

THE “ORIGINALISM IS NOT HISTORY” DISCLAIMER: A HISTORIAN’S REBUTTAL

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In the *Cleveland State Law Review*’s symposium issue—“History and the Meaning of the Constitution”—both Lee Strang and Scott Douglas Gerber issue the disclaimer that their competing strands of originalism are not history,¹ and that they therefore do not suffer from the problems generally associated with history-in-law.² It is a disclaimer that a number of originalists make—particularly new originalists. Michael Rappaport, for one, distinguishes a new originalist inquiry from a historical inquiry on the grounds that the former is an “investigation of legal meanings,” rather than an attempt to “understand the past to the full extent that a historian needs to.”³ Kurt T. Lash presents a similar line of argument, writing that new originalism is about identifying “historical *patterns* of usage, not historically *unanimous* usage.”⁴

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¹ Lee J. Strang, *Originalism’s Promise, and Its Limits*, 63 CLEV. ST. L. REV. 81, 98 (2014) (“[A]scertaining the Constitution’s original meaning exerts pressure on judicial competence . . . [and] judges are not historians—though, luckily, originalism is not history”); Scott D. Gerber, *Liberal Originalism: The Declaration of Independence and Constitutional Interpretation*, 63 CLEV. ST. L. REV. 1, 9 (2014). Gerber asserts that liberal originalism is “a theory [of constitutional interpretation] that identifies the relevant political theory by appealing to history . . . [and Supreme Court justices] should use history to identify the political philosophy of the American Founding and then decide cases in light of that political philosophy.” Gerber, *supra* note 1, at 9. Gerber further stated that “liberal originalism is grounded in *political theory*, rather than textualism or history.” *Id.* at 21.

² For some of the earliest criticisms of history-in-law, see Charles A. Beard, *The Act of Constitutional Interpretation*, 1 NAT’L LAW. GUILD Q. 9 (1937); Julius Goebel, Jr., *Constitutional History and Constitutional Law*, 38 COLUM. L. REV. 555 (1938); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119 (1965). For an expanded discussion of the problems associated with history-in-law, see PATRICK J. CHARLES, *HISTORICISM, ORIGINALISM, AND THE CONSTITUTION: THE USE AND ABUSE OF THE PAST IN AMERICAN JURISPRUDENCE* 5-28 (2014).

³ Michael Rappaport, *Gordon Wood on History and Originalism*, LIBRARY OF LAW & LIBERTY (Oct. 24, 2013), <http://www.libertylawsite.org/2013/10/24/gordon-wood-on-history-and-originalism/>.

⁴ Kurt T. Lash, *The Fourteenth Amendment, Original Meaning Originalism and How to Approach the Historical Record: A Response to David Upham*, LIBRARY OF LAW & LIBERTY

Stated differently, Lash's view is that new originalism is not about history, but rather is about recovering "the original meaning of the text . . . by investigating the historical usage of terms . . . to determine the likely understanding of a competent speaker of the English language."⁵

For those academics that have immersed themselves into originalist theory, the "originalism is not history" disclaimer is rather perplexing. First and foremost, the disclaimer contradicts what is arguably the central purpose of originalism—decoding the original meaning of constitutional text at a fixed point in time.⁶ One must also consider that a number of originalists have described an originalist inquiry as essentially being equivalent to a historical inquiry.⁷ What primarily distinguishes the two is that the former is conducted by a legal professional, while the latter is conducted by a historian. According to originalists, this difference is crucial because it prevents "dumb results."⁸ In the words of Randy E. Barnett: "Ask a historian what the meaning of a legal text is in history, and you know what, unless they are a trained lawyer they are not going to be able to tell you something that is very helpful about it. Historians' stock and trade is not legal interpretation. They are very bad at it."⁹

Still, despite originalism's historically-focused approach to constitutional interpretation, more originalists are issuing the "originalism is not history"

(Oct. 8, 2014), <http://www.libertylawsite.org/2014/10/08/the-fourteenth-amendment-original-meaning-originalism-and-how-to-approach-the-historical-record-a-response-to-david-upham/>.

⁵ *Id.*

⁶ This is commonly referred to as the "fixation thesis." See Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, SSRN (Feb. 3, 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2559701; see also Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 412 (2013) ("Originalism stands for the proposition that the meaning of a written constitution should remain the same until it is properly changed."); Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 647 (2013) ("According to the originalist model of authority, constitutional interpretations are legitimate to the extent that they are consistent with what is fixed at the time of adoption; they are illegitimate to the extent that they are not."); Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 377-78 (2013) (stating that originalists agree that the text "historically fixed" is at the heart of originalism); JOHN O. MCGINNIS & MICHAEL RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 117 (Harvard Univ. Press 2013) ("Originalist theories argue that the actual meaning of the Constitution is fixed as of the time of its enactment."); Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1372 (2009) ("The core of originalism is the proposition that text and history impose meaningful, binding constraints on interpretive discretion.").

⁷ See, e.g., David F. Forte, *The Originalist Perspective*, in THE HERITAGE GUIDE TO THE CONSTITUTION 21-26 (2d ed. 2014) (describing originalist inquiries largely in historical terms); ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 399-402 (West 2012) (conflating originalism with a historical inquiry into the Constitution).

⁸ Video: Randy E. Barnett et al., *Showcase Panel II: Textualism and Constitutional Interpretation*, THE FEDERALIST SOCIETY (Nov. 15, 2013), available at <http://www.fed-soc.org/multimedia/detail/showcase-panel-ii-textualism-and-constitutional-interpretation-event-audiovideo>.

⁹ Barnett et al., *supra* note 8, at 14:18.

disclaimer. The shift is seemingly intentional,¹⁰ and it seeks to shield originalism from the history-in-law criticisms of non-originalists and historians alike—particularly criticisms of the subjectivity problems associated with originalism’s practice.¹¹ The reality is that the past can never be recreated in its entirety to include the drafting, ratification, and early interpretation of the Constitution. This still holds true today whenever Congress proposes a new piece of legislation, debates its contents, submits amendments, and votes on its passage. Indeed, the content of the legislation, the video recording of the legislative debates, and the voting record survive for historical critique and analysis, yet still a historian can never fully recreate the collective or individual thought processes of each voting member. Even if one interviewed each and every member of Congress regarding the legislative process, the historical record would still be incomplete, because the historian can never fully gauge the ideological processes of the interviewee.¹²

Undoubtedly, the aforementioned scenario is the most ideal that a historian could hope for, as it offers the best means to employ the evidentiary record thoroughly, accurately, and objectively. This, in turn, contextualizes the past and provides the strongest foundation for historical reasoning.¹³ The more historical evidence that is available, the better one can recreate the past; however, copious amounts of historical evidence will not necessarily answer each and every historical inquiry. Dependent upon the question at hand, the pieces of historical evidence available may only retain a loose connection, therefore causing the historian to make broadly based assumptions about the past, which essentially facilitates mythmaking, rather than fact-finding.¹⁴

¹⁰ The author agrees that “originalism is not history,” given that originalist outcomes are often ahistorical. CHARLES, *supra* note 2, at 43-44. However, when originalists declare that “originalism is not history,” it is in order to shield originalism from historical criticism, and not necessarily to distinguish originalism from the practice of history-in-law.

¹¹ For some further discussion, see Buckner F. Melton, *Clio at the Bar: A Guide to Historical Method for Legalists and Jurists*, 83 MINN. L. REV. 377 (1998); Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court’s Uses of History*, 73 J. L. & POL. 809 (1997); CHARLES A. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* (Harvard Univ. Press 1969).

¹² For some discussion of the problems associated with recreating the past, even where interviews of the subjects in question are available, see JENNIFER RUTNER & ROGER C. SCHONFELD, SUPPORTING THE CHANGING RESEARCH PRACTICES OF HISTORIANS (Ithaca S+R 2012), available at <http://sr.ithaka.org/sites/default/files/reports/supporting-the-changing-research-practices-of-historians.pdf>, and *Principles and Best Practices for Oral History*, ORAL HISTORY ASSOCIATION (Oct. 2009), available at <http://www.oralhistory.org/about/principles-and-practices/>.

¹³ CHARLES, *supra* note 2, at 87-98; see also Jack Rakove, *Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism*, 48 SAN DIEGO. L. REV. 575, 575-600 (2011) (dissenting on contextual grounds to the original and semantic meaning of originalism).

¹⁴ For a broader discussion of the issues set forth in this paragraph, see Patrick J. Charles, *History in Law, Mythmaking, and Constitutional Legitimacy*, 63 CLEV. ST. L. REV. 23, 37-40 (2014).

More often than not, originalism presents this very objectivity dilemma.¹⁵ Methodologically speaking, originalism is essentially an attempt to synthesize copious amounts of unrelated historical evidence in search of a common thread—or, one might say, a usable past.¹⁶ Take for instance the Necessary and Proper Clause, where the drafting and ratification debates leave much unanswered. To fill in the historical void, originalists have turned to a myriad of evidentiary sources, including post-ratification discussions on the scope of the Necessary and Proper Clause, dictionary definitions of the words “necessary” and “proper,” the general usage and meaning of those words in common parlance at the time of the Constitution’s ratification, and even the transplanting of Eighteenth Century agency and administrative legal principles into the equation.¹⁷ Effort has also been expended in analyzing the Supreme Court’s early opinions concerning the Necessary and Proper Clause to determine original meaning.¹⁸ Ultimately, originalists have seized on anything they conceivably can to derive a rather limiting interpretation.

In the discipline of history, however, a different set of methodologies must be employed. As it applies to the Necessary and Proper Clause, an intellectual historical inquiry suggests that the leading legal minds of the late Eighteenth and early Nineteenth Centuries did not interpret the Clause quite so narrowly.¹⁹ These legal scholars include Chief Justice John Marshall, who wrote the authoritative opinions on the Necessary and Proper Clause in *United States v. Fisher*²⁰ and *McCulloch v. Maryland*.²¹ In essence, what differentiates a historical inquiry from an originalist inquiry is the methodological approach that each takes in recreating the past. The former requires that historical evidence be substantially and intimately related—and that it be contextualized—while the latter does not.

Originalists consider it acceptable to establish a casual connection between pieces of historical evidence to determine original meaning, original understanding,

¹⁵ For a discussion of the problems associated with originalism’s promise, see Eric Berger, *Originalism’s Pretenses*, 16 J. CONST. L. 329 (2013), and for a responsive discussion regarding originalism’s limits, see Strang, *supra* note 1, at 95-100.

¹⁶ Originalism often seeks to accomplish this by determining “public meaning” or “public understanding.” See Keith Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599 (2004); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002).

¹⁷ See, e.g., Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745 (1997); Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183 (2003); Gary Lawson, *Discretion as Delegation: The “Proper” Understanding of Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235 (2003); GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I. SEIDMAN, *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* (Cambridge Univ. Press 2010).

¹⁸ See, e.g., David B. Kopel & Robert G. Natelson, “Health Laws of Every Description”: *John Marshall’s Ruling on a Federal Health Care Law*, 12 ENGAGE 49 (2011).

¹⁹ John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045 (2014); CHARLES, *supra* note 2, at 13-16.

²⁰ 6 U.S. 358 (1805).

²¹ 17 U.S. 316 (1819); accord Patrick J. Charles, *Originalism, John Marshall, and the Necessary and Proper Clause: Resurrecting the Jurisprudence of Alexander Addison*, 58 CLEV. ST. L. REV. 529 (2010).

or public understanding. Given the objectivity and accuracy concerns that may be presented by this type of *ad hoc* historical analysis, it should come as no surprise that intellectual historians object to originalism outright.²² To the intellectual historian, it makes far more sense to rationalize from known historical truths.²³ In the words of Pulitzer Prize-winning historian Jack Rakove: “[T]he only possible way in which one could satisfactorily reconstruct the original meaning of a constitutional text must necessarily involve an essentially historical inquiry. Such an inquiry would have to take careful account of the sources, explaining how and why a document was drafted, debated, and finally approved. It would involve immersion in the kinds of sources that historians ordinarily use and would need to consider the array of purposes shaping their action.”²⁴

Until recently, the originalist response to this type of critique was to dismiss it as “history office law”; that is, that historians inquire into the meaning of the Constitution, yet neglect the distinctive aspects of the legal task at hand.²⁵ According to this originalist line of argument, historians are inept at constitutional interpretation because they are not trained legal professionals.²⁶ In other words, determining the original meaning of legal texts is a task better left to lawyers.²⁷ As I have detailed elsewhere, these types of originalist counterclaims are hypocritical and unsupported. They are the equivalent of proclaiming that less-than-factual information about the past produces better interpretive outcomes than an inquiry involving more factual information.²⁸

Enter the “originalism is not history” disclaimer. For all intents and purposes, this disclaimer shields originalism from any and all history-in-law criticisms, with the rationale being that originalism is about the interpretation of legal texts, rather than about correctly interpreting history. According to the disclaimer’s proponents, originalism does indeed employ historical documents to determine legal meaning—

²² See, e.g., Rakove, *supra* note 13; Saul Cornell, *The People’s Constitution vs. the Lawyer’s Constitution: Popular Constitutionalism and the Original Debate Over Originalism*, 23 YALE J. L. & HUM. 295 (2011).

²³ See Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 FORDHAM L. REV. 721 (2013); CHARLES, *supra* note 2, at 83-121.

²⁴ Rakove, *supra* note 13, at 580.

²⁵ See Gary Lawson, *No History, No Certainty, No Legitimacy...No Problem: Originalism and the Limits of Legal Theory*, 64 FLA. L. REV. 1551, 1559 (2012); Saikrishna B. Prakash, *Unoriginalism’s Law Without Meaning*, 15 CONST. COMMENT. 529, 534 (1998); Michael Rappaport, *History Office Law*, THE ORIGINALISM BLOG (Dec. 27, 2010), <http://originalismblog.typepad.com/the-originalism-blog/2010/12/recently-i-linked-to-this-op-ed-by-distinguished-historian-pauline-meier-the-piece-defended-justice-breyers-comments-on-the.html>.

²⁶ Michael Rappaport, *Historians, Originalists, and Pauline Maier*, LIBRARY OF LAW & LIBERTY (Aug. 17, 2013), <http://www.libertylawsite.org/2013/08/17/historians-originalists-and-pauline-meier/>.

²⁷ Randy E. Barnett, *Can Lawyers Ascertain the Original Meaning of the Constitution?*, THE VOLOKH CONSPIRACY (Aug. 19, 2013), <http://www.volokh.com/2013/08/19/can-lawyers-ascertain-the-original-meaning-of-the-constitution/>.

²⁸ Charles, *supra* note 14, at 32-34.

and often incorporates the larger historical record to bring clarity to that legal meaning—but originalism is in no way intended to serve as a substitute for the discipline of history. Originalism is about adhering to certain methodological rules and principles that will produce predictable and constraining results in the interpretation of legal texts—period.²⁹

To those unfamiliar with the longstanding originalism-versus-history debate, the “originalism is not history” disclaimer may prove sufficient; but to scholars who have witnessed originalism morph and transform over the years, the disclaimer is misleading. Consider originalist proponent Michael Rappaport’s explanation as to why originalism is not really history: “Originalism does not require too much of law professors. Originalist scholars can investigate the original meanings; they don’t need to fully understand the history the way that a historian needs to. Thus, they can practice, not really a form of history lite, but rather a subspecialty of history—an investigation of legal meanings.”³⁰

Here, despite Rappaport’s agreement with the “originalism is not history” disclaimer, he conceded that originalism is about history, even if history is just a subcontractor to legal interpretation.³¹ Lee Strang conceded the same when he wrote that “originalism’s fidelity to our *historically-conditioned* Constitution is in stark contrast to the core of non-originalism.”³² This also confirms that originalism’s use of history is what legitimizes the practice.³³ Ultimately, it is the power of history—not originalist methodologies—that drives the legal profession to incorporate originalist doctrine into legal memoranda, briefings, and judicial opinions.³⁴ In other

²⁹ For a comprehensive discussion of this point and of the application of originalism’s “fixation thesis,” see Solum, *supra* note 6, at 18-29.

³⁰ Rappaport, *supra* note 3.

³¹ *See id.*

³² Strang, *supra* note 2, at 93 (emphasis added).

³³ *See, e.g.*, Balkin, *supra* note 6, at 647. Balkin stated:

The originalist theory of authority I mentioned at the beginning of this Article asserts that current generations are bound by what was fixed at the time of adoption. History is relevant because it shows us what was fixed. People who make arguments from original meaning use history and study the historical record against the background of this model of authority. They view history through the lens of their task: discovering what meaning was fixed at the time of adoption. History that does not elucidate this question is ignored or treated as irrelevant, even though it may be quite relevant for other purposes.

Id.; *see also* Eric Posner, *Originalism: History vs. Law*, ERIC POSNER BLOG (Jan. 10, 2014), <http://ericposner.com/originalism-history-vs-law/>.

³⁴ *See, e.g.*, Michael McConnell, *The Role of Democratic Politics in Transforming Moral Convictions Into Law*, 98 YALE L.J. 1501, 1525 (1989) (writing that what makes originalism attractive is that it draws upon “the foundational principles of the American Republic—principles we can all perceive for ourselves and that have shaped our nation’s political character—and not the political-moral principles of whomever happens to occupy the judicial office”); Michael Rappaport, *Why is Originalism Appealing*, THE ORIGINALISM BLOG (Jan. 9, 2014), <http://originalismblog.typepad.com/the-originalism-blog/2014/01/why-is-originalism-appealingmike-rappaport.html> (stating that what makes originalism appealing is the “idea that a written law should have the meaning that it had at the time of its enactment seems extremely

words, it is originalism’s reliance on the past that makes it authoritatively attractive to the bench and bar.³⁵

Originalists are well aware of this fact,³⁶ which is why the “originalism is not history” disclaimer has yet to appear consistently in prominent originalist writings, including the briefs of originalist scholars that advocate an originalist position before the courts. At no point do these briefs distinguish originalism from history, nor do they divulge that originalist methodologies are dissimilar from their historical counterparts. If anything, the two are packaged and sold as indistinguishable. Take, for instance, the Supreme Court case *National Labor Relations Board v. Noel Canning, Inc.*,³⁷ where originalist arguments were presented in both the Brief of Originalist Scholars³⁸ and in the Brief of Constitutional Law Scholars,³⁹ which

intuitive and part of how we understand legislation and other written enactments . . . [and] [i]n my view, this intuitive reason primarily explains why originalism has a certain appeal across the spectrum and is why the ordinary person is usually an originalist”).

³⁵ See Amanda L. Taylor et al., *A Dialogue with Federal Judges on the Role of History in Interpretation*, 80 GEO. WASH. L. REV. 1889, 1896 (2012) (statement of Judge Jeffrey S. Sutton) (“[A]ll nine [Supreme Court] Justices care about the history . . . and of course a Justice who believes in originalism *must* know the history.”); A. Raymond Randolph, *Originalism and History: The Case of Boumediene v. Bush*, 34 HARV. J. L. & PUB. POL’Y. 89, 89 (2012) (“To interpret the Constitution in light of history, which is what originalism amounts to, you have to interpret history.”); Jeffrey S. Sutton, *The Role of History in Judging Disputes About the Meaning of the Constitution*, 41 TEX. TECH L. REV. 1173, 1180 (2009) (“If debates about the meaning of the Constitution do not turn on what the document originally meant, what should debates about the meaning of the Constitution turn on? . . . History grounds constitutional interpretation on the legitimate question . . . and on a legitimately debatable way of answering that question.”); see also Eric A. Posner, *Why Originalism Is So Popular*, NEW REPUBLIC (Jan. 14, 2011), <http://www.newrepublic.com/article/politics/81480/republicans-constitution-originalism-popular>; Tara Smith, *Why Originalism Won’t Die—Common Mistakes in Competing Theories of Judicial Interpretation*, 2 DUKE J. CONST. L. & PUB. POL’Y 159 (2007).

³⁶ This is a point many originalists concede whenever they self-identify a judicial opinion using the past in order to determine that a legal outcome is originalist in nature. Compare Steven Smith, *Hosanna-Tabor: Reviving the Right Question*, THE ORIGINALISM BLOG (Jan. 24, 2012), <http://originalismblog.typepad.com/the-originalism-blog/2012/01/hosanna-tabor-reviving-the-right-questionsteven-smith.html> (inferring that *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC* is an originalist opinion), with *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (relying on history—not originalism—to determine the scope of the First Amendment’s Establishment and Free Exercise Clauses); compare Michael Ramsey, *Yesterday’s Other Supreme Court Opinion*, THE ORIGINALISM BLOG (June 29, 2012), <http://originalismblog.typepad.com/the-originalism-blog/2012/06/yesterdays-other-supreme-court-opinionmichael-ramsey.html> (writing that *United States v. Alvarez* employs originalism at times), with *United States v. Alvarez*, 132 S. Ct. 2537 (2012) (citing to history and tradition—not originalism—to determine the constitutionality of the Stolen Valor Act).

³⁷ 134 S. Ct. 2550 (2014).

³⁸ Brief of Originalist Scholars as Amici Curiae in Support of Respondent, *National Labor Relations Board v. Noel Canning, Inc.*, 134 S. Ct. 2550 (2014) (No. 12-1281).

³⁹ Brief of Constitutional Law Scholars as Amici Curiae in Support of Respondent, *Noel Canning*, 134 S. Ct. 2550 (2014) (No. 12-1281).

consisted primarily of originalist proponents. In the Brief of Originalist Scholars, at no point was it presented that “originalism is not history.” Instead, the thrust of the Brief was that text, structure, history, and historical practice supported the Scholars’ originalist position.⁴⁰ Indeed, at one point, the brief distinguished a “well-considered reading of the Constitution’s text” from historical practice taking “twenty years or more” to interpret the Recess Appointments Clause,⁴¹ but this reads more as a “best historical evidence” argument than an “originalism is not history” disclaimer. The Brief of Constitutional Law Scholars also failed to distinguish originalism from history. The two disciplines were presented as one and the same in the Brief’s opening statement: “[I]n the absence of judicial precedent, disputes about the Constitution’s meaning often reduce to disputes about interpretive methods. The interpretive tools are familiar: constitutional text, structure, *historical context*, *early practice* (which bears on original meaning), *longstanding practice* (which constitutes nonjudicial precedent), and pragmatic consequences.”⁴²

To be clear, the point of this Article is that the “originalism is not history” disclaimer is a complete misnomer. Originalism is about history, through and through. Whether originalists draw from constitutional text, legal dictionaries, political pamphlets, books, manuscripts, correspondence, or other similar sources, originalism uses and applies historical evidence to determine legal meaning at a fixed point in time. Originalists would be far better suited by the issuance of an “originalism is not intended to be accurate history” disclaimer. This description would clarify to the reader that originalism does not concern itself with attaining historical accuracy, nor do originalist outcomes confer historical legitimacy.⁴³ Essentially, this disclaimer would illuminate that originalism is about the use of historical evidence to determine legal meaning—period—even if said legal meaning is more hypothetical than factual.⁴⁴

Indeed, by fully disclosing that originalism is not intended to be accurate history, the legitimacy of originalism as a constitutional theory will continue to be called into question by historians and non-originalists; but every theoretical approach to interpreting the Constitution is the subject of some form of criticism. The key problem with originalism—as is the case with all forms of history-in-law—is that the law requires outcomes.⁴⁵ Therefore, unlike historians, the bench and bar cannot forego making a historical determination simply because the evidentiary record is

⁴⁰ Brief of Originalist Scholars, *supra* note 38, at 9-34.

⁴¹ Brief of Originalist Scholars, *supra* note 38, at 22.

⁴² Brief of Constitutional Law Scholars, *supra* note 39, at 1 (emphasis added).

⁴³ CHARLES, *supra* note 2, at 44.

⁴⁴ Solum, *The Fixation Thesis*, *supra* note 6, at 26-27, 31-34 (confirming that the fixation thesis is more of a hypothetical inquiry into legal language as it is understood by the public at large, and not necessarily an inquiry into “legal content” or context).

⁴⁵ Melton, *supra* note 11, at 385 (“[D]isparity in the state of research tools and sources . . . is a principal reason why accomplished attorneys, judges, and law professors often turn out to be poor amateur historians. Another reason is the law’s emphasis on an analytical approach to the subject is in many ways not just different from, but the antithesis of, a historical approach.”); see also Joshua Stein, *Historians Before the Bench: Friends of the Court, Foes of Originalism*, 25 YALE J. L. & HUM. 101, 105 (2013).

lacking, incomplete, or indeterminate. The reality is that the law is history, history is the law, and determinations about the importance of the past must be made.⁴⁶

Herein rests originalism’s attractiveness to the bench and bar—it provides legal professionals with familiar tools to interpret historical texts. Ultimately, what originalists *should* be selling is that originalism provides the best means for the bench and bar to supplement the world of historical uncertainty. To assert that “originalism is not history” is to declare that originalism does not concern itself with history at all. However, by openly disclaiming that “originalism is not intended to be accurate history,” the underlying truth is disclosed—that originalism seeks to identify historical patterns, not historical truths.⁴⁷

In terms of doctrinal legitimacy, this disclaimer does little to undermine the core premise of originalism—that is, the fixation thesis and the constraint principle—for originalists may continue to assert that originalism is the only theory of interpretation that coincides with the Constitution’s “writeness.”⁴⁸ At the same time, however, this is originalism’s Achilles’ heel, because whenever originalists focus intently on constitutional text, the larger contextual aspects of the Constitution are set aside—or, at minimum, demoted—as subservient to the text.⁴⁹ This can be seen in a number of originalist examples, including the freedom of the press,⁵⁰ the foreign and immigration powers,⁵¹ armed carriage,⁵² and birthright citizenship.⁵³ In these examples, and in others, originalism’s commitment to textualism leads to results that contradict what a thorough historical inquiry provides.⁵⁴

Another concern with originalism moving forward is that it occasionally suffers from a lack of transparency. Should originalists replace the “originalism is not history” disclaimer with “originalism is not intended to be accurate history,” many of the misconceptions as to *what is* and *what is not* originalism will be corrected.

⁴⁶ Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897), reprinted in 52 BOSTON U. L. REV. 212, 221 (1972) (“The rational study of the law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened skepticism, that is, towards a deliberate reconsideration of the worth of those rules.”).

⁴⁷ Lash, *supra* note 4.

⁴⁸ Strang, *supra* note 2, at 85-86, 90.

⁴⁹ To some originalists, determining the “original meaning” of constitutional text may supersede the larger context of the Constitution. See Randy E. Barnett, *News Flash: The Constitution Means What it Says*, WALL ST. J. (June 26, 2008), <http://www.wsj.com/articles/SB121452412614009067>.

⁵⁰ CHARLES, *supra* note 2, at 98-105.

⁵¹ *Id.* at 89-92; see also Eugene Kontorovich, *Originalism and the Difficulties of History in Foreign Affairs*, 53 ST. LOUIS U. L.J. 39 (2008).

⁵² CHARLES, *supra* note 2, at 122-47.

⁵³ *Id.* at 148-84.

⁵⁴ See, e.g., Stephen M. Feldman, *Constitutional Interpretation and History: New Originalism or Eclecticism?*, 28 BYU J. PUB. L. 283 (2014); Helen Irving, *Constitutional Interpretation, the High Court, and the Discipline of History*, 41 FED. L. REV. 95 (2013); Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185 (2008).

Originalists must also issue the new disclaimer whenever they present briefs to the courts. It would be rather hypocritical for originalists to advocate a position to the courts under the guise of historical legitimacy, yet all the while criticize historians for doing the same.⁵⁵

Also of concern is originalism's hypocritical argument against non-originalism.⁵⁶ According to originalists, non-originalism is the greater of the two evils because it leads to subjective outcomes; yet originalism can do the same, in that it is a form of history-in-law.⁵⁷ Depending upon how the inquiry is framed, how the historical sources are collected, and how the findings are presented, originalism—as with other forms of history-in-law—can just as easily lead to subjective outcomes.⁵⁸ This is not to say that all originalist scholarship lacks objectivity, or that strides have not been made to limit subjective originalist outcomes. It simply means that both originalism and non-originalism are theories of constitutional interpretation that can be manipulated if need be.

In closing, the overall point of this Article is not to argue for the exclusion of originalism as a theory for interpreting the Constitution. Again, originalism's strength is that it provides legal professionals with familiar tools to supplement the world of historical uncertainty. But throughout the interpretive process, originalism needs to at least operate within the constraints of what is historically certain, and must elicit historical context to the greatest detail. Currently, originalism does not operate in this manner. To state this point differently, by accepting the premise that originalists only need to be familiar with a “subspecialty of history” or the “investigation of legal meanings,”⁵⁹ originalism fails by facilitating mythmaking more so than fact-finding. Of course, originalism can be reformed in this respect. One suggested rule that, if applied, would minimize mythmaking, would be a requirement that originalists contextualize the Constitution before delving into its original meaning. Another such rule would require that any accepted contemporaneous legal doctrines must supersede the original meaning of the text.⁶⁰

⁵⁵ See, e.g., Barnett, *supra* note 6, at 422.

⁵⁶ In the words of Justice Antonin Scalia, originalism is “less subjective, and intrudes much less upon the democratic process” because it rests on a “reasoned analysis rather than a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor.” *McDonald v. City of Chicago*, 561 U.S. 742, 804 (2010) (Scalia, J., concurring); see also SCALIA & GARNER, *supra* note 7, at 402 (“Originalism does not always provide an easy answer, or even a clear one. Originalism is not perfect. But it is more certain than any other criterion.”).

⁵⁷ See, e.g., Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?*, 34 HARV. J. L. & PUB. POL'Y. 5 (2013).

⁵⁸ See H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987).

⁵⁹ Rappaport, *supra* note 3.

⁶⁰ One such example is the fact that libel and slander laws are constitutional, despite the First Amendment guaranteeing freedom of speech and of the press. For a larger discussion on the use of history and the Press Clause, see Patrick J. Charles & Kevin F. O'Neill, *Saving the Press Clause from Ruin: The Customary Origins of a “Free Press” as Interface to the Present and Future*, 2012 UTAH L. REV. 1691 (2012). Another example is that the requirement of licenses in order to carry firearms is constitutional despite the Second Amendment guaranteeing a right to bear arms. See Saul Cornell, *The Right to Carry Firearms Outside the Home: Separating Historical Myths from Historical Realities*, 39 FORDHAM URB. L.J. 1695

There are indeed other rules and examples worth considering, but these exceed the scope of this Article.

(2012); Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 CLEV. ST. L. REV. 1 (2012).