Interdisciplinary Legal Scholarship: The Case of History-in-Law

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Holmes, it appears, was right. The legal scholar of the late twentieth century, if not the lawyer, is "the man of statistics and the master of economics." Of course, just as we must now read the word man more inclusively, so we must read statistics and economics. Legal scholarship has become broadly interdisciplinary, to illuminate what Holmes called the process of "weighing considerations of social advantage," that he believed essential to—or even definitional of—law. The most-cited law review article is by an economist; Justice Rehnquist called the third most-cited "in the area of political science, rather than of constitutional law." Other articles high on the list are even more obviously interdisciplinary than Gunther's.

Is this appearance of interdisciplinarity accurate? Not entirely. First, a high proportion of the most-cited articles are doctrinal in the classic sense despite the criticisms Judge Edwards has made of a legal scholarship that fails to engage the doctrinal concerns of the legal profession. Although Herbert Wechsler did sometimes develop arguments that could fairly be called political science, his most-cited article is purely doctrinal, devoted to an examination of the logical implications of Supreme Court opinions. So too with the classic Tuss-
man and tenBroek article on the concept of equal protection, despite the fact that Tussman is a professional philosopher.

Second, and perhaps more important, legal scholarship that displays the form of interdisciplinarity (to use a barbarism) may not be truly interdisciplinary. In this Article I use the example of how history is used in legal scholarship to examine whether such scholarship ought to be called interdisciplinary. I focus on that subcategory of legal scholarship even though it appears infrequently on the list of most-cited law review articles, for two reasons. As a part-time historian I am more familiar with the questions of disciplinarity that arise in the use of history in legal scholarship than I am with the parallel questions about economics and philosophy. In addition, to the extent that I am familiar with those parallel questions, they seem to me to resemble the ones I discuss here.

I. INTRODUCTION: INTELLECTUAL VOYEURISM AND DECORATION IN LEGAL GENRES

I take as my initial text an article by Brian Leiter whose title conveys its thesis: "Intellectual Voyeurism in Legal Scholarship." Trained as a philosopher and as a lawyer, Leiter argues that some interdisciplinary work is "sub-standard," containing "superficial and ill-informed treatment of serious ideas, apparently done for intellectual 'titillation' or to advertise, in a pretentious way, the 'sophistication' of the writer." Leiter uses an article by Gerald Frug as his foil. According to Leiter, Frug drops citations to Nietzsche into his article

7. Some readers might fairly ask, "Who cares?" That is, does anything turn on whether legal scholarship can be fairly called interdisciplinary? Perhaps not much. I believe, however, that asking the questions illuminates the practice of legal scholarship. For a discussion of what, if anything, can be gained from efforts to police the boundaries of disciplines, seeinfra text accompanying notes 89-103 (concluding that the policing effort in itself is unlikely to be productive).
8. For example, on the rare occasions that practitioners of law and economics attempt to offer more than the most superficial reasons why economics has something to say to law, they tend to rely almost entirely on Milton Friedman's famous essay on the methodology of positive economics, without acknowledging that Friedman's account of economic methodology is highly contested among philosophers of economics. See, e.g., Daniel M. Hausman, The Inexact and Separate Science of Economics 162-69 (1992); Donald N. McCloskey, The Rhetoric of Economics (1985). This is not to take a position on the question here; I am hardly qualified to offer an opinion that anyone ought to take seriously. Rather, it is to suggest only that the arguments I make in this Article about the use of history in law may well be available to those who might want to argue about the use of economics (and philosophy) in law.
10. Leiter, supra note 9, at 80.
without acknowledging that Nietzsche's position, when fully understood, does not support the limited points for which Frug cites Nietzsche, and that Frug's appropriation of Nietzsche, while sometimes superficially consistent with the body of Nietzsche's work, offers claims that are highly contested among scholars more familiar with that work.

I am in no position to say whether Leiter's criticisms of Frug are accurate. Assume they are, in the sense that philosophers familiar with Nietzsche would agree with Leiter. Why should it make any difference to legal scholarship that Frug merely displays the name of Nietzsche in his article? One reason might be that Frug could be asking his readers to accept his arguments on the ground that Nietzsche made them. Here Nietzsche would be an authority whose word carries weight. That would be a peculiar use of philosophy in law. Lawyers must know that few philosophers examine what their predecessors have said as a source of authority in the way a Supreme Court decision is a source of authority in constitutional law. Philosophers pay attention to Nietzsche's arguments, or Aristotle's, because—and to the degree that—the arguments carry rational force.

One can imagine that Frug relies on Nietzsche to provide him with lemmas along the way to his own conclusion. Frug would be assuming both that Nietzsche's conclusions are themselves well-supported—lemmas that Frug need not argue for because Nietzsche proved them—and that they do indeed support Frug's conclusion. And perhaps he is wrong about that. Or perhaps the fact that Frug appears to believe—if he does so appear—that Nietzsche's arguments support his own arguments itself demonstrates a fundamental failure of reasoning ability: It is circumstantial evidence of Frug's inability to make good arguments, which casts doubt on the arguments he does make. Or, finally, Frug's failure to appreciate difficulties with his view of Nietzsche may indicate that he has not understood the true difficulty of the issues with which he is concerned: Frug may make hard questions seem easy, and had he truly grappled with Nietzsche's work he would have seen how hard the questions are. But in none of these cases is the true criticism that Frug's use of Nietzsche is superficial or ill-informed.

12. See, e.g., Leiter, supra note 9, at 83-85.
13. See, e.g., id. at 88-90.
14. For what it is worth, they do have the ring of accuracy to my ears.
15. Instead of asserting, "Because Nietzsche said X, we should conclude Y," Frug might be asserting, "As Nietzsche demonstrated, X, from which I conclude Y."
For all that, Leiter is surely on to something. Here I think it helpful to introduce a distinction between philosophy\textsubscript{1} and philosophy\textsubscript{2}. Philosophy\textsubscript{1} is what people regarded as philosophers do. Some, for example, offer reasons that any reasonable person should find rationally compelling for the positions they assert on matters of philosophical interest. Others, in James Tully's words, seek to "dissolv[e] philosophical problems, not by presenting yet another solution, but by a survey which brings to critical light the unexamined conventions that govern the language games in which both the problem and the range of solutions arise."\textsuperscript{16} And there surely are other philosophers' practices. Philosophy\textsubscript{2} is different. For present purposes, philosophy\textsubscript{2} is the practice engaged in by lawyers using philosophy: philosophy-in-law rather than legal philosophy.

The distinction matters because the practices of legal academics and philosophers differ. Like philosophers, legal academics are interested in determining the truth and establishing the conditions of justice. Like philosophers, legal academics are interested in getting tenure and building a secure reputation. And like philosophers (and lawyers), legal academics are interested in making a case that persuades their audiences. Although reasons that reasonable people would find rationally compelling form one part of such a case, legal arguments are, I believe, more highly rhetorical than philosophical ones.\textsuperscript{17} A good legal argument has many components. The authority of the person making the argument itself has weight,\textsuperscript{18} for example, in a way that may not happen in philosophy.\textsuperscript{19} A good legal argument quite often is one that is simple enough to encapsulate in the obligatory parenthetical when it is cited, even though arguments that are rationally compelling may be quite complicated. And, finally, good legal arguments often have a certain rhetorical flair.


\textsuperscript{17} Of course I would not want to push the distinction too hard, for I am sure that philosophical practices are also rhetorical.

\textsuperscript{18} This may be part of the reason for the heavy predominance of people teaching at the highest ranked law schools on the list of most highly cited articles. That conclusion must be qualified, however. For understandable reasons, people teaching at such schools have readier access to the law reviews published at their home law schools. Until recently, those reviews were more readily available for others to consult and then cite. It will be interesting to see what will happen as more law reviews are easily available in computer-accessible data bases.

\textsuperscript{19} There may be a presumption, in any scholarly field, that it is worth paying attention to arguments made by a person who has written interesting and persuasive things in the past. Yet, I would think that philosophers would not give weight to the mere fact that John Rawls made an argument in the way the legal academy gives weight to the mere fact that a celebrated law professor has made a new argument. (People in both fields might, of course, come to the new contributions with a strong principle of charity in interpretation.)
Often legal scholars provide citations to fancy philosophers as a form of decoration for their arguments. I use the term *decoration* for a reason: According to one of his law clerks, Justice Abe Fortas handed over a draft opinion to the law clerk with the instruction, “Decorate it,” meaning, “Come up with the citations to support what I wrote.” For Fortas, to work in the genre *judicial opinion* meant that one had to offer case authority to support conclusions arrived at for other reasons and justified on other grounds.

So too with philosophy. To do it well the author must decorate it with citations to fancy philosophers. Leiter suggests that these citations are designed to “titillate” or perhaps intimidate readers. Alternatively, they simply satisfy the genre’s demands: “Nice move,” a reader might say, on seeing a citation to Nietzsche or—my favorite—Alfarabi. The citation shows the author to be a Serious Person, but within the genre of philosophy it is not taken as a serious effort to use philosophical authority to support the author’s conclusion. In this sense something that is quite bad philosophy may be effective philosophy—unless the conventions of philosophy are that citations to philosophers are rhetorically effective only if they are good philosophy.

Is the use of history in legal scholarship different? The answer might be yes if we focus on original intent theorists of constitutional interpretation. For them, the very fact that the Framers and ratifiers of the Constitution and its amendments understood the document’s provisions in a specified way is authoritative. They need no reasons for the constitutional positions they take; it is sufficient that the Framers and ratifiers understood the Constitution as they did.


21. This is not a necessary implication of Fortas’s instruction. He could have believed that case authority was the only justification for his decision, and the only reason for arriving at it, and could have known that such authority existed without being able to locate it himself. The saying, “He has forgotten more law than you will ever know,” suggests this position, at least to the extent that it implies, as I believe it often does, that the subject has not truly forgotten the law, but merely cannot retrieve it at the moment. I have argued elsewhere that Fortas’s instruction is not best understood in this way, although a similar injunction issued by William O. Douglas would best be so understood. Mark Tushnet, *Themes in Warren Court Biographies*, 70 N.Y.U. L. REV. 748, 755 (1995).

22. Leiter, *supra* note 9, at 80, 91.


24. Despite the criticisms I have received from those who commented on an early version of this Article, I remain convinced that philosophy does not have such a convention.

25. As will appear, I use the term *original intent theorists* quite broadly, to encompass all legal scholars who use historical evidence to support interpretations of law in the present day.
There are of course standard objections to originalism, the most potent of which is that it is, quite literally, irrational. Here I want to focus on a different point. Originalist law review articles constitute their own genre of scholarship, which I call history-in-law (instead of history). I believe that history functions in that genre as decoration rather than authority. To support that assertion, I must first describe the genre of historical writing.

II. THE TROPEs OF HISTORICAL DISCOURSE

Few practicing historians think that all they do is dig up facts no one knew before. Historians realize that in one way or another, they are all storytellers. And as storytellers they operate with a few well-established story lines, under the constraint that a historian can use a particular story line only when it has some—often minimal—support in the sources. Here I sketch four that I believe are quite common in modern historical scholarship.

The first and probably oldest is the story of progressive development, which has garnered the pejorative label Whig history. According to this story, today's institutions and ideas are the outgrowth of institutions and ideas in the past. To some extent today's ideas and institutions are really the same as those in the past: a story of continuity. To some extent they are different, but only because we have come to understand better what those ideas mean and what those institutions are designed to accomplish.

26. There may be reasons for adopting originalism as a theory of interpretation, but there can be no reason outside of originalism for adopting a particular originalist interpretation. Originalists must take the mere fact that the Framers took a particular position as dispositive, and they depart from originalism when they explain why the Framers' position was sensible, sound, wise, or anything else—when, in short, they offer reasons to justify the Framers' position. Originalists have done quite badly in explaining why people today should be bound to decisions made in the past solely on the ground that the Framers made those decisions. Or, as Shakespeare put it, "What's Hecuba to him, or he to Hecuba, That he should weep for her?" WILLIAM SHAKESPEARE, HAMLET, act 2, sc. 2. It is an equally standard response to arguments like this to assert that originalism, whatever its defects—including its irrationality—is better than alternative modes of constitutional interpretation, particularly in constraining judicial interpretation. I doubt it, and the arguments I made to support my doubts apparently led enough people to cite my work for me to be included on the list in this Symposium, Shapiro, supra note 5, at 769.

27. In what follows I specifically exempt those working in the genre legal history, who I would identify roughly as legal academics who are members of the American Society of Legal History and who participate regularly in the Society's activities. (Obviously this distinction itself is a form of boundary-drawing, and the concerns I raise in § IV infra about who polices the boundaries are relevant here as well.)

28. The basic sources here are HAYDEN WHITE, METAHISTORY (1973), and HAYDEN WHITE, TROPICS OF DISCOURSE (1978).

29. I focus on tropes commonly used in intellectual and institutional history, which are the closest analogues to the tropes using history in law.
The historian explains how those old institutions and ideas held the germ for (or were the seeds of—the metaphors vary) today's institutions and ideas, and demonstrates their gradual unfolding. That which we today find unpalatable in the past is presented as incompatible with the fundamental commitments of the past itself: As people gradually became more aware of their true commitments, they discarded the rest.

The story-line of *decline and fall* is the obverse of Whig history. Here the historian describes how institutions degenerated. This story has its own variants. Sometimes the historian celebrates the demise of an institution that deserved to die. Sometimes the historian regrets the decline, to the point of writing a jeremiad celebrating the past in contrast to the degenerate present. And sometimes the historian sees the features that caused the decline as inherent flaws, so that the institution was eaten away by its own commitments.

A third common story-line is *irony*, of which the last variant of the story of decline and fall may be an example as well. The historian shows what people in the past intentionally set out to do, and demonstrates how things turned out quite differently. In some versions this story-line resembles Whig history. To the Whig historian, the best in today's society is the residue of the past's wisdom, and we can be encouraged in confronting today's injustices by the thought that this too shall pass. To the complacent ironist, we stand apart from the past. We look bemusedly on their illusions, and are comforted because we know they were deluded. The complacent ironist, that is, elevates his or her present knowledge above what appeared to be knowledge but was actually mere prejudice.

A more self-conscious ironist understands that just as things turned out differently from the way people in the past thought they would, so things might—indeed, are likely to—turn out differently from the way we think they will. This stance, too, might lead to complacency: Whatever you think is the best thing to do is likely to have ironic consequences, so why bother to do anything?  

A final story-line is *complexity and contradiction*. Here the historian demonstrates that the past is a foreign country where people managed to think that things we find inconsistent were entirely compatible, indeed sometimes entailed by each other. The historian

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30. There is a third type of ironist, who thoroughly deconstructs the narrative of irony itself, turning it into one of many tropes available to historians without having any special epistemological status itself.
shows how complicated yesterday's ideas and institutions were. The simple fact that people in the past used words we use today does not mean that those words meant to them what they mean to us. For example, the Fourteenth Amendment's framers clearly wanted to protect what they called civil rights, but the scope of that class was substantially narrower than what today is encompassed within the term.\textsuperscript{31} Historians can trace how words that used to mean one thing came to mean something else,\textsuperscript{32} with the effect of estranging us from the past—that is, making it stranger than it seemed at first.\textsuperscript{33}

Even more troubling, historians can do the same with institutions as well as concepts. For example, a historian of the death penalty can show that the social meaning of death and punishment in the late eighteenth century was so different from the social meaning of death and punishment in the world of AIDS that the institution of capital punishment is simply a different institution today. Or, a historian of Congress can show that the House of Representatives in the early twentieth century was inserted into a political and cultural system unique to that time, so that the institution we call the House today is historically continuous with, but dramatically different from the one that met in the same building in 1905.

An odd alliance of cultural conservatives and cultural radicals supports the search for a usable past. The conservatives wish to find a past to celebrate as a model for today, and the radicals look for elements in the past that they think offer hope of radical transformation. Mostly, however, historians try to emphasize the pastness of the past. They take up particular events, ideas, and institutions as they were in the past, and situate them in as full a context as they can. By doing so, they hope to dissolve any illusions that we can easily learn lessons from the past, or identify straight-line connections between single ideas or institutions in the past and today's ideas and institutions, or even between small-scale complexes of ideas and institutions then and now. Precisely because the whole world was different then, particular ideas and institutions were different.

These and other story-lines, not the discovery and mere presentation of facts, constitute the practice of history. Once we understand

\begin{itemize}
\item \textsuperscript{31} Most notably, today we think that people have claims against private entities for denials of civil rights, a concept that would have baffled the Fourteenth Amendment's framers.
\item \textsuperscript{32} See, e.g., Raymond Williams, Keywords (1976); Daniel Rodgers, Contested Truths (1987).
\item \textsuperscript{33} Historian Robert Darnton writes of "the unfathomable strangeness of life among the dead." Robert Darnton, The Kiss of LaMourette at xiv (1990).
\end{itemize}
that history is a practice, a new set of questions arises. What constitutes a good performance within that practice? Who determines what constitutes good historical practice? These questions return us to my discussion of Leiter’s criticism of intellectual voyeurism. There I suggested that Leiter’s criticisms were misplaced because he misunderstood the practice he was criticizing: He thought it was philosophy and applied philosophers’ standards, but it actually was philosophy-in-law, which must be assessed by other standards.

Similarly, seeing history as a practice, we might wonder whether the criteria for good performance have much bearing on other practices. In particular, the criteria for determining whether someone has done well at the practice of history-in-law may be different from those for determining whether someone has done well at the practice of history, and they may be developed and applied by lawyers and legal academics rather than historians.

III. The Tropes of History-in-Law

A. Law-Office History and Whig History

Thirty years ago constitutional historian Alfred Kelly, who had assisted the National Association for the Advancement of Colored People’s legal team in developing a brief on the Fourteenth Amendment’s historical background, criticized what he called law-office history. To Kelly, law-office history was characterized by “the selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered.” Law-office history was, Kelly asserted, often “very bad history indeed.” “It fails to stand up under the most superficial scrutiny by a scholar possessing some knowledge of American constitutional development.”

One difficulty with Kelly’s definition of law-office history is that law-office history that disregards contrary evidence and the like is not very good advocacy. As Jefferson Powell puts it, “[S]ystematic anachronism and quotation out of context is unconvincing advocacy and unacceptable scholarship.” Truly effective law-office history

34. See Mark Tushnet, Making Civil Rights Law 197-99 (1994).
36. Id. at 122 n.13.
37. Id. at 126.
38. Id. at 132.
acknowledges the contradictory data and explains them away. Michael McConnell's originalist scholarship is law-office history of the highest quality, as one might expect from an advocate of McConnell's talents. By examining it, we may obtain a greater understanding of one aspect of the practice of history-in-law.

Recently McConnell offered a revisionist interpretation of the original understanding of the Fourteenth Amendment with respect to school segregation.\(^4\) The conventional wisdom is that in its framers' and ratifiers' understanding, the Amendment did not make school segregation unconstitutional. Without recapitulating the supporting evidence in detail, I can summarize it in a few sentences. The Amendment's framers and ratifiers distinguished among civil, political, and social rights, and believed that the Amendment protected civil rights alone. There was some uncertainty about the contours of each category, but when opponents asserted that the Amendment would require school desegregation, supporters responded that it would not, because school attendance involved a social rather than a civil right.\(^4\) In addition, the Congress that sent the Amendment to the states for ratification itself enforced school segregation in the District of Columbia.

McConnell makes an ingenious argument against the conventional wisdom. McConnell's argument has several important elements. As an originalist he seeks the original understanding of the Amendment's framers and ratifiers. Unfortunately, direct evidence of the ratifiers' understanding of the Amendment's implications for school segregation is hard to come by.\(^4\) Popular opposition to school desegregation was admittedly widespread in the North, but the Amendment was adopted in extraordinary times, "when a political minority . . . imposed constitutional change on the Nation . . . with little regard for popular opinion."\(^4\)


\(^{41}\) The evidence supporting this aspect of the conventional wisdom is summarized by McConnell. *See id.* at 959-60.

\(^{42}\) The evidence, though hard to locate, is actually more extensive than McConnell acknowledges. *See Michael McConnell, The Originalist Justification for Brown: A Reply to Professor Klarman*, 81 Va. L. Rev. 1937, 1944 (1995) ("Although in theory, evidence of the understanding of the state legislatures at the precise time of ratification would be a superior basis for interpretation, it does not exist."). It does exist, for example, in reports in local newspapers at the time of ratification. The NAACP had several volunteer lawyers examine such evidence in preparation for the reargument in Brown v. Board of Education, 347 U.S. 483 (1954). *See Tushnet, supra* note 34, at 196-97. The results are available in the NAACP Papers (on file with the Library of Congress, Manuscript Division, box II-B-141).

\(^{43}\) McConnell, *supra* note 42, at 1939.
tion in the District of Columbia may have reflected the constraints of contemporary politics rather than a principled understanding of the Fourteenth Amendment's implications. Or, it may have reflected the fact even its framers did not fully understand the implications of the principles to which they were committed. They were, however, committed to the protection of civil rights. When the Amendment was adopted, it might have been reasonable to think that access to education was not a civil right, because it was then "in a fledgling and uncertain state."44 By 1900, and certainly by 1954, "[c]ommon schools had become the 'pillars of the republic.'"45 Thus, given the framers' own understanding of the concept civil rights, by 1900 or 1954, access to education without regard to race was a civil right protected by the Fourteenth Amendment.

McConnell's argument about the concept of civil rights is not entirely original. It can be found in embryonic form in Brown itself, with Chief Justice Earl Warren's statement that "we cannot turn the clock back to 1868," but "must consider public education in the light of its full development and its present place in American life throughout the Nation."46 I developed it in slightly greater detail for anti-originalist purposes.47

More original is McConnell's quite ingenious argument about the Civil Rights Act of 1875. A cynic might say that McConnell argues that Congress' failure to outlaw school segregation in 1875 demonstrates that the Fourteenth Amendment's framers and ratifiers understood in 1868-69 that school segregation would become unconstitutional upon the Amendment's adoption. McConnell demonstrates that a majority in each house of Congress at separate times voted to outlaw school segregation in the course of considering the 1875 Civil Rights Act. Congress did not enact the prohibition, however, because of some procedural obstacles that made it impossible for both houses to agree on the provision at the same time.

44. Id. at 1951.
45. Id.
47. Mark Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, 96 HARV. L. REV. 781, 800-01 (1983) (developing analogy between right to contract, treated as a civil right in 1868, and right to access to education in modern United States). Against the claim that this sort of analogizing demonstrates the "indeterminacy of originalism," McConnell asserts that this sort of analogizing is "not a matter of mere conclusory labelling or assertion, but of reasoned legal argument, which we can understand and evaluate." McConnell, supra note 42, at 1951-52. He actually addresses only half of the argument against originalism, which claims that other analogies are just as well-supported by reasoned legal argument.
How does the debate over the 1875 Civil Rights Act illuminate the original understanding of the Fourteenth Amendment? Not, of course, because the Amendment’s adopters believed that Congress had some authority to interpret the Amendment. Congress has to act to exercise such authority. The procedural obstacles McConnell discusses are just as much a part of the process by which Congress exercises its interpretive authority as the substantive provisions it enacts. Nor does McConnell contend that constitutional super-majorities in Congress supported desegregation, but only that majorities did.

Once McConnell’s argument is unpacked, we see that the votes in Congress are far less decisive than the scores of pages McConnell devotes to them make them seem. The question is what the Amendment’s adopters understood it to mean. One way to find that out is to examine what they thought the Amendment meant after it was adopted. So, for example, when one of its supporters argued in 1874 in favor of a statutory ban on school segregation on the ground that the Fourteenth Amendment made segregation unconstitutional, we can infer, albeit with some qualifications, that the supporter had that same understanding in 1868-69. McConnell demonstrates that a large majority of members of Congress in 1874 who had been in Congress in 1868 and who supported the Amendment then argued against school segregation on constitutional grounds. He infers that those who supported the Amendment in 1869 (when it was ratified) probably understood it to enact a principle against school segregation.

Nothing whatever in this argument turns on the fact that both houses of Congress voted to prohibit school segregation. McConnell uses positions asserted in the 1874 debates to determine what the Amendment’s supporters in 1868 understood it to mean. Members of the 1874 Congress are simply a convenient sample of the 1868 supporters.

How might a constitutional historian address McConnell’s argument? First, and perhaps most obvious, a constitutional historian, understanding the argument’s logic, would ask for more evidence: What

48. I have no idea whether the Amendment’s adopters did understand the Amendment in this way, but as I show next, such an understanding is irrelevant anyway.

49. See McConnell, supra note 40, at 953 (“In a large number of votes over a three and one half year period, between one-half and two-thirds of both houses of Congress voted in favor of school desegregation and against the principle of separate but equal.”).

50. The supporter’s views may have changed, or he might be strategically or rhetorically casting his argument in terms of constitutional principle when he simply believed segregation to be unwise policy.
reason is there to believe that the congressional sample is repre-
sentative of the Amendment’s supporters in 1868? One might think that
the congressional sample consisted of the most persistent and dedi-
cated political activists, whose views might have been more radical
than those who served and retired. What did the Amendment’s sup-
porters who were not in Congress in 1874 think? A historian would
try to track representatives and senators from 1868 who left Congress
to see what they believed. Did they write private letters discussing the
proposed ban on school segregation?51

Second, and more interesting, what might a historian say about
McConnell’s argument about the concept of civil rights? A historian
might attempt to embed the concept of civil rights in a larger intellec-
tual, political, social, cultural, and religious universe.52 A historian
would ask most narrowly, How did people connect the concept of civil
rights to their understanding of the proper roles of legislatures and
courts in a democratic United States? Although today we think that
courts automatically enforce most principles embedded in the Consti-
tution, perhaps the Fourteenth Amendment’s adopters had a different
view. They might have thought that, at least in some dimensions, the
question of school segregation presented what we would now call a
political question. The Constitution, they might have thought, en-
acted a principle condemning school segregation, but that principle
was to be enforced solely through legislative action.

A historian would also want to know whether the concept of civil
rights was bound up with broader concepts about the well-ordered
society. If it was, as I suspect, it might help to understand the religious
framework within which the adopters operated, because their concept
of civil rights would ultimately be connected to their religious views,
through their vision of the well-ordered society. More specifically, a
historian would want to know how the 1868 concept of civil rights was
connected to the 1868 vision of the public role in providing education,
not in the sense of whether people in 1868 thought of access to educa-
tion as a civil right but in the sense of whether their vision of the

51. A standard argument against using private letters from congressional supporters of a
proposed constitutional amendment as evidence of the ratifiers’ understanding is that those let-
ters were unavailable to the public when it considered the amendment’s adoption. For a version
of the argument, see McConnell, supra note 40, at 954 (“Constitutional interpretation by its
nature depends on public statements and public acts. . . . [W]hat matters is their public position
on what the Constitution means.”). Post-ratification evidence like McConnell’s is subject to the
same objection, which—as I indicate in the text—I do not believe to be a serious one.

52. Cf. Powell, supra note 39, at 674 (“The founders’ comments on constitutional issues
always are parts of a larger historical and intellectual whole.”).
public role in providing education affected the way they defined civil rights.

As the horizon of inquiry broadens, the historian would become increasingly nervous about McConnell's mode of argument. That mode holds the concept of civil rights constant and inserts new facts about education. But if the facts about education are complexly bound up with the definition of the concept of civil rights, it is not obvious that one can fairly insert new facts without adjusting the concept of civil rights itself. The rhetoric of the conventional wisdom captures this point as follows: Someone who concludes that inserting new facts into old concepts leads to conclusions that we know the adopters rejected probably doesn't have a real grasp on what those old concepts were. Perhaps if we recalled a Republican senator who served in 1868 from the grave and taught him about the place of education in 1954, he would tell us that of course access to education was a civil right under those new circumstances. But perhaps he would tell us instead that he would structure his concept of civil rights to guarantee that it would not encompass access to education under those new circumstances.53

McConnell's is, I emphasize, exceptional law-office history. His rhetorical skill allows him to lead readers to think that the votes in 1874 were in themselves important.54 He is extraordinarily talented at accounting for contradictory data. In discussing segregation in the District of Columbia, for example, McConnell forthrightly points out that proposals to desegregate the schools were defended, even by the adamantly anti-slavery Senator Charles Sumner, on policy rather than constitutional grounds.55 But, McConnell points out that "the Fourteenth Amendment did not apply to congressional legislation," with the consequence that "senators were free to vote in accordance with their assessments of practical impact . . . rather than according to the perceived dictates of the Constitution."56 True enough, but perhaps a

53. Similarly, the senator might say that his substantive concept of civil rights indeed encompassed education under the new circumstances, but might point out that the complex of ideas he held about civil rights included an understanding that courts would not enforce all constitutional rights; in a legal universe where courts do enforce all constitutional rights, he would not include education within the complex procedural-substantive concept of civil rights. We misunderstand the concept of civil rights that he himself held in 1868, although he now knows that he expressed himself inartfully, because he could not know what was going to happen with respect to public education or the judiciary as social institutions.

54. On the rhetorical level, McConnell accomplishes this by devoting as many pages as he does to those votes, thereby inducing readers to believe that the votes are in themselves significant.
56. Id. at 980.
bit too cute: A historian might note that congressional Republicans were the political heirs of those who had made abolition of the slave trade in the District of Columbia the centerpiece of their efforts to attack slavery within the ante bellum constitutional framework. They might wonder how those politicians, having won the war and proposed a highly principled rejection of segregation in schools everywhere else in the nation, somehow were merely practical in considering desegregation in Washington.

McConnell says that to read Congress’ actions “as proof that the Congress of the day viewed segregation as constitutionally legitimate is to overread the evidence.”57 As “proof,” surely. But how about “strong evidence”? And, after all, McConnell is asserting that “the Congress of the day viewed segregation as constitutionally illegitimate.”58 It is hardly overreading the evidence regarding segregation in the District of Columbia to think that it provides no support whatever for that proposition. McConnell is adept at using the rhetorical strategy of overstating his opponents’ claims without appearing to do so, and then reasonably rejecting the overstated claims.

Perhaps the most dramatic example of McConnell’s rhetorical ability is found in his discussion of post-1869 cases in which courts were asked to rule on the legality of school segregation. According to McConnell, from 1868 to 1883, nine Northern supreme courts considered the constitutionality of school segregation: Five—a majority—found that school segregation did not violate the Fourteenth Amendment. Four others invalidated school segregation.59 McConnell acknowledges that the courts striking segregation down relied on state law, although sometimes the state law used equality language that, McConnell asserts, allows us to “infer that the court would have given the Fourteenth Amendment a similar construction had it reached the federal constitutional issue.”60 In one interesting move, McConnell discounts decisions by the California and Indiana supreme courts on the ground that “California had not ratified the Fourteenth Amendment, Indiana was notoriously the most racist of the Northern states, and both courts were dominated by Democrats, the party hostile to

57. Id.
58. His precise words are, “[S]chool segregation was understood during Reconstruction to violate the principles of equality of the Fourteenth Amendment.” Id. at 1140. Note the equivocation on “during Reconstruction” here.
59. Id. at 971-75.
60. Id. at 972.
Reconstruction." Courts upholding segregation, readers are invited to infer, were motivated by mean political considerations, while those striking it down were motivated by deep constitutional principle.

McConnell concludes:

The experience in the Northern states during the fifteen year period after ratification of the Fourteenth Amendment thus falls short of proving that school segregation was understood to violate the Amendment, but it is also inconsistent with the equally extreme view that the Amendment had no bearing on the issue.

This is a classic rhetorical move, describing two extreme positions and implicitly asking readers to take a position in the middle, here that the Fourteenth Amendment had some bearing on the question of school desegregation. Along the way, readers may lose sight of two propositions. McConnell's originalist argument is precisely one of the extreme views, that the Fourteenth Amendment's adopters understood it to make school segregation unconstitutional. And, perhaps more interesting, McConnell's evidence is actually this: With the exception of one unappealed lower court decision, not a single post-1868 court held that school segregation violated the Fourteenth Amendment, and every court but one to consider the question held that it did not.

It is important to emphasize that I am analyzing McConnell's rhetoric here, treating his work as history-in-law rather than as history. If my arguments have any bite, they do so because they identify places where even as talented a rhetorician as McConnell slipped. So, for example, he might have done better to avoid the rhetorical strategy of describing two extreme positions when his is one of them. And yet even that suggestion must be qualified. With respect to what audience would McConnell "have done better"? Not, I think, with respect to his primary audience. Consider the likely citation patterns for McConnell's article. The standard parenthetical is likely to be "(arguing that original understanding supported holding segregation unconstitutional)." It will be followed by something like: "Contra Klarman, Response." It is unlikely that the criticisms contained in this

61. Id. at 974. I particularly like the reference to California's failure to ratify the Fourteenth Amendment. McConnell carefully does not claim that California's supreme court was thereby relieved of its obligation to enforce the Amendment. Cf. id. at 972 (discussing an 1868 Iowa Supreme Court case invalidating segregation before Fourteenth Amendment was legally binding).

62. Id. at 977.

63. Concurring in Missouri v. Jenkins, Justice Thomas cited the article to support the following proposition: "Brown I itself did not need to rely upon any psychological or social-science research in order to announce the simple, yet fundamental truth that the Government cannot discriminate among its citizens on the basis of race." Missouri v. Jenkins, 115 S. Ct. 2038, 2065 (1995) (Thomas, J., concurring).
Article will be picked up at all. This Article is in a Symposium on legal scholarship, not on segregation or originalism, and its title does not suggest that somewhere embedded in the article is a criticism of McConnell's argument. The criticisms I have offered are therefore unlikely to impair the enduring rhetorical effectiveness of McConnell's article. Why, then, should he bother to improve on an already highly effective product?

A historian reading McConnell's work might be tempted to echo a comment made about the Charge of the Light Brigade: "C'est magnifique, mais ce n'est pas l'histoire." The historian would be wrong, and not only because one can translate "histoire" as "story." McConnell tells a compelling story within the genre of law-office history, which is history-in-law, not history as done by historians. The criteria for evaluating how well he performs are drawn from law rather than history. And, indeed, McConnell himself may think so. Responding to a critic who argues that constitutional history should consider "historical forces—political, social, economic, ideological, cultural," McConnell writes that, when offered as a reason to avoid attempting to justify or criticize Supreme Court decisions, "this is not just an attack on originalism. It is an attack on the traditional enterprise of constitutional law, in which the meaning of the Constitution is seen to be a legitimate question for historical and interpretive inquiry." He was engaged in a legal inquiry, not a historical one.

B. History Lite and the Search for a Usable Past

The past decades have seen the invention of two major constructs in the intellectual history of United States law: civic republicanism and classical legal thought. I use the words invention and construct advisedly. Martin Flaherty describes much of the literature on civic republicanism as history "lite." Having scavenged the secondary historical

64. As a result, even computer-assisted research techniques may not make a difference here: The first move in the research strategy may be to locate citations to McConnell's article; the second is to look at the list of titles; the third is to discard those whose titles do not suggest that they contain substantive comments on McConnell's article. In light of my emphasis on the role authority plays in legal scholarship, it may be worth noting that occasionally this Article will survive the third step because my name appears as its author.


literature, legal scholars found something that seemed attractive, and then pursued original sources to discover snippets that could be quoted in support of their contemporary positions. They then created a body of thought they called civic republicanism. Historical material is almost exactly described as decoration in this literature.

Civic republicanism was attractive to the center-left in the legal academic spectrum. A similar construction occurred, I believe, further to the left, as Duncan Kennedy and Morton Horwitz invented what they called classical legal thought or liberal legalism. In both cases the constructs serve the legal academy well, but are problematic from a historian’s point of view.

1. Civic Republicanism and the National Identity

The difficulties with the civic republicanism construct, treated as history, are well-known, and I merely sketch them here. I have already outlined one set of problems. Civic republicanism is a term that describes one part of a complex intellectual universe in the founding era. As historians have shown, it existed in uneasy tension with ideas about religion and commerce. What the ideas of civic republicanism mean in a nation with far greater religious pluralism than existed at the founding, and where commerce is global, is quite unclear. Just as the post-Civil War concept of civil rights had the meaning it did because it was part of a larger complex of ideas, so did civic republicanism. Taking “it” out of its context makes it into something else. What it becomes may be interesting or normatively attractive, but it has little relation to the ideas actually held at the founding.

Then too the ideas actually held at the founding may not be all that attractive. Some of its contemporary advocates are attracted to civic republicanism because it provides an account of public citizenship that contrasts with the intense privatization of concerns republicanism’s advocates attribute to liberalism. Their critics responded that civic republicanism as it actually was had unattractive aspects—militarism, anti-feminism, and elitism—that make it an unappealing

70. Descriptions of civic republicanism appear at numbers 47 and 93 on the list in this Symposium, Shapiro, supra note 5, at 769, 771.
71. It may be appropriate to note here that while I am sometimes linked to contemporary civic republicans, see, e.g., Richard H. Fallon, Jr., What is Republicanism, and Is It Worth Reviving?, 102 HARV. L. REV. 1695 (1989), my endorsement of the concept was heavily qualified. See, e.g., MARK TUSHNET, RED, WHITE, AND BLUE 17 (1988) (“Republicanism made sense only in a specific social setting”).
model for contemporary constitutional thinking. Stripping civic republicanism of those elements, while normatively attractive, converts it into a body of thought actually held by no one in the past. Notably, modern civic republicanism tends to treat slavery in classic Whig fashion: as an excrescence fundamentally incompatible with the founders' deepest commitments.

As Martin Flaherty notes, lawyers' appropriation of civic republicanism is more sophisticated than other originalist scholarship, but it nonetheless drains the founders' intellectual universe of its real complexity. I believe the reason is that modern civic republicans are not truly interested in history as such. Again, Flaherty makes the point well. Cass Sunstein, according to Flaherty, does not "invoke[ ] the Founders solely as one might cite Antonio Gramsci or Michel Foucault, that is, on the strength of the usefulness of ideas put forward by thinkers who otherwise have no direct connection to our constitutional culture." Rather, he "invokes [them] for . . . the authority that springs from their historical connection with a document and the culture it continues to shape."73

Modern civic republicanism offers a Whig interpretation of our present national identity. The people of the United States are constituted not by ethnicity or religion, but by our shared commitment to the Constitution. That commitment is reproduced by creation-narratives that describe our origins in the Constitution and by tales of development that connect the creation to the present. To modern civic republicans, their vision of civic republicanism at the founding provides a more attractive national identity than the narrative that describes the founding as liberal through and through.

The claim might well be correct in that comparative version. Consider, however, an alternative creation-narrative that acknowledged the historical complexity of the founders' intellectual universe. Such a narrative would connect us to a world in which liberal and republican elements were both available, where republicanism included militarism and elitism as well as public-mindedness, and where liberalism included pure selfishness and the power of self-making that Crevecoeur celebrated. I confess that I find the identity constituted

72. Flaherty, supra note 68, at 571-74.
73. Id. at 574.
75. The underlying normative claim, I believe, is two-fold: that commitment to some supra-individual identity is a human good, and that one important supra-individual identity is national. I find the first element compelling, the second far more problematic.
by that narrative far more interesting and normatively attractive than the identity constituted by Whig civic republicanism. For one thing, it acknowledges on the national and historical levels complexities in national identity that parallel the complexities of personal identity that introspection reveals.

In some sense, then, better history would give us a better narrative of national identity. That, however, is plainly a nonhistorical argument. History "lite" is satisfactory as a form of history-in-law to the extent that one finds the national identity it constitutes more attractive than the alternative that historians' history would constitute.

2. Classical Legal Thought and the Puzzle of Critical Legal Histories

The second great invention of recent studies of the intellectual history of legal thought is classical legal thought. Here too the work is so familiar that I will not describe it in detail. Briefly, classical legal thought is said to be a body of thought characteristic of the late nineteenth century. It relied on highly abstract distinctions, for example between the state and the market, that generated legal conclusions across the entire range of law.

The narrative of classical legal thought combines two historians' story-lines: decline and fall, and irony. As Robert Gordon put it in an early assessment, the story describes "how the construct was purified of its preliberal elements and elaborated to its highest pitch in the late nineteenth century; and how, at the moment of its perfection, it started to decay under attacks from without and the pressure of its own internal contradictions." And, according to Gordon, we still are "living in its ruins, no longer believing in its . . . powers, and clinging to it still because we have found nothing to replace it. . . ."

Gordon calls liberal legalism a construct, which "arose and developed its own characteristic set of mediating devices" in the nineteenth century. In his usage, as elsewhere in the literature on classical legal thought, the body of thought was constructed by people in the past. On closer examination, however, it appears that classical legal thought

76. The only work specifically about classical legal thought on the list in this Symposium, Shapiro, supra note 5, at 767, appears at number 42, but others—e.g., numbers 80 and 83 (Olsen)—are strongly influenced by the construct.
78. Id.
79. Id. at 114.
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was constructed in the late twentieth century rather than the late nineteenth.

A signal of the difficulty with the construct is that "it" seems to be a living—though decaying—historical subject. The actual people who adhered to classical legal thought rarely appear in scholarship discussing it. And for good reason. As constructed in recent scholarship, classical legal thought is a highly rationalized body of thought that seemed for a moment to resolve all contradictions. It decayed because it did not. I am not a specialist in late nineteenth century legal thought, but I have looked closely enough at works by people I would have thought associated with classical legal thought—Christopher Tiedemann, James Bradley Thayer, and George Ticknor Curtis—to know that what they actually believed was more complex than the story of classical legal thought allows. Indeed, precisely because classical legal thought is a construct created in the late twentieth century, we can be reasonably confident that no one ever adhered to it.

Why, then, pay attention to classical legal thought? Kennedy and Horwitz did identify some interesting things in late nineteenth century legal thought, which earlier scholars had not seen. They then drew the strands they identified together into the construct classical legal thought. That construct may function in some ways as an ideal type. People familiar with the construct are able to read the sources differently, seeing in each source one or another of the themes that form the construct.

Scholars who see classical legal thought as an ideal type may be misled in ways that Gordon's argument suggests. In usages drawn from Max Weber's confrontation with Marxism, the term ideal type is connected to a sense that ideal types do more than draw diverse


For example, Curtis, who died in 1894, was a Unionist Democrat whose concerns about law and order led him to strongly oppose the New York draft riots. After the War Curtis became a leading patent lawyer, representing Cyrus McCormick and Samuel F.B. Morse. Shortly before he retired from the active practice of law, Curtis took up the cause of Utah's Mormons, of all people, represented Mormon interests in the Supreme Court, and wrote powerful pamphlets defending their right to religious liberty. Curtis's thinking about law cannot be captured by the simplifications of classic legal thought. For an elaborate demonstration of the complexity of legal thought in this era, see Thomas A. Green, Freedom and Responsibility in the Age of Pound: An Essay on Criminal Justice, 93 MICH. L. REV. 1915 (1995).

82. For an exemplary study of how one lawyer actually thought about law, see Daniel R. Ernst, Lawyers Against Labor 24-48 (1995).
strands together. Ideal types also have an associated dynamic. Intellectual history, of the sort represented by Kennedy and Horwitz, deals with ideas. The analogue of the dynamic of an ideal type in intellectual history is the connection among ideas. How, then, were the ideas of classical legal thought connected to each other? Not, according to Horwitz at least, because one followed inexorably from another. Indeed, Horwitz's work is designed to show that ideas people believed to be connected rationally were in fact not so connected. To make this argument, however, it is essential to show that some people actually did think the ideas were connected. Drawing together strands that appear in the work of different people—creating an ideal type—will not do.

As a form of critical legal history, classical legal thought is said to be connected to our current way of thinking about law. Again, the metaphors vary: Residues of classical legal thought can be found in ours; classical legal thought has left us a legacy on which we still live; our thought is genetically connected to classical legal thought; the construct classical legal thought helps us identify continuities between legal thought then and now. But, because no one actually adhered to classical legal thought, these claims are puzzling.

As with modern civic republicanism, contemporary creators of classical legal thought may have noticed statements made in the nineteenth century that somehow resemble statements made today, and assert connections. At the same time, they insist that classical legal thought was a highly interconnected body of thought: If a person adhered to one element of classical legal thought, he was quite likely to adhere to a great many others. At this point, the relation between classical legal thought and the present becomes quite obscure. In their best work, the modern creators of classical legal thought succeed in the historians' enterprise of emphasizing the pastness of the past. They make classical legal thought quite strange by describing how its adherents managed to think that many concepts, which we today see as quite unrelated, were actually tightly bound together.

Its creators offer classical legal thought as a critical enterprise. The more strange it is, however, the more puzzling is the claim that it
offers a critical perspective on modern legal thought. If one thought that classical legal thought combined elements that were logically mutually entailed, one would have some critical leverage. Suppose a critic thought that some people adhered to one element of classical legal thought that the critic found unattractive, and thought as well that people rejected other elements on the ground that they found those elements unattractive. If the elements of classical legal thought were mutually entailed, the critic could then chastise them for logical inconsistency, and hope that they would abandon the critic’s disfavored element rather than embrace the elements they currently reject.

Unfortunately, that is not how the literature on classical legal thought reads. It emphasizes internal contradiction rather than insisting on logical entailments. Although its adherents are presented as believing that classical legal thought constituted a logically integrated whole, they were wrong. Actually, according to today’s scholars of classical legal thought, classical legal thought was nothing more than an ensemble of disparate elements, bricolage in Levi-Strauss’s terms.\textsuperscript{86}

This way of presenting classical legal thought has some critical bite, but not much. Consider again the critic who finds some aspect of today’s legal thought unattractive. If the critic’s targets believe that legal thought consists of logical entailments, they may believe that some logical necessity compels them to accept some things they dislike in order to get other things they like more. Critics may combat a false necessitarian strain in today’s thinking by demonstrating that classical legal thought was bricolage even though its adherents thought it consisted of logical entailments.\textsuperscript{87} The critic might thereby induce readers to discard a rule if they initially believed it to be an unfortunate but necessary consequence of other, more fundamental rules.

If all legal thought is bricolage, however, the idea of genetic connections between past legal thought and today’s, and the ideas of legacies and residues, become quite hard to understand. Consider, for example, a concept like patriarchy. Legal scholars surely can identify elements of legal thought in the nineteenth century properly denominated patriarchal, and they can do so as well with elements in contemporary legal thought. But, precisely because the earlier elements were part of an ensemble of ideas strikingly different from today’s, the con-

\textsuperscript{87} I believe that this is the dominant theme in Gordon, supra note 77.
cept *patriarchy* cannot mean the same thing when applied both to older and to contemporary ideas. 88

The construction of classical legal thought looks like history, but it is not history as historians would do it. It overlooks too much complexity in the way people in the late nineteenth century actually thought about law, and it fails to connect their legal thought to anything other than a vaguely described economic system and a badly specified conservatism. That said, classical legal thought is perfectly fine history-in-law. Its creators, like the modern civic republicans, have substantially affected the way we think about law, whether or not they have taught us much about the past.

IV. POLICING THE BOUNDARIES

One might think that some historians' standards could be relevant to assessing the use of history in legal scholarship even if history-in-law is a genre of legal scholarship rather than a version of historical scholarship. 89 That would be true to the extent that those who engage in one practice take seriously the comments and criticisms made by people who engage in another. It might be part of the practice of history-in-law, for example, that criticisms levelled by historians count against the persuasiveness of a history-in-law argument. Most notably, one might think that legal scholars using history in law would perform badly if they got the facts wrong. 90

One might think that, but one would be wrong. 91 In 1992, the *Yale Law Journal* published an article by two well-regarded scholars in which they made a number of elementary factual errors. 92 One is particularly striking: The authors asserted that Robert Morris made cer-

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88. See Reva Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 *Yale L.J.* 2117 (1996), for an interesting though undertheorized effort to establish a genetic connection through a process Siegel calls “preservation-through-transformation in the structure of a status regime,” id. at 2178.

89. Flaherty, *supra* note 68, at 551-52, argues for invoking standards that “come from the discipline of history itself” because historians “commonly resolve what is historically convincing,” and because it makes sense to defer to specialists.

90. See *id.* at 552 (“Perhaps the most basic [criterion] is simply getting elementary facts straight.”).

91. Historians have other standards as well, but they seem to me as much standards of effective argument, such as “Do not disregard contrary evidence” and “Do not quote out of context,” as they are standards of good historical practice.

tain statements at the Constitutional Convention. In fact, Gouverneur Morris made them. A historian would find this a significant mistake. To understand what the speaker meant, an intellectual historian would say we have to understand how those statements fit into the speaker's overall intellectual universe. The historian would try to relate the speaker's statements about the President's power to nominate to the speaker's views about popular democracy, aristocracy, the well-ordered government, religion, and much else. A historian would at least worry that a set of words uttered by Gouverneur Morris really meant something quite different from the same set of words uttered by Robert Morris. If one misidentifies the speaker, that effort at real understanding simply cannot get off the ground.

Of course even historians make mistakes. Sometimes the mistakes may be irrelevant to the historian's argument. Or sometimes a historian may have sufficient authority, based on his or her prior work or the power of the argument elsewhere in the piece where the mistake occurred, for historians to treat a mistake as harmless. Neither response seems to me available here.

As we have seen, history-in-law does not really try to explain what people in the past thought. A misidentification is therefore not terribly significant. Indeed, the critic who pointed out the identification error did not regard it as a scholarly failure. He concluded, instead, that "The Yale Law Journal must share responsibility for many of the[ ] errors." And the authors responded, "We are grateful to [the critic] for correcting some errors in identifying the first names of certain delegates. We do not believe, however, that these errors are relevant to the correctness of the propositions discussed in our essay." That is nicely put: The error lay in providing the wrong first name, not in naming the wrong person. Of course even these scholars

93. Strauss & Sunstein, supra note 92, at 1498.
94. See McGinnis supra note 92, at 639 n.29 (citing THE RECORDS OF THE FEDERAL CONVENTION OF 1789, at 539 (Max Farrand ed., 1966)).
95. McGinnis, id. at 639-40, does briefly describe Gouverneur Morris's broader views.
96. I am embarrassed to note that in TUSHNET, supra note 34, at 176-77, I located Topeka in Oklahoma, as part of a transition between one discussion and another. But I am embarrassed. (I also note that I am invoking my authority qua historian here.)
97. One can, just barely, construct an interpretive theory according to which the mere fact that some founder—no matter who—uttered certain words has some bearing on how the Constitution should be interpreted. If originalism in its best forms is questionable, this bastardized originalism seems completely implausible. (Jack Balkin suggested the possibility of such an interpretive theory to me, without endorsing it.)
98. McGinnis, supra note 92, at 635 n.7.
would undoubtedly have preferred to get at least the names right, although they appear unconcerned about the relation between a person’s particular statements and the overall context of thought that can deepen our understanding of those statements.

This is only one example, but surely it is suggestive. Getting the facts right did not matter much to these authors or even to their critic. Yet it would seem that the least demanding requirement a historian would impose on a legal scholar’s use of history is that the legal scholar get the facts right. The practice of history-in-law apparently can go on even when that requirement is not met.101

Readers of a draft of this Article sounded Jefferson Powell’s theme.102 Bad history, they urged, was bad advocacy and therefore was bad history-in-law, just as Leiter believes that bad philosophy, is bad philosophy. I may be too cynical, or I may have read more widely in the literature that constitutes history-in-law, but my understanding of the practice is that the connection between the standards of discipline, and those of the legal academy is much looser than that.103 Asking legal scholars to satisfy even the most basic criteria drawn from the practice of history misunderstands the practice of history-in-law.

V. Conclusion

Law-office history has a bad name, at least among historians. It shouldn’t.104 Law-office history is a legal practice, not a historical one. The criteria for evaluating it, for determining what is a successful per-

100. Similarly, practitioners of history-in-law undoubtedly think they are writing history, just as practitioners of philosophy may well think they are doing philosophy. The connection between engaging in a particular practice and thinking that you are engaging in a different one is quite complex. I find Stanley Fish, Dennis Martinez and the Uses of Theory, 96 YALE L.J. 1773 (1987), the most helpful introduction.

101. This would not be true if the article or its authors lost credibility because of its sloppiness with respect to historical detail. It is not my impression that this has happened, although I have been told that some scholars “think that even this mistake was indicative of a general insouciance about history that robs the argument of much of the force it sought by invoking history in the first place.” (I regard the source of the information as confidential.)

102. See supra text accompanying note 39.

103. Martin Flaherty pointed out to me that this may change as more scholars with formal training in other disciplines become law professors. I confess to some skepticism. Although a full-scale defense of my position is out of place here, I simply assert the following: The politically motivated resurgence of originalism as a theory of constitutional interpretation has generated what is now a very large body of legal scholarship—history-in-law—that is (a) quite bad according to historians’ standards, and (b) published in the most prestigious law reviews.

104. Having gone back and forth in my mind over including this footnote, I decided to point out that this Article is written in the trope of irony. My ambivalence about including this footnote reflects my concern that I have failed if the footnote is necessary.
formance, must be drawn from legal practice rather than from historical practice.\textsuperscript{105} I believe the same conclusion can be drawn about interdisciplinary legal scholarship generally. In this sense, lists like the one that opens this Symposium are extremely helpful in identifying the legal academy’s criteria for good performance.\textsuperscript{106}

\textsuperscript{105} I have refrained from describing those criteria, in large part because the material discussed in § IV \textit{supra} shakes my confidence in my ability to do so. That is, my first candidate for doing history-in-law well probably would have been that it helps to get the facts right. With that off the list, I am puzzled about what comes next.

\textsuperscript{106} A cynic might say that the list indicates that the two main criteria are that a good performer have a job at a top-ranked law school and write articles that students at top-ranked law schools regard as worth publishing. As a colleague and I have argued elsewhere, however, this cynical view fails to appreciate that the causal arrow may run from “having high potential as a good performer” to “having a job at a top-ranked law school” rather than, as the cynic would have it, the other way. Mark Tushnet & Timothy Lynch, \textit{The Project of the Harvard Forewords: A Social and Intellectual Inquiry}, 11 CONST. COMMENTARY 463, 468-69 (1994-95).