that Larry Solum and I developed for our recent article, *Originalism After* Dobbs*,* Bruen*, and* Kennedy*: The Role of History and Tradition*, which appeared in the *Northwestern Law Review*.[2]

I. WHAT EVIDENCE PRINCIPLES TEACH ABOUT THE RELEVANCE OF HISTORY

Let me begin by tweaking the title of our program from "The Uses and Misuses of History" to "The *Relevance* of History to Constitutional Theory and Practice." I do so because it allows me to apply my experience as a criminal trial lawyer. When a lawyer seeks to introduce an item into evidence, opposing counsel might respond, "Objection, your Honor, as to relevance." To rule on this objection, the trial judge might then turn to the proffering lawyer and ask, "Counsel, just what are you trying to prove?"

The only way the trial judge can assess the relevance of the evidence is to know what the party intends to prove by its introduction. What fact or facts does this evidence make more or less likely to be true? If the evidence makes more or less likely a fact that is material to the case at hand, then it is deemed to be *relevant* and admissible—absent some other objection to it.[3]

To assess how history is relevant to constitutional theory and practice, we need to specify just what that history is being offered to prove. Just what does that history make more or less likely to be true, and how is the truth of that fact material to either constitutional theory or practice? Or, to return to the actual title of this program, history is properly *used* to make more or less likely a fact that is material to the proper interpretation or application of the Constitution. Conversely, history is being *misused* if it fails to make more or less likely any fact that bears on the proper interpretation or application of the Constitution.

This regression to my trial lawyer days reveals that the question of the "uses and misuses of history" can only be answered if one has a theory of constitutional interpretation or application. When historians or law professors present to their readers some historical facts, we cannot assess whether history is being used or misused solely by looking at the facts themselves. The facts themselves are just facts. We can only answer this question in relation to a theory

[1] JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION (2024).

[2] *See generally* Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs*,* Bruen*, and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. 433 (2023).

[3] *See* Fed. R. Evid. 401.

of constitutional interpretation or application. Whenever historians or law professors are making some historical claim, to decide whether they are using or misusing history, we must ask, "Just what are you trying to prove?"

In this way, the proper use of history is deeply theory dependent. This is true regardless of whether or not the historian or law professor claims to have a theory of constitutional interpretation and application. However theory-phobic a particular scholar may be, there's no avoiding the question of "just what are you trying to prove," inevitably prompting a theoretically-informed answer.

In sum, like any evidence being proffered at trial, the introduction of historical evidence into a debate over the proper interpretation or application of the Constitution is not self justifying. Historical evidence must be relevant—it must make a fact at issue in the inquiry more or less likely to be true—by which I mean, support reading the Constitution a certain way and not another.[4]

This helps explain why the historical debates surrounding the Constitution can seem so perennially intractable. Many historians are drawn to history because of their love of historical research, and may find theories of interpretation to be uninteresting and even irrelevant to what they do. For their part, many law professors are most comfortable when making factual claims about the meaning of previous and pending cases, or even when making normative claims about their proper outcomes. They too may find wrangling over theories of constitutional interpretation to be like debating the number of angels that can dance on the head of a pin.

My first, and main point, then, is that historians and law professors who are theory-phobic are whistling past the graveyard. Whether they like it or not, their respective enterprises are theory dependent. And the relevant theory can get complicated.

II. THE PROPER USES OF HISTORY WITHIN ORIGINALISM

In our article *Originalism After* Dobbs*,* Bruen*, and* Kennedy*: The Role of History and Tradition*,[5] Larry and I attempt to unpack these complexities without taking any sides in these theoretical debates. Both he and I are Public Meaning Originalists, but our analysis does not assume the correctness of that theoretical stance. In our article, we identify the proper role of history for both Public Meaning Originalism, the most dominant form of originalism among both constitutional scholars and judges, and Constitutional Pluralism, the most dominant form of non-originalist living constitutionalism.[6]

We also consider a new alternative, which we call Historical Traditionalism.[7] In our article, we consider the possibility that in its recent decisions in *Dobbs v.*

[4] *See id.*

[5] *See generally* Barnett & Solum, *supra* note 2.

[6] *See id.* at 445-55.

[7] *See id.* at 452-54 (defining "historical traditionalism" as theory that "[c]onstitutional decisions and doctrines are justified only if they are deeply rooted in the history and traditions

Jackson Women's Health Organization,[8] *N.Y. State Rifle and Pistol Association v. Bruen*,[9] and *Kennedy v. Bremerton School District*,[10] the Court has adopted Historical Traditionalism as a new theoretical alternative to originalism and living constitutionalism.[11] Because we conclude that the Court has not done so, I will set aside that theory in these remarks.[12] I will also set aside our discussion of *tradition*, which we distinguish from history,[13] because our topic today is on the use and misuse of *history*. (Were the existence of a tradition material to constitutional interpretation, however, history could be used to identify and establish that existence.)

Let me begin with the relevance of history to Public Meaning Originalism. We define Public Meaning Originalism as a commitment to three propositions. The *Fixation Thesis* claims that "[t]he original meaning of the constitutional text is fixed at the time each provision is framed and ratified"; the *Public Meaning Thesis* claims that "[t]he best understanding of original meaning is the communicative content of the constitutional text that was accessible to the public at the time each provision was framed and ratified"; and the *Constraint Principle* claims that "[c]onstitutional practice ought to be consistent with, fully expressive of, and fairly traceable to the original public meaning of the constitutional text."[14] The Fixation and Public Meaning Theses are empirical claims, while the Constraint Principle is a normative claim.[15]

In addition, Larry and I discuss the interpretation-construction distinction. *Constitutional interpretation* is "[t]he activity that discerns the meaning (communicative content) of the constitutional text."[16] By contrast, *constitutional construction* is "[t]he activity that determines the legal effect of the constitutional text, including the decision of constitutional cases and the crafting of constitutional doctrines."[17] This is important because history can play a role in faithfully applying constitutional meaning to particular cases and controversies.

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of the United States, including (1) longstanding and continuous historical practice, (2) longstanding and continuous precedent, or (3) longstanding and continuous customs and social norms").

[8] 597 U.S. 215 (2022).

[9] 597 U.S. 1 (2022).

[10] 597 U.S. 507 (2022).

[11] *Id.* at 455-78.

[12] *See id.* at 477 ("[T]he opinions in these cases contain scant evidence of the emergence of a new approach to constitutional interpretation that would supplant either Public Meaning Originalism or Constitutional Pluralism along the lines of what we have called 'Historical Traditionalism.'").

[13] *Id.* at 442-445 (defining "tradition" in constitutional discourse).

[14] *Id.* at 436-37.

[15] *Id.* at 479-80.

[16] *Id.* at 437.

[17] *Id.*

When it comes to identifying the communicative content of the constitutional text, we see three distinct roles that history should play. First, originalist judges and scholars should consider all of the relevant evidence provided by *the constitutional record*.[18] Such evidence includes "the general historical background in which provisions were framed and ratified, records of the framing or drafting of the relevant provisions, public debates about the relevant provisions, ratification debates, early implementation of the relevant provisions, and early judicial decisions interpreting the provisions."[19] When reviewing this evidence, jurists and scholars must avoid the temptation to "cherry-pick[] evidence that favors a preferred outcome," and instead "consider all of the relevant evidence."[20]

Originalist judges and scholars should also consider *historical linguistics*, which we define as the "direct evidence of patterns of usage during the framing and ratification of the relevant constitutional provisions."[21] Such direct evidence can be uncovered by tools such as *corpus linguistics*, which analyzes large databases to identify the semantic meaning of relevant words and phrases through their patterns of usage.[22]

Finally, originalist scholars should engage in *originalist immersion*.[23] These scholars "should acquire deep knowledge of the historical period in which a constitutional provision was framed and ratified, either through primary sources or through secondary sources that report the results of such immersion."[24]

When applying this framework, just what are Public Meaning Originalists trying to prove? They are trying to identify the communicative content of the text of the Constitution—the information communicated by the text to the general public at the time it was enacted. Any historical account that makes one or another meaning more or less likely to be true is relevant to an Original Public Meaning originalist.

When it comes to the *Constraint Principle*—that is, the normative claim that constitutional actors *ought* to adhere to the original public meaning of the text—history is relevant in a different way.[25] Here, what we call *historical narratives* assume particular importance.[26] By historical narratives, we mean "the construction of stories that recount the origins, purposes, development, or consequences of constitutional actions and events."[27] While these stories are

[18] *Id.* at 439.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *See* TONY MCENERY & ANDREW WILSON, CORPUS LINGUISTICS 1-2, 30-33 (2d ed. 2001) (defining corpus linguistics and explaining centrality of databases).

[23] Barnett & Solum, *supra* note 2, at 439.

[24] *Id.*

[25] *See id.* at 437.

[26] *See id.* at 440.

[27] *Id.*

relevant to the identification of original meaning, they are also relevant to the normative claim that this original meaning should be followed.

Historical narratives can serve a normative function insofar as they "elicit a moral or legal evaluation of . . . constitutional action[s] or event[s]."[28] Such narratives can be either "vindicating" or "debunking."[29] A vindicating narrative elicits a positive evaluation—for example, "a narrative that explained that the Nineteenth Amendment was a response to a movement for the fundamental human rights of women would be a vindicating narrative."[30] By contrast, a debunking narrative elicits a negative evaluation—for example, "a narrative that tied the Electoral College to the interests of slaveowners would be a debunking narrative."[31]

In my experience, to the extent that historians or legal scholars are seeking to bolster or critique originalist claims, they are generally not seeking to identify the original communicative content of the text—though some surely are. Instead, they are primarily concerned with bolstering or undermining the normative case for adhering to that meaning. This is an entirely appropriate use of history in constitutional theory because historical narratives are relevant to the moral claim that constitutional actors *ought* to adhere to the original meaning of the Constitution.

But it is important that these scholars not confusedly claim that this, their *normative* project, is a *descriptive* inquiry into original meaning. Historians or law professors who use historical narratives for this purpose are not identifying the meaning of the text. They are contesting whether that meaning ought to constrain constitutional actors.

Before turning to Constitutional Pluralism, let me identify two more proper uses of history within originalism. These concern the use of history while engaged in constitutional construction as distinct from constitutional interpretation—that is, the activity of giving legal effect to the original meaning of the text, often by the development of constitutional implementing doctrines. Here, history can play at least two roles.

First, Evan Bernick and I have argued that implementing doctrines—that is, what constitutes constitutional *law*—should be *faithful* to the original meaning of the text.[32] This requires adhering to the original functions, ends, objects, purposes, or problems for which the text was adopted—as distinct from the purposes of a legislator or judge applying the text today.[33] We call these original functions, ends, objects, etc. the "spirit" of the text, as distinct from its "letter."[34]

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[28] *Id.* at 441.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *See* Randy E. Barnett & Evan D. Bernick, The Letter and the Spirit: A Unified Theory of Originalism, 107 GEO. L.J. 1, 35-36 (2018).

[33] *Id.*

[34] *See id.*

The spirit of the text is identified by looking to much the same kinds of historical evidence that establish the communicative content of the text. Constitutional decision-makers who implement the letter of the text—its original public meaning—consistently with its spirit are being faithful. Decision-makers who implement the letter, or fail to do so, in pursuit of their own objectives or purposes are being unfaithful.[35]

Second, a particular implementing doctrine could itself consist of some sort of historical inquiry. This is one interpretation of Justice Thomas's requirement in *Bruen*: to be a reasonable regulation of the right to bear arms, a proposed gun law must be analogous to some historical regulation at the time the Second Amendment was adopted.[36] In other words, his opinion can be read to adopt a "historical analogues" test as an implementing doctrine to assess the constitutionality of gun laws.[37]

Larry and I concede this is a plausible reading of Justice Thomas's opinion in *Bruen*. But, upon a close inspection of his reasoning, we contend that Justice Thomas is seeking historical analogues not as an implementing doctrine, but rather to identify the original contours or content of a preexisting right to bear arms.[38] In short, rightly or wrongly, Justice Thomas is using history as a means of proving the original meaning of the right in the text.

III. THE ROLE OF HISTORY WITHIN CONSTITUTIONAL PLURALISM

With these suggestions for how history is relevant to originalist interpretation and construction, before closing, I now turn briefly to the role of history within Constitutional Pluralism. Constitutional Pluralists, understood as a subset of living constitutionalists, think that "[c]onstitutional doctrine and the decision of constitutional cases should be determined by . . . a finite set of the modalities of constitutional justification."[39]

The modalities theory of constitutional interpretation was innovated by Philip Bobbitt, who identified six modalities of constitutional interpretation.[40] In *Memory and Authority*, Jack expands the number of modalities that figure into

[35] For an extended application of this approach to the Fourteenth Amendment, see RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE 14TH AMENDMENT: ITS LETTER & SPIRIT (2021).

[36] *See* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 30 (2022); Barnett & Solum, *supra* note 2, at 471.

[37] *See* Barnett & Solum, *supra* note 2, at 469-71.

[38] *Id.* at 469.

[39] *Id.* at 451.

[40] *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12-13 (1991) [hereinafter BOBBITT, CONSTITUTIONAL INTERPRETATION] (identifying modalities as historical, textual, structural, doctrinal, ethical, and prudential); *see also* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1984) (introducing theory of modalities).

constitutional discourse and explains how and why they matter.[41] He provides this list:

Arguments from *text*;
Arguments about constitutional *structure*;
Arguments from constitutional *purpose*;
Arguments from *consequences*;
Arguments from *judicial precedent*;
Arguments from *political convention*;
Arguments from the people's *customs* and lived experience;
Arguments from *natural law or natural rights*;
Arguments from *national ethos*;
Arguments from *political tradition*; and
Arguments from *honored authority*.[42]

Each of these modalities of constitutional argument, he explains, "involves a distinctive form of justification. Each offers a different kind of reason why people should accept a particular reading of the Constitution. And each modality has an account of why that form of argument is or should be valid in American legal culture."[43]

Pluralists believe that constitutional doctrines and decisions that are supported by at least one modality are reasonably justified, but no modality is privileged over the others.[44] Therefore, the constitutional text can be overridden by arguments from the other modalities. Additionally, Progressive Constitutional Pluralism uses modalities of constitutional argument to "allow judges to adopt novel constitutional constructions in response to changing values and circumstances."[45]

Constitutional Pluralism, however, need not be progressive. It can also be conservative by "elevat[ing] the backward-looking modalities, combining history and tradition with both the original meaning of the constitutional text and precedent."[46] Justice Alito's opinion in *Dobbs*, we contend, is an example of Conservative Constitutional Pluralism.[47]

To the extent that a Constitutional Pluralist considers text one among several modalities of constitutional argument—and also accepts the Fixation Thesis that the meaning of the text is its communicative content when enacted—history plays all the same roles here as it does in originalism. The only difference is that

[41] *See* BALKIN, *supra* note 1, at 17-21.

[42] *Id.* at 18-21.

[43] *Id.* at 21-22.

[44] *See* Barnett & Solum, *supra* note 2, at 451.

[45] *Id.*

[46] *See id.*

[47] *See id.* at 476 (concluding Justice Alito's opinion in *Dobbs* "is best understood as operating outside an originalist framework but within a constitutional pluralist framework—although the gravitational force of originalism likely played a role in the background").

the text is not necessarily binding on constitutional actors but is just one of several modalities to be consulted.

Furthermore, history and tradition can serve as its own modality of constitutional argument. Bobbitt, for example, listed history as a separate modality than that of text.[48] In contrast, Balkin views history as potentially relevant to any or all of the eleven modalities he identifies, rather than as a modality in and of itself. This is consistent with my thesis here. For Jack, the eleven modalities are what history may be offered to prove.

CONCLUSION

Let me conclude by stressing the point with which I began. Identifying the proper uses and improper misuses of history is an entirely theory-dependent inquiry. You may not be interested in constitutional theory, but if you are employing history to address either the Constitution's meaning or its application, then constitutional theory is definitely interested in you. Whether you are doing it right, or doing it wrong, will all depend on just what you are trying to prove.

[48] *See id.* at 451 (citing BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 40, at 11-16).