

HISTORY FOR THE NON-ORIGINALIST

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It has always seemed a perversion of language to use a name to signify what something is not, rather than what it is.¹ A name is related, in some way, to understanding and to mastering, indeed to being human, as suggested by the Old Testament's delegation to man to name "every living creature."² Yet for those of us who believe that the meaning of the Constitution includes more than what any group of persons thought or intended in 1789, a name is an honor that has eluded us. We have long borne the stigma of identification by negative appellation. Whoever it was, who first used the term "non-originalist," she did us no favors. This non-name concedes a great deal to its negative referent, originalism. At one point, Professor Thomas Grey tried to help out by introducing the term "noninterpretiv[ist],"³ but that has ultimately turned out even less charitably: not only are we thought not to care much what the Constitution *originally* meant, but now it appears we are not concerned with interpreting the document at all!

The issue of appellation is not problematic in name only. It carries over into our very essence, perhaps even contributing to a widespread defensiveness about what we think the Constitution is. The insecurity runs rampant through the pages of constitutional theory literature as, one by one, we have tried to construct an affirmative definition of constitutionalism that exists without use of the word "not."

The members of the Federalist Society are very proud of their love of originalism. Even though there is no unanimity about what originalism actually means,⁴ or what it calls upon judges to do in a

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1. The annoying, but persistent, appellation "non-dairy creamer" comes to mind. Just what *is* that stuff, anyway?

2. *Genesis* 2:19-20 (King James).

3. Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 *STAN. L. REV.* 703, 715 (1975); see also JOHN HART ELY, *DEMOCRACY AND DISTRUST* 1 (1980).

4. See CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* 26 (2001) ("Originalism comes in a bewildering variety of colors and flavors.").

close case, its adherents gain a great deal by sharing one name that offers the appearance, if not the reality, of agreement. They also gain the strategic advantage of claiming, by virtue of their name alone, the baseline from which departures must be justified.⁵ By this reasoning, it is no wonder that the Anti-Federalists—another group with a derivative identity—never quite captured the high ground in the framing of the Constitution, even though many of their ideas were well-accepted and had an important influence on the substance of the political outcomes at the founding. They did not have a name to call their own. And so it is to be a non-originalist at a Federalist Society Symposium.

The topic of this panel, “Originalism and Historical Truth,” adds to the conundrum. Can the non-originalist have anything to say about “originalism and historical truth?” Does she necessarily disavow historical truth by claiming to be a non-originalist? Does she compromise non-originalism by claiming an interest in historical truth? That is the issue that I would like to address: not so much the perils of originalism itself, which have had ample attention in the literature,⁶ but more the implications of this particular predicament for a non-originalist like me. Why does the non-originalist care about historical truth?

It is today very popular to level criticism against legal academics, practitioners, and judges for their (our) irresponsible use of history by disregarding professional standards that ought to guide historical inquiry.⁷ Some of that critique is no doubt extremely helpful and

5. See LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 137-38 (1996) (describing the allure of originalism and liberals' failure to offer a “principled alternative”).

6. See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365 (1990); H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987).

7. See, e.g., Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002) (criticizing legal scholars' failure to adhere to professional methodological standards applicable to empirical research); Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 525-26 (1995) (“constitutional discourse is replete with historical assertions that are at best deeply problematic and at worst, howlers. . . . [H]abits 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.”); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 155 (“from a professional point of view, most, if not all, of [the Supreme Court’s] recent historical essays are very poor indeed. . . . Too often they reach conclusions that are plainly erroneous. More often they state as categorical absolutes propositions that the historian would find to be tentative, speculative, interesting, and worthy of further investigation and inquiry, but not at all pedigreed historical truth.”).

deserved, and will ultimately improve the quality of legal scholarship. But only with a theory that explains why we care about history in the first place and how the past fits into our view of the appropriate manner for interpreting the Constitution, can we even begin to address the methodological questions regarding how to be appropriately rigorous in the use of historical evidence in furtherance of that theory. Our conclusions about why we look to history could support a defense against the criticism for certain uses of history that appear irresponsible if offered for one purpose, but may prove appropriate if offered for another. Indeed, “[t]he constitutional lawyer interested in history need not be a politically motivated scavenger of real historical work, but a different sort of creature altogether, with a special and not dishonorable function.”⁸

The employment of the notion of “historical truth” as a starting place for this discussion itself colors the inquiry in ways that may not be entirely helpful. Even the historians, who seek to follow a canon of objectivity in their quest, do not necessarily understand their quarry to be “truth.” Professional historians do not always set out to answer the kinds of questions that constitutional interpreters must resolve.⁹ And if truth is elusive even to historians, the constitutional theorists, whose quest of history is necessarily subordinate to a separate conclusion about constitutional meaning, face even higher hurdles. The use of the word “truth” bears a hint of the smugness for which originalism has been amply criticized. The kinds of questions that tend to arise in constitutional interpretation, and on which historical evidence might be helpful, tend not to be the kinds of questions that can aspire to truth. That the First Amendment was ratified in 1791 may be a matter of historical truth, for example. No one would argue that whether its ratifiers intended it to prohibit regulation of child pornography is a matter of historical truth.¹⁰ Decision about the applicability of the First Amendment is better described as a matter of historical judgment, based on the available evidence and extrapolations from it.

8. Cass R. Sunstein, *The Idea of a Useable Past*, 95 COLUM. L. REV. 601, 602 (1995).

9. *See id.* at 603 (acknowledging the difference between a constitutional lawyer and a historian in their conceptions of role and approaches to historical interpretation).

10. *See, e.g.*, JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 9-10 (1996) (“[H]istorians have little stake in ascertaining the original meaning of a clause for its own sake, or in attempting to freeze or distill its true, unadulterated meaning at some pristine moment of constitutional understanding. They can rest content with—even revel in—the ambiguities of the evidentiary record, recognizing that behind the textual brevity of any clause there once lay a spectrum of complex views and different shadings of opinion.”).

The issue of what relevance that judgment should have for an interpreter of the First Amendment more than 210 years later is even less a matter of truth or falsity. It is more appropriately considered to be a product of the very human task of applying political or constitutional theory to the evidence available. While I do not wish to denigrate the possibility, importance, or even accessibility of truth—historical or otherwise—I do suggest that its relationship to the process of constitutional adjudication has, at times, been misrepresented and its significance overstated. The originalists are the principal perpetrators of this overstatement.

Originalists and non-originalists alike must be prepared to defend their interest in history. For originalists, the “why history” question is relatively easy. They have several different rationales for following an originalist approach, and each of the rationales raises a need for historical truth to supply the evidence that the theory demands. The difficulty for originalists is “how” to ascertain the truth their approach needs, more than it is “why” to seek it in the first place. But their justifications for why history matters, assuming it is ascertainable, are by and large not available to the non-originalists.

For example, some justify their originalism on a command theory of constitutional meaning. They view the Constitution as binding today because it sets out a series of authoritative commands, much like a statute. One who understands the Constitution in this way must look to history for evidence of the exact scope of the command that was embodied in the constitutional text. This view posits that the Constitution is important to us because of the authority it carries. If one believes that the Constitution is followed today because it was laid down as the law and we are required to follow it like a code, exactly as the command was issued, then historical evidence about intentions is clearly relevant.¹¹ One must seek to discover the exact nature of the command. But the non-originalist necessarily rejects this basis for the Constitution’s authority. The non-originalist believes that the authority of the Constitution derives from sources other than its status as a legal command. Evidence of particular practices common at the time of the founding, or evidence suggesting what specific

11. All of this is complicated by the strong evidence, both historical and textual, that the framers’ intent actually was not to issue specific commands, but to set forth guiding principles through which an evolving free society could continue to flourish. See RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 7-12 (1996) (emphasizing the deliberate use in the Constitution of abstract concepts); Grey, *supra* note 3, at 715-17; H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 936 (1985).

applications would likely come to mind in the readers of the time, cannot provide dispositive evidence to the non-originalist on the command theory. If this kind of information is relevant to the non-originalist inquiry, it must be for another reason.

The same is true of the originalist's turn to history for the purpose of maintaining the Constitution's democratic legitimacy. The originalist might make the textual argument that only the text, understood as it was at the time of the ratification, was actually voted on by the people (those few who were permitted to vote), and therefore any rendering of the text that is not squarely within the zone of original understanding compromises the democratic legitimacy of the Constitution.¹² They do not seem bothered by the obvious intertemporal difficulty presented by this theory,¹³ or the fact that, by no stretch of the imagination, can the ratifiers of the Constitution be considered to be representative of anyone alive today. But I am not here to poke holes in the originalists' foundational claims. My aim is only to show that, however strong or weak their theory is, the textual justification for the use of history is unavailable to the non-originalist. The democratic, political, or moral legitimacy of the Constitution, for us, comes from characteristics of the Constitution that have little or nothing to do with the circumstances surrounding its original ratification. If we are to be interested in events or understandings prevailing at the time, we must have a different reason for our interest.

The same holds true for the pragmatic justification for reliance on history that is sometimes offered by originalists to justify their interpretative approach. Justice Scalia has argued that, even without the justifications provided by the notions of authority and democracy, originalism would still be the best choice because it cabins the discretion of judges.¹⁴ Using history as a dispositive interpretive factor ostensibly limits the opportunity of judges to change or skew the meaning of constitutional provisions.¹⁵ This goal, along with its animating fear that judges untethered to fixed historical meanings will run amok in reading the Constitution, is a highly important and central objective of originalists. History is a way to prevent creative

12. See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 2-8 (1971).

13. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

14. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U. CIN. L. REV.* 849, 863-64 (1989).

15. See KALMAN, *supra* note 5, at 137-38.

interpretation by judges. This rationale obviously depends on some objective claim to truth in historical inquiry. If it turned out that the process of discerning historical truth was itself as subjective and vulnerable to personal influence as the process of interpreting the Constitution without any historical constraint, then this principal bulwark of originalism—limiting the discretion and power of the unelected judiciary—would crumble. Once one makes the frightening acknowledgment that historical inquiry itself involves significant judgment,¹⁶ then one loses much of the comfort that this rationale is offered to provide.

Non-originalists, however, are unable to piggy-back on the pragmatic rationale for looking to history. Denial of originalism leads to a conclusion that history cannot save us from interpretation by judges, both good and bad. Depending on our particular brand of non-originalism, we either tolerate or celebrate the opportunity for judges to make judgments about the present meaning of the Constitution, thereby contributing to its evolution over time. We have concluded that the history of the founding period surely cannot, and perhaps should not, seek to be a substitute for the insight that must undergird any such determination.

This discussion suggests that the originalists must be absolutely rigorous in their quest for accuracy and legitimacy in their historical investigations. The accusations of selective use of history, “law office history,” incomplete history, sloppy or strategic methodology, and lack of candor are all devastating critiques of the originalists, because their justifications for using history depend on a claim of truth and objectivity. The tenets of originalism, which justify the use of history in the first place, necessarily require that the history be objective, accurate, and “true.” It is imperative, under the theoretical rationale, for the power of the past espoused by the originalist credo, that all aspects of the past be examined, that inquiry be complete and rigorous and honest, that conflicting evidence somehow be resolved, and that defensible answers be obtained. The difficulty of attaining that ideal has been, and continues to be, a serious problem for the originalists.¹⁷

The non-originalists face different problems. They do not need to

16. See Powell, *supra* note 6, at 691.

17. See Rakove, *supra* note 10, at 11 (describing conclusions of historians Leonard Levy and William E. Nelson that “the Supreme Court’s use of . . . ‘law office history’ and justificatory rhetoric . . . offers little reason to think that [originalism] can provide the faithful and accurate application of the original constitutional understandings its advocates promise.”).

worry about *how* they conduct historical research—at least not from the outset. The pertinent question for the non-originalist is *why* such research should have any bearing at all on the interpretative inquiry. What is its purpose? How does it advance the inquiry into the meaning of ambiguous constitutional provisions? This difficult question has not been adequately addressed in the literature. Although I cannot do it justice in these few pages, I do want to call attention to the puzzle and offer some suggestions about how to approach its solution.

The burden that the non-originalists have shouldered (in addition to being titularly challenged) is the charge, easy to make and not so easy to refute, that if one rejects originalism, then one abandons all hope of principle or discipline in constitutional interpretation.¹⁸ The charge suggests that if one does not take the founders' views as authoritative, binding interpretations of the Constitution, then one might look as much to Machiavelli as to Madison in interpreting the Constitution. The only alternative to originalism, it is said, is the unleashing of the dreaded "personal values" of the judges who will simply choose an outcome that they personally favor, rather than seeking the meaning of the document they are charged with interpreting. The originalist view divides the universe of all possible historical material into two categories: (1) history that reflects the intentions of the founders of the Constitution and its ratifying public regarding their understanding of the application of specific parts of the Constitution, and (2) everything else. If those who espouse the originalist view are correct, then the non-originalist should have no particular interest in constitutional history, and certainly no special interest in that as opposed to other available information.

And yet we do. The charge is not well founded, either descriptively or theoretically. The cleaving of history into two categories is, indeed, indefensible. Although I cannot speak for all forms of non-originalist constitutional theory, for there are countless variations, history does play a very important role for the non-originalists, yet without the controlling status that the originalists would give it. One does not need to be ruled by the past to believe that the present is the product of its lessons and its legacies.

History, of which our Constitution is a robust part, helps us

18. See Michael McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501, 1528 (1989) (book review) (arguing that "to apply an unintended meaning is no different from introducing a principle that has no textual basis whatsoever").

understand the people that we are collectively today, which is important if one understands the Constitution, affirmatively rather than negatively, as representing a balance that each generation must aspire to achieve in the relationship between the legitimate needs of the community and the freedom of individuals. Justice Harlan called it ordered liberty.¹⁹ That is the promise of the Constitution—not a command; not a blueprint; not a secret code to be deciphered. The balance that is ordered liberty—the ideal aspiration of a free society—is a fantastically complex matter, with many nuances and interrelationships arising in the context of the times. The Constitution helps us by providing some fixed points that the founders believed would always assist each generation's quest for the balance. Two such points, for example, are the age of the president²⁰ and the general allocation of powers among branches.²¹ They necessarily left some aspects of the balance that is ordered liberty to be developed by the judgment of each generation itself, through its representatives and its judges, lest they defeat their own project by imposing constraints that would not facilitate the achievement of this critical balance. The plans and aspirations for the Constitution that the founders drafted are not controlling on subsequent generations, but they are very much a part of the job of understanding the Constitution that we do have and what it means today.

Far from denigrating or rejecting the value of the founding generation, this approach honors the founders more than one that attributes to them a rigidity and an autocratic inclination that they would surely disavow. Perhaps it would be helpful to reflect on what we do know about our constitutional founders—the framers and those who participated in the ratification of the Constitution. We know that the founders of our nation were very much aware of the importance of history. They were well-versed in the history of ancient Greece, the Roman Empire, and all subsequent developments in European and British political history. Yet they saw that knowledge of history as a means to other ends, providing lessons to assist them in departures from the past that would mark them as the most enlightened statesmen of their generation. Their actions display as much a commitment to departing from history as to following it. Indeed, their place in history is marked by their own quest to find the best in the

19. *Poe v. Ullman*, 367 U.S. 497, 549 (1961) (Harlan, J., dissenting).

20. U.S. CONST. art. II, § 1.

21. U.S. CONST. art. I, § 1; U.S. CONST. art. II, § 1; U.S. CONST. art. III, § 1.

history of western civilization while not being bound to repeat its mistakes. For example, they took much from the principles of democratic governance developed in ancient Athens, but they saw, too, that all prior democracies had eventually weakened and failed. They exercised critical judgment in looking to their own past, taking what they saw as the good and seeking to improve on what they saw as the bad. The same could be said of the principles of liberty for which their own homeland, England, was renowned. Yet they sought to avoid the abuses and pitfalls that they had seen through the development of a new understanding of rights and separated powers. These realizations led to the new design of a republic unlike any in prior times. An honest look at those who created and ratified the Constitution requires an acknowledgment that they valued history for its contribution to their own wisdom, theory, and judgment. It did not shackle them. Rather, it inspired and enlightened them in the forward-looking quest for the right path for their own generation. No one has successfully offered a plausible reason why today's scholars should approach their work in a spirit so inimical to the founders' own.

The founders' own spirit would suggest that they should serve as exemplars of the principles that produced our constitutional government, providing us with guidance and insight into who we are as a nation,²² with no corresponding need to restore us to who we were or who we might have been at another moment in time. Non-originalism asks how the balance that the founders sought to achieve can be comprehensively understood in the particular forms in which it is challenged in current times. That question requires an understanding of the society of which we are all a part, which, in turn, requires some knowledge of constitutional and societal history. Only by looking at our history—in revolutionary times as well as subsequently, perhaps even previously—can we hope to gain a sense of what values must be credited in striking the balance of ordered liberty for our own times. Madison is a central part of that history in a way that Machiavelli is not, and his contributions to the analysis are correspondingly greater.

It is true that the founders of our nation may have some special contribution to make to an inquiry because they were particularly talented, trained, and committed to the principles that our Constitution

22. See Rebecca L. Brown, *Tradition and Insight*, 103 *YALE L.J.* 177, 214-21 (1993) (describing how tradition and history can be used as a basis for insight into our Constitution).

seeks to carry forward. But even there, we must be discerning in our reliance on the founders, because their expertise is more enduring in some areas than in others.²³ They demonstrated wisdom and acuity in predicting how government structures could counteract enduring human frailties such as corruption or avarice. Their insights are still in keeping with modern experience and contemporary principles. Yet the founders could hardly be viewed today as experts on all matters, including human liberty. For example, their generation was able to reconcile belief in political liberty with the holding of slaves.²⁴ No one today could maintain that understanding of liberty. This disparity does not speak so much ill of our eighteenth-century forebears, as it speaks well of the environment they created in which societal principles such as liberty could freely mature and evolve. The disparity does remind us that blind acceptance of the particular instantiations of a principle that may have seemed plausible or defensible to great political leaders does not necessarily aid us in living up to those leaders' more general aspirations for future societies to decide on the propriety of principles for themselves. It shows us that expertise is no more promising as an excuse to avoid critical judgments of history than any other. We must judge the value of even the framers' expertise as we interpret the Constitution for our own times.

In constitutional interpretation, the history employed is only as good as the judgment of the interpreter. "Historical truth" is not a concept that carries any independent meaning in this setting. History will necessarily be a jumble of ideas, conflicting events, and ambiguous political acts. Just imagine a historian trying to figure out what the American people of 2000 thought about the principles implicated in the debate over a right to abortion. What would be the historical truth there? That the supreme law of the land has recognized abortion as a fundamental right, protected at the highest level along with the greatest political rights, such as the right to vote and the right to speak freely? Or that many people disagree with this holding and seek, at every political level, to reverse this pronouncement? Where is the truth? The truth is that in a hundred

23. Powell, *supra* note 6, at 664-65 (noting the "(almost?) universal recognition that the vast majority of contemporary constitutional disputes involve facts, practices, and problems that were not considered or even dreamt of by the founders.").

24. See generally EDMUND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* (1975) (arguing that slavery played an important role in the understanding of freedom during the revolutionary era).

years an interpreter of these events will have to use informed judgment to single out trends, salient views, and representative acts that she believes best reveal the temper of these times, properly understood from the perspective of the values of her own century. No doubt the results of that inquiry will be very different from anything we would write today, whatever our views on the issue. It would be incorrect for us to think that our view of the past has any greater hope of determinacy or truth.

Nor should it.²⁵ If we understand the purpose of history to be the education of the interpreter regarding the various elements that go into a judgment about the balance that the American people strike between liberty and government control, then history is just a means to the end of judgment. It will be the interpreter's job to decide which strands are the more deserving of carrying forward and are more in keeping with the highest aspirations of the polity. In just this way, many of our less noble practices, such as discrimination and persecution, have already failed to stand the test of judgment through time. Maintaining the balance is the best way we can show our fidelity to the framers of our Constitution and the plan that they embodied in the written words of the document.

That is why accusations of selectivity or lack of historiographical rigor are not necessarily fatal to the non-originalist, as they are to the originalist. The non-originalist's use of history does not claim absolute objectivity, comprehensiveness, or determinacy. Rather, it searches (of course, with obligations to honesty and candor) for insight and edification. It necessarily rejects certain aspects of history—even "true" aspects—as not in accordance with the best traditions of our constitutional aspirations. It appropriately relies on the compilation and interpretative work of even controversial historians to help provide insight into the founding period that can come only after comprehensive study impossible for the non-historian. It determines that certain historical patterns and traditions are worthy or more nearly correct in hindsight, while others are not. It recognizes that the Constitution is a document about politics and ideas, which require some engagement for understanding and

25. See also Jack Goldsmith & Adrian Vermeule, *Empirical Methodology and Legal Scholarship*, 69 U. CHI. L. REV. 153, 154 (2002) (arguing, in a slightly different but related vein, that law is different from purely empirical disciplines because it is "professionally and practically involved in the business of courts and other governmental institutions that must constantly reach decisions despite profound empirical uncertainty.").

meaningful implementation.²⁶ As Jack Rakove put it, the debate over constitutional meaning “is very much about a specific moment in history but is not about history alone.”²⁷

Thus, while I would certainly not encourage lack of rigor or care or objectivity in the project of considering constitutional meaning, the project is, by definition, a form of art, not of nature, and is much richer than the simple (although difficult) search for some historical answer. It can afford to be more impressionistic and to contain more of the interpreter than can a project claiming to seek some sort of external “truth.” Such interpretation is a good thing for a democracy, for the non-originalist interpreter’s involvement in her own art is openly acknowledged, and the artist can be judged based on how well she performs the job, while the interpreter who claims to be merely discovering an external truth hides the personal judgments behind a claim of determinacy and does not take responsibility for the inevitable judgments that lie in the project of examining and reporting history.²⁸ “A judge who uses history as a substitute for moral and political judgment is either misusing history or misrepresenting it or both.”²⁹

Ultimately, history is as essential to the formation of judgment as experience is to attainment of reason—a syllogism with which the

26. Jack Rakove’s subtitle “Politics and Ideas in the Making of the Constitution” captures this thought nicely. See Rakove, *supra* note 10.

27. Rakove, *supra* note 10, at 22.

28. The debate in both historical and legal academic circles on the “republican revival” in understanding constitutional history is a good example of how making judgments explicit can lead to enlightenment and a constructive dialectic on both the descriptive and normative aspects of historical judgment. The historical works of Bailyn, Pocock and Wood, carried forward into legal academia by Sunstein and others, have led to a robust debate concerning the legitimacy of majoritarian dominance, for example, which has significant consequences for the interpretation of the Bill of Rights. See generally BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967) (arguing that ideology of the Revolution was dominated by classic republican values); J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975) (seeking to demonstrate that English and American tradition incorporated concepts of classic republican political values); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969) (describing evolution of political thought in the founding period as including a turn to the revolutionary idea of republicanism); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993) (arguing that the Constitution incorporates much of the classic republican political vision); see also Rakove, *supra* note 10, at 22 (“Surely J. G. A. Pocock, Bernard Bailyn, and Gordon Wood never imagined that their reconstruction of the early modern ideology of republicanism would provide the conceptual foundation upon which an entire school of legal scholars soon launched a ‘republican revival’ of their own, in the process fashioning an originalism of the communitarian left to challenge the originalism of the new (and Republican) right.”).

29. Eisgruber, *supra* note 4, at 135.

framers of the Constitution were very familiar.³⁰ But it is the judgment, like reason, that should be the focal point of debate and disagreement concerning the values of the polity on the centrally important question of constitutional balance. History should contribute “as servant, not rival, to justice.”³¹ By acknowledging that the consideration of history is not a mechanical exercise, we make it clear that some people will do it better than others and that some will be more persuasive than others. Who the judge is will matter, and each judge will be accountable for the judgments that she makes in determining how to interpret the past when striking the balance that the Constitution prescribes. That is the debate in which a democracy should always be engaged. But at the end of the day, judgment is the only truth we have. Neither originalists nor non-originalists can escape that. Maybe it is time we all got ourselves a new name.

30. See, e.g., JOSEPH J. ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION* 61 (2000) (noting the importance of David Hume to the constitutional framers); MORTON WHITE, *PHILOSOPHY, THE FEDERALIST AND THE CONSTITUTION* 14-17 (1987) (describing Hume’s view, influential to Madison and Hamilton, that experience is essential to all types of reason, including even what some describe as *a priori* reason).

31. Eisgruber, *supra* note 4, at 127.

