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LAW HISTORIANS' FALLACIES

ILAN WURMAN*

ABSTRACT

A common line of attack against originalists is that lawyers just aren't good at doing history. But in his famous book *Historians' Fallacies*, David Hackett Fischer noted that many historians aren't good at doing history either: They often fall into one or more of numerous fallacies that he catalogued in his celebrated and often devastating three-hundred-page book. This article points out the many ways in which originalists and other legal historians fall into, but also how they may avoid, some of the same fallacies committed by the historians whose works made their way into Fischer's book. It will then point to corresponding lessons that lawyers-turned-historians ought to employ to write better history. The belief is that lawyers, judges, and legal academics can become good—or at least better—historians.

Part II confronts two general attacks on the use of history, both of which challenge the possibility of obtaining relevant and objective historical knowledge. Part III establishes the importance of investigative questions and describes fallacies of question-framing that lead originalists astray. Part IV explores fallacies of factual verification that stem from reliance on flawed types of evidence. Part V addresses one fallacy of factual significance—which we shall call the originalist's fallacy—that leads some originalists to misunderstand the significance of certain evidence. Part VI illustrates fallacies of narration, including fallacies of anachronism and presentism, that too often create fruitless investigations and provide ahistorical answers. Part VII, although recognizing the importance of generalization, demonstrates how originalists (and other legal historians) often generalize improperly.

* Associate, Winston & Strawn LLP. J.D., Stanford Law School, 2013. Thanks to the usual suspects, and to some new ones: William Baude, Sean Bland, Jud Campbell, Brenner Fissell, Philip Hamburger, Michael McConnell, Torsten Menge, Brendan Selby, Julie Silverbrook, Kenneth Young. This article was written when I was clerking for Judge Jerry E. Smith of the U.S. Court of Appeals for the Fifth Circuit, whom I also thank for allowing me the time to think and write about such things.

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I. INTRODUCTION

In his celebrated work, *Historians' Fallacies*,¹ David Hackett Fischer catalogued and described over one hundred fallacies common in historical literature. The aim of Fischer's book was to help refine the study of history and not to impugn its relevance or utility. Many scholars have criticized originalism for demanding historical analysis for which lawyers are simply

1. DAVID HACKETT FISCHER, *HISTORIANS' FALLACIES* (1970).

ill equipped; others have criticized originalist scholarship and judicial opinions for committing various historical errors; and yet others assail originalism altogether as a method of obtaining its adherents' preferred outcomes. As this article will show, many of these attacks are legitimate: many originalists do in fact commit errors of historical methodology that should bring their conclusions into doubt. Yet this article demonstrates that many of these errors commonly appear in all historical literature, whether originalist or not, and can be avoided with careful practice.

This article will rely on David Hackett Fischer's definitions to explain several of the common fallacies that appear in the academic literature and in judicial opinions. It will survey the works of both originalist academics and general historians, both liberal and conservative. It aims to provide a kind of toolkit or guide for originalist lawyers, judges, and academics so they can more readily identify and remedy these common errors.² This article assumes, then, that historical knowledge is relevant for constitutional and legal analysis and seeks to help lawyers be a bit better at it.³

Before addressing more specific examples of common fallacies and demonstrating their commission in various originalist articles and judicial opinions, Part II addresses general attacks on the possibility of historical knowledge because identifying methodological errors does little good if one believes that historical knowledge—or at least the relevant historical knowledge—is impossible to attain. Although tomes can be written on this debate and academics of several disciplines continue to argue over it, I would like merely to suggest a few common-sense reasons to think that historical knowledge is possible and attainable. And, fittingly, David Hackett Fischer has described certain fallacies that appertain to these issues as well.

Part III will introduce fallacies of question-framing that originalists often commit. These fallacies lead originalists astray because they consist in a failure to ask the right kinds of questions. If, for example, an originalist investigator begins his historical inquiry by asking whether sovereign immunity is rooted in common law and defeasible by statute or is an indefeasible natural law doctrine, he may completely miss alternative

2. Although some historians have challenged parts of Fischer's work, it remains widely read and celebrated. That said, Fischer's authority on these matters should not be taken as self-evident. I do not think that all of the "fallacies" he describes, for many of which he invented names, are in fact fallacies. He nonetheless provides a good starting point for a methodological study. Each of the fallacies discussed here are described in some detail so the reader can decide for himself whether they are persuasive. The ones selected, in my view, all have merit.

3. Indeed, even non-originalists recognize that history is relevant to non-originalist constitutional theory. *See, e.g.*, Jack M. Balkin, *The New Originalism and the Uses of History*, 82 *FORDHAM L. REV.* 641, 650-51, 668-72, 717-19 (2013).

possibilities such as that sovereign immunity was in fact a doctrine of personal jurisdiction with other attributes altogether. He will have committed the fallacy of false dichotomous questions.

Part IV will discuss fallacies of factual verification involving reliance on flawed types of evidence. The most common fallacy of this sort in the literature—and it has become rampant in judicial opinions—is the fallacy of negative proof that consists in declaring that if there is no evidence that *X* is the case, then not-*X* is in fact the case. This fallacy has potentially led to erroneous conclusions in the anti-commandeering judicial opinions and literature and has reared its head in numerous other places. This Part will also devote some attention to the fallacy of the reversible reference that consists in using evidence for a proposition that, without more, is literally meaningless because the evidence could also stand for precisely the opposite proposition.

Part V will then discuss one fallacy of factual significance, which it will refer to as the *originalist's fallacy*, that was unknown to Fischer because it is only relevant to originalist history. It is the idea that the best originalist evidence must be culled from before the date of drafting or ratification of the Constitution or its amendments. This proposition is utter nonsense, and as trivial as the point may seem, a surprising number of originalists seem to accept it at least occasionally. Even if originalists believe that the meaning of the Constitution is fixed at the time of enactment, that does not mean that the only evidence we can use to determine that meaning must date from before the enactment. Nor does it mean that, if such evidence exists, it will be the best evidence.

Part VI illustrates various fallacies of narration, and particularly the fallacy of anachronism and the fallacy of presentism, a special kind of anachronism. This fallacy consists in misinterpreting history by ignoring past threads that have become unfamiliar to the modern world, or which have become irrelevant to the modern world but which were familiar and important in the past. There are several examples of this fallacy and other anachronisms at work, but the history of judicial review is a particularly important area in which this fallacy may be often committed.

Part VII, finally, describes fallacies of generalization. Although generalizations are unavoidable and necessary, originalists often improperly generalize by relying on insufficient statistical samples and on lonely facts, or by applying double standards to evidence so that inconvenient facts are unjustifiably explained away.

II. PRELIMINARY MATTERS

For any of the fallacies described here to be of use, one must first be persuaded that history is useful to begin with for legal analysis. There are many attacks on the relevance of history, but here I focus on the key objection that historical knowledge is not objective or is too indeterminate to be useful. Conveniently, Fischer describes fallacies in his work that may offer some insight into these objections.

A. THE HISTORICIST CLAIM

The historicist claim consists in the following notion: if we cannot operate without modern presuppositions, then we can never obtain objective or useful historical knowledge. The originalist enterprise is therefore impossible. There are varying degrees of historicism, from the proposition that historical knowledge may be true and “objective” but only relative to its particular time and place to the proposition that no objective knowledge is possible at all.⁴

G. Edward White has demonstrated this kind of historicism in the constitutional scholarship of the 1960s–70s. White surveyed the “growing view of scholars in fields once associated with historico-politics that properly conducted historical inquiry illuminated only the past and was thus irrelevant to contemporary social issues.”⁵ But the knowledge we could have about the past was still “objectiv[e],” investigated by a “disinterested . . . scientific investigator.”⁶ In other words, history can reveal objective truths, but these “truths” are only objective *relative* to a time and place; they

4. Defining terms is extremely important. Many legal academics have used the term “historicist” differently than I use it here. By historicism I mean the school in the philosophy of history that is opposed to the notion of transcendental truth; all truths and values are relative to their time and place. For a general introduction to this understanding of historicism, see LEO STRAUSS, *NATURAL RIGHT AND HISTORY* 9-34 (1953).

I do not use the term as Stephen M. Griffin or Richard Posner, for example, use it. Griffin has defined historicism as follows: “A historicist perspective focuses on the contexts in which historical events took place and how those contexts were later changed.” Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1205 (2008). Historicism is not simply the attempt to understand history in context. By definition that is what history *is*. To say that originalists are not historicist because they fail to appreciate the contexts of the various pasts is to distort originalism, as Griffin does, *see id.*, about which I shall have more to say later. *See infra* text accompanying note 72.

As for Posner, G. Edward White correctly describes his use of the term historicist as akin to “historically oriented.” *See* G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485, 490 n.8 (2002); Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573, 574, 593-96 (2000).

5. White, *supra* note 4, at 506.

6. *Id.* at 494.

tell us nothing enduring.⁷ Historicist legal thinkers in the 1930s–40s, therefore, “assumed that since the present never duplicated the past, there was little point in attempting to resolve present legal issues by invoking principles extracted from a legal source remote in time.”⁸ Finally, the great constitutional theorists of the 1960s–70s, such as Alexander Bickel, came “to realize that the past, in constitutional interpretation as in other fields, offers no specific answers to specific contemporary problems”; the role of history was “reduced to demonstrating ‘what one age finds worthy of note in another.’”⁹

If historicists are right—and if the constitutional theorists of the 1960s–70s were right to discount history—then originalism may be unworkable because it can never obtain answers to its questions as all historical answers are only relative to their own time and place. This particular version of historicism, however, is not so lethal to originalism if the originalist argument is that the objective truths relative to the founders’ time are the relevant truths today by virtue of their enshrinement in the Constitution.

Paul Brest demonstrates a slight variation on this historicism in his famous critique of originalism that presents a much greater challenge to originalism—and with which several modern scholars continue to agree. He argues that modern lawyers—all modern people, indeed—are unable truly to understand historical thought because of inescapable modern presuppositions. In *The Misconceived Quest for the Original Understanding*, Brest approvingly quotes Quentin Skinner who made this observation vis-à-vis political theorists:

[I]t will never in fact be possible simply to study what any given classical writer has *said* . . . without bringing to bear some of one’s own expectations about what he must have been saying [T]hese models and preconceptions in terms of which we unavoidably organize and adjust our perceptions and thoughts will themselves tend to act as determinants of what we think or perceive. . . . The perpetual danger, in our attempts to enlarge our

7. That is also how Leo Strauss has described historicism. *Cf.* STRAUSS, *supra* note 4, at 16 (“In trying to discover standards which, while being objective, were relative to particular historical situations, the historical school assigned to historical studies a much greater importance than they had ever possessed.”).

8. White, *supra* note 4, at 522.

9. *Id.* at 566. The progressive notion in historicism may have contributed to the views of these scholars. *See id.* at 513-18, 609-14. If history progresses, that is, if mankind’s knowledge and understanding progress over historical time in the same way that our knowledge of the natural sciences progress, why should principles of another age have any bearing on modern legal interpretation? We are much wiser than they were, and so we should not look to the past for an understanding of present problems.

historical understanding, is thus that our expectations about what someone must be saying or doing will themselves determine that we understand the agent to be doing something which he would not—or even could not—himself have accepted as an account of what he *was* doing.¹⁰

Brest then suggests that his reader study specific areas of constitutional history to see “the problem of doing original history” and the “elusiveness of the original understanding” because of such presuppositions.¹¹ Mark Tushnet has made the same criticism.¹²

Brest concludes that because all historians have presuppositions, the relevant historical knowledge is therefore impossible. It stems from the idea that truth is only relative to a particular time and place and therefore we cannot understand prior truths because our own, different, historical existences inescapably color everything about our own understandings.

William Nelson has described Brest’s and Tushnet’s view of history in a way that clarifies nicely the relativist quality of this kind of historicism.¹³ Their “contextualist” view, along with those of other “critical legal scholars,” holds that all historical knowledge is merely giving *present*

10. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 219 (1980) (quoting Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 HIST. & THEORY 3, 6 (1969)) (brackets and first two sets of ellipses in Brest’s original). Brest repeats this concern a few pages later, explaining that one need not assume that historical knowledge is completely impossible to appreciate its indeterminacies; but the point is essentially the same. *Id.* at 221-22 (“Even when the interpreter performs the more conventional historian’s role, one may wonder whether the task is possible. There is a hermeneutic tradition, of which Hans-Georg Gadamer is the leading modern proponent, which holds that we can never understand the past in its own terms, free from our prejudices and preconceptions. We are hopelessly imprisoned in our own world-views; we can shed some preconceptions only to adopt others, with no reason to believe that they are the conceptions of the different society that we are trying to understand. One need not embrace this essentially solipsistic view of historical knowledge to appreciate the indeterminate and contingent nature of the historical understanding that an originalist historian seeks to achieve.”).

11. *Id.* at 219.

12. Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 793 (1983) (“The internal critique cuts deeper; it undermines in several steps the plausibility of interpretivism as a constitutional theory. The first step is an argument that interpretivism must rest on an account of historical knowledge more subtle than the naive presumption that past attitudes and intentions are directly accessible to present understanding. The second step identifies the most plausible such account, the view—sometimes called hermeneutics—that historical understanding requires an imaginative transposition of former world views into the categories of our own. The third step is an argument that such an imaginative transposition implies an ambiguity that is inconsistent with the project of liberal constitutional theory (and interpretivism). The project of imaginative transposition can be carried through in a number of different ways, with a number of different results, none of which is more “correct” than the others. The existence of such an indeterminacy means that interpretivism, unless it falls back on nonliberal assumptions, cannot constrain judges sufficiently to carry out the liberal project of avoiding judicial tyranny.”); *see also id.* at 793-804.

13. William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237 (1986).

meaning to past facts. In this act of translating the past into present meaning, the historian, “as he renders the past meaningful in the present, cannot avoid changing its meaning, just as the Egyptologist who translates hieroglyphics into English through Greek can at best only approximate their original meaning.”¹⁴ The change that the historian begets depends on his particular point of view. “A contextualist historian selects one historical interpretation in preference to another on the basis of its consistency with his own value system or world view, or that of his audience.”¹⁵ David Strauss has made this same point.¹⁶

We should notice that these historicisms have a quality of relativism. Fischer argues that relativist historicism is fallacious because *some* facts are simply true from all perspectives.¹⁷ Indeed, common sense suggests that historicism is wrong in at least some obvious circumstances relevant to originalism. For example, no matter from what perspective one looks at it, the Eleventh Amendment was intended to overturn *Chisolm v. Georgia*. That piece of historical knowledge may not be enough standing alone to answer any particular question on sovereign immunity, but that piece of knowledge is relevant to such an inquiry and it is indisputable. Nelson provides several examples of historical questions relevant to originalists in which a historicist would be hard-pressed to come up with more than one answer to the particular question.¹⁸ Fischer additionally argues that merely because all historical knowledge is incomplete does not mean it is false.¹⁹

I think, moreover, that a serious question is raised about historicism because it appears to be self-contradictory: If all knowledge is relative to a particular time and place, and has no objective value beyond the partial perspective and presuppositions of the particular individual, then isn't *historicism itself* merely one “perspective” unique to the cultural, intellectual, and historical context of its proponents? Fischer explains that “relativists all argued that they and their friends were exempt from relativism in some degree.”²⁰ As a more prominent political theorist of the last century has written,

The historicist thesis is . . . exposed to a very obvious difficulty which cannot be solved but only evaded or obscured by

14. *Id.* at 1243.

15. *Id.* at 1244.

16. David Strauss, *Originalism, Conservatism, and Judicial Restraint*, 34 HARV. J.L. & PUB. POL'Y 137, 140-41. Others have made the same point. See, e.g., Jeffrey M. Shaman, *The End of Originalism*, 47 SAN DIEGO L. REV. 83, 91-92 (2010).

17. FISCHER, *supra* note 1, at 42 n.4.

18. Nelson, *supra* note 13, at 1257-59.

19. FISCHER, *supra* note 1, at 42 n.4.

20. *Id.*

considerations of a more subtle character. Historicism asserts that all human thoughts or beliefs are historical, and hence deservedly destined to perish; but historicism itself is a human thought; hence historicism can be of only temporary validity, or it cannot be simply true. To assert the historicist thesis means to doubt it and thus to transcend it. . . . Historicism thrives on the fact that it inconsistently exempts itself from its own verdict about all human thought. The historicist thesis is self-contradictory or absurd. We cannot see the historical character of “all” thought—that is, of all thought with the exception of the historicist insight and its implications—without transcending history, without grasping something trans-historical.²¹

There are other common-sense reasons we might think historicism is not quite right. Consider that we *also* have different presuppositions from person to person within a time and place; or within merely a short span of time; and so forth. We already lose something in translating hieroglyphs to Greek itself, without yet another intermediating language. To say, then, that objective historical knowledge is impossible is to say also that all knowledge is impossible. If that is true, then any other legal method will be just as arbitrary as an originalist one because it will rely on some other knowledge that is still subjective.

These preliminary observations are not intended to resolve the debate over the possibility of historical knowledge. Obviously much more theoretical work would be necessary. My point here is only that there are a number of common-sense reasons to assume that historical knowledge is possible.

B. INDETERMINACY AND THE USES OF HISTORY

With that reasonable assumption made, I would like to turn to a slightly different inquiry: what if there is no objective historical knowledge of the *kind* relevant to legal inquiries? What if our objective historical knowledge is too indeterminate to provide us with answers to constitutional questions? David Strauss stresses this point often. Again, I do not intend here to prove or disprove Strauss—but because his criticism is prominent, I would like to suggest a few common-sense reasons why his criticism does not seem quite right.

He has written,

21. STRAUSS, *supra* note 4, at 24-25.

On the most practical level, it is often impossible to uncover what the original understandings were: what people thought they were doing when they adopted the various provisions of the Constitution. Discovering how people in the past thought about their world is the task of historians, and there is no reason to think that lawyers and judges are going to be good at doing that kind of history—especially when they are dealing with controversial legal issues that arouse strong sentiments.²²

Elsewhere he has written that “the originalist project [is] a particularly difficult, challenging form of intellectual history and one that often will, to the honest originalist, turn up the answer ‘I don’t know,’ or ‘there were various ideas and none clearly prevailed,’ or ‘they were just confused back then.’”²³ “Too often,” he writes, “it will be just too hard to figure out the answers to the relevant historical questions.”²⁴ Others have made these criticisms as well, and at least one originalist has written that it is perhaps the most universal criticism.²⁵

But Strauss’s criticisms hardly seem unique to originalism. Surely it is true that history is more difficult to do objectively when dealing with “controversial legal issues that arouse strong sentiments.”²⁶ But many historical questions are controversial and arouse strong sentiments—the effects of imperialism, the roots of slavery, the causes of the First World War—and yet we don’t give up the study of those topics. Surely it’s just as easy (or hard) to answer a legal history question as it is to answer any other historical question from the relevant period. To be sure, Strauss’s criticism might be justified if what he means is that *all* history suffers from the problem of incomplete knowledge and indeterminacy, and so using history is not a good way to solve legal problems.

On this count, we might glean some insight from Fischer. As he explains,

There are many objective truths to be told about the past—great and vital truths that are relevant and even urgent to the needs of mankind. But there is no whole truth to be discovered by a simple method of induction. Every true historical statement is an answer to a question which a historian has asked. Not to The Question.

22. DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 18 (2010).

23. David A. Strauss, *Originalism, Conservatism, and Judicial Restraint*, 34 HARV. J.L. & PUB. POL’Y 137, 140 (2011).

24. *Id.*

25. Thomas B. McAfee, *Originalism and Indeterminacy*, 19 HARV. J.L. & PUB. POL’Y 429, 429 (1996).

26. STRAUSS, *supra* note 22, at 18.

Not to questions about everything. But to questions about something.²⁷

I think there is much truth, and common sense, to this statement. Some questions may be too broad to be of relevance, for example (and as we shall revisit later), whether the Constitution is on the whole a “classical liberal” constitution or a “civic republican” constitution. But critics hardly show that all or even most questions of relevance to lawyers and constitutional scholars—for example, the meaning of the words “happen” and “the Session” in the Vacancies Clause—cannot produce particular and important truths or at least a circumscribed range of possibly true answers.²⁸

That last point is particularly important. It may be that there is no *one right answer* to a constitutional question, but that does not mean history isn't useful. If the history can boil down the legal “answer” to two possibilities, that is worth something. It means the courts cannot (if you are an originalist) impose a third possibility. One prominent example will suffice to illustrate: the famous debate between Michael McConnell and Philip Hamburger over the meaning of the Free Exercise Clause. The debate centered on whether the clause guarantees religious exemptions from generally applicable laws; for example, whether the clause would require that generally applicable drug laws provide an exemption for Native Americans whose religious practices require using peyote.²⁹ That was the issue, most recently, in *Burwell v. Hobby Lobby*.³⁰

The general dispute revolved around the “caveats” or “provisos” in early state free exercise clauses. McConnell argues that the provisos generally allowed for free exercise of religion except where the actions would not be “peaceable” or would disturb the “peace” or “safety” of the state.³¹ The implication he draws is that religious objectors could be exempt from generally applicable state laws,³² and only when their religious actions would disturb the peace or threaten the safety of the state could such

27. FISCHER, *supra* note 1, at 5.

28. *See, e.g., infra* notes 96-100 and accompanying text.

29. This was the question in *Employment Division v. Smith*, 494 U.S. 872, 874 (1990).

30. 134 S. Ct. 2751, 2759 (2014). Though *Hobby Lobby* was based on a federal statute, the Religious Freedom Restoration Act, which Congress passed in order to reinstate Free Exercise Clause jurisprudence as it existed prior to *Smith*.

31. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1461-62 (1990). Here is an example of one such proviso, from New York's 1777 Constitution: “[T]he free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: *Provided*, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.” *Id.* at 1456.

32. *Contra* the decision in *Smith*, 494 U.S. at 890.

actions be suppressed. As McConnell writes, “[T]he state provisions make sense only if free exercise envisions religiously compelled exemptions from at least some generally applicable laws.”³³

Hamburger disputes this implication on the ground that “instead of implying that the right of free exercise was very extensive—that it permitted peaceable departure from civil law [(McConnell’s position)]—the caveats stated the conditions upon which religious liberty could be denied.”³⁴ That is, a proviso “could have been a condition of the availability of a relatively narrow right of free exercise rather than a limitation on an otherwise very extensive right.”³⁵ Put differently, the “right to free exercise” in the state constitutions was not self-defining, and it could have been understood as a narrow right.

The McConnell-Hamburger disagreement can be useful for constitutional interpretation in at least two ways. First, it may be that their debate reveals a *range* of originalist meaning. Perhaps the *Employment Division v. Smith* test eliminating exemptions from generally applicable laws³⁶ and the prior *Sherbert v. Verner* test adopting exemptions from generally applicable laws³⁷ are both plausible interpretations in light of the originalist history. That is useful insofar as we know that one of these two rules, or either of them, would be a legitimate interpretation of the text. Excluding other possibilities does not indicate total failure.

Second, it may be that this debate can still provide us with an answer depending on the interpretive conventions we employ. For original public meaning originalists, for instance, perhaps once the text is unclear, we need only rely on the *preponderance* of the evidence with respect to the original public meaning. In that sense, while both Hamburger’s and McConnell’s versions provide significant evidence for their respective positions, perhaps one or the other provides a preponderance of the evidence. Or perhaps an interpretive method that uses the founders’ idea of liquidation—the notion that the meaning of the text becomes determined by the first courts to interpret the text in light of particular controversies—can rely on this debate, too. The argument would go as follows: There is originalist evidence suggesting one of two plausible meanings. The early cases suggest that the courts (or the political branches) liquidated the meaning of

33. McConnell, *supra* note 31, at 1462.

34. Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 919 (1992).

35. *Id.* at 921.

36. *Emp’t. Div. v. Smith*, 494 U.S. 872, 878-79 (1990).

37. *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

the clause in favor of one rule over the other.³⁸ For example, it was unclear at the time of the founding whether the *Ex Post Facto* Clause should be interpreted by its plain meaning to include all retrospective legislation, or by its technical meaning to include only criminal cases. Early interpretations settled on the technical and thus helped to “fix” or “liquidate” one rule over the other.³⁹

My point thus far has been to suggest some common-sense reasons why certain academic arguments against the use of history in legal analysis seem wrong. At least, for purposes of this article, we can safely assume that historical knowledge is possible and also relevant. We are thus ready to engage with the thrust of this article: the fallacies historians tend to commit and how we might avoid them.

III. FALLACIES OF QUESTION-FRAMING

Question-framing is important to any historical inquiry. “A moment’s reflection,” writes David Hackett Fischer, “should suffice to establish the simple proposition that every historian, willy-nilly, must begin his research with a question.”⁴⁰ A historian cannot simply absorb all facts in existence before coming to some conclusion. He cannot know what facts are *relevant* without first asking a question. He must generally know what he is looking for. Now, to be sure, our discussion of the historicist fallacy has suggested that historians have certain presuppositions and assumptions. Everyone does.

Our inquiry is whether historians can be sufficiently careful to avoid coloring their investigations with these presuppositions and assumptions. We thus begin with the more specific fallacy describing the ways in which originalist historians too often approach questions with the end in mind—a habit for highly effective people, perhaps, but also for highly ineffective historians.

38. These early cases did not liquidate the meaning in favor of McConnell’s view. See McConnell, *supra* note 31, at 1503-11. The cases opposed to exemptions often contain language suggesting that exemptions might be available in other contexts, but ultimately only one early case definitively found a right to an exemption and at least one found definitively the other way. *Id.* at 1513.

39. Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 547 (2003).

40. FISCHER, *supra* note 1, at 3.

A. FALLACY OF DECLARATIVE QUESTIONS

The fallacy of declarative questions is a fallacy of question-framing whereby an historian with a presupposition will prove what he sets out to prove:

The *fallacy of declarative questions* consists in confusing an interrogative with a declarative statement. It violates a fundamental rule of empirical question-framing, which requires that a question must have an open end, which will allow a free and honest choice, with minimal bias and maximal flexibility. If a historian goes to his sources with a simple affirmative proposition that “X was the case,” then he is predisposed to prove it.⁴¹

In originalist histories this fallacy is likely committed subconsciously. It is particularly common in works that attempt to justify a particular constitutional interpretation with an appeal to the historical, general, original understanding of the Constitution. Instead of approaching the question afresh, many constitutional theorists end up supporting their particular political views. In particular and more subtly, many theorists tend to support a particular notion of constitutional legitimacy and then claim that the original meaning happily comports with their particular notions of legitimacy.⁴² That’s not to say these legal historians *must* be wrong, only that it raises the question of whether their research questions were properly framed.⁴³

This fallacy was likely committed in Randy Barnett’s *Restoring the Lost Constitution: The Presumption of Liberty*.⁴⁴ His research question is spelled out early, and it takes something like the following form: The Constitution must protect natural rights to be legitimate. We must therefore look to the original Constitution and see if it protects natural rights. He then looks and discovers that the original Constitution, when properly understood, does protect natural rights.⁴⁵ Barnett does not, at least

41. FISCHER, *supra* note 1, at 24.

42. I have discussed this elsewhere. See Ilan Wurman, *The Original Understanding of Constitutional Legitimacy*, 2014 BYU L. REV. 819, 819-48 (2014).

43. H. Jefferson Powell also recognized a fallacy of this kind. H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 677 (1987) (“If the founders, as you understand them, always agree with you, it is logically possible that you are in incredible harmony with them. It is considerably more likely that your reconstruction of their views is being systematically warped by your personal opinions on constitutional construction.”).

44. RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004).

45. More specifically, Barnett argues that a constitution may legitimately bind non-consenting residents only if their natural rights are protected. *Id.* at 4 (“I contend that if a constitution contains adequate procedures to protect these natural rights, it can be legitimate even if it was not consented to by everyone; and one that lacks adequate procedures to protect natural

consciously, impose the presumption of liberty on the text in order to make the Constitution more just; it just so happens that these constitutional clauses, when given this correct original meaning, are also just, and so the Constitution is also legitimate and worthy of our obedience. He may be correct, but readers of history must surely approach such a claim with some skepticism.

I think a fallacy of this sort also has occurred in the writing of Jack Balkin. For him, the Constitution can only be legitimate if it allows for updating constitutional constructions in our time.⁴⁶ Balkin further claims that the Framers *intended* for us continually to change how we interpret the standards and principles in the text of the Constitution.⁴⁷ Of course, such a view runs directly contrary to Barnett's thesis that the Constitution was meant primarily to protect individuals from future decision-making by enshrining their rights—and thus a presumption of liberty—into the constitutional text. Balkin draws the precise opposite conclusion than does Barnett from the open-endedness of the Constitution's grand rights provisions with respect to the correct constitutional hermeneutic. But both share at least one thing in common: they begin with a notion of what the Constitution must say if it is to be legitimate (from their respective points of view), and they go on to “prove” that the Constitution says precisely that. Neither began his project with a truly open-ended research question.

B. FALLACY OF FALSE DICHOTOMOUS QUESTIONS (THE EXCLUDED MIDDLE)

Another specific way in which a historian might not ask the right question is if he asks a falsely dichotomous one. Fischer singles out this fallacy for “special condemnation” because it “arises from the abuse of an exceedingly dangerous conceptual device.”⁴⁸ Properly understood, a dichotomy is a division into two parts that are mutually exclusive and

rights is illegitimate even if it was consented to by a majority.”). Barnett then argues that if the text of the various constitutional provisions is properly understood, it points to interpretations that may be described as a presumption of liberty. His clearest statement that he is deriving this presumption from the original meaning comes on page 152, where he writes, “The original meaning of these nearly lost clauses [—Necessary & Proper, Privileges or Immunities, and the Ninth Amendment—] argues strongly against a presumption of constitutionality and in favor of the contrary construction I describe in chapter 10: the Presumption of Liberty.” *Id.* at 152. This presumption also best protects the people's natural rights by putting the burden on the government to justify that every action it takes is both “necessary and proper.” *Id.* at 260.

46. JACK M. BALKIN, *LIVING ORIGINALISM* 4, 55, 69-73 (2011).

47. *Cf. id.* at 25 (“This choice of [vague and abstract] language [of principles] makes little sense if the purpose of constitutionalism is to strongly constrain future decisionmaking.”); *see also id.* at 29 (“[Open-ended rights guarantees] are designed to *channel* and *discipline* future political judgment, not forestall it.”). *See generally id.* at 21-34.

48. FISCHER, *supra* note 1, at 9.

collectively exhaustive. A dichotomy “is used incorrectly when a question is constructed so that it demands a choice between two answers which are in fact not exclusive or not exhaustive.”⁴⁹ Nevertheless, says Fischer, historians often misuse dichotomy. He collects titles from actual (!) historical works, such as *Plato: Totalitarian or Democrat?* and *Renaissance Man—Medieval or Modern?* along with about two dozen others.⁵⁰ Perhaps Plato was somewhat totalitarian and somewhat a democrat. Or perhaps he was something altogether different; after all, describing him in these terms is to commit an anachronism, another fallacy to which we come later. But surely Plato was not solely either a totalitarian or a democrat.

Restoring the Lost Constitution likely commits this fallacy as well. In making the case for a presumption of liberty, the author describes the battle over constitutional interpretation as a battle between the presumption of liberty and its nemesis, the presumption of constitutionality.⁵¹ Now of course many others fall into this trap, too. Indeed, Fischer explains that many of the examples he cites “reflect a false dichotomy which is deeply embedded in scholarly literature on the subject at hand.”⁵² But deeply embedded or not, why must either be the case? That is, why must the Constitution either enshrine a presumption of liberty *or* a presumption of constitutionality? Casting it as either one or the other ignores the possibility that it may be a little of both, or perhaps sometimes one and sometimes the other, or that maybe these presumptions can be avoided altogether, or that they are altogether meaningless.⁵³

Judicial opinions are replete with such questions or a least with statements that describe false dichotomies. Often these will take the form of erroneous “if-then” propositions or “either-or” propositions; in this form

49. *Id.* at 10.

50. *Id.* at 10-11.

51. BARNETT, *supra* note 44, at 5 (“Finally, I shall show how, when the meaning of these missing provisions is correctly understood, we can choose properly between two opposing constructions of the powers the Constitution delegates to government officials: . . . The first of these is called ‘the presumption of constitutionality.’ . . . The second of these may be called the Presumption of Liberty. . .”).

52. FISCHER, *supra* note 1, at 11.

53. For example, as I have written elsewhere, the Founders understood constitutional legitimacy in such a way that suggests they made compromises among the ends of government, and therefore it may be difficult to discern which presumption is more consonant with original meaning. See Wurman, *supra* note 42, at 848-49, 864-65. McGinnis and Rappaport claim that by using original interpretive conventions we can avoid using any sort of presumption in constitutional construction. John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009).

the fallacy is often called the fallacy of the excluded middle.⁵⁴ The dissent in *Alden v. Maine*⁵⁵ seems to have committed this error numerous times. The majority argued that *Chisolm v. Georgia*,⁵⁶ the ruling of which was overturned by the Eleventh Amendment, was wrong, and therefore the principles of sovereign immunity extend beyond the diversity cases described in the Eleventh Amendment.⁵⁷ The dissent responded, “[I]f the Court’s current reasoning is correct, the Eleventh Amendment itself was unnecessary.”⁵⁸ That statement excludes several middles. As the majority itself explained, the Amendment was at least necessary to overrule *Chisolm*.⁵⁹ Caleb Nelson has further explained that the Eleventh Amendment would have allowed dismissal of suits pending against any state that may have already been compelled to appear and also protected states that waived sovereign immunity in their own courts from having to appear in federal court on the basis of removal jurisdiction.⁶⁰

The dissent again committed the fallacy of false dichotomous questions when it set up its inquiry by seeking to determine whether sovereign immunity was, at the time of the founding, considered: (1) a common law power understood to be defeasible by statute or (2) whether it was considered a natural law concept whereby a sovereign could not be logically bound to the law it made.⁶¹ It turns out that neither of these two conceptions was likely how the founders viewed sovereign immunity. Caleb Nelson again shows that sovereign immunity was not a natural law doctrine or a common law power defeasible by statute, but rather it was more likely a doctrine of *personal jurisdiction* whereby a sovereign could not be sued because there was no way to compel the sovereign’s attendance by civil process—and therefore courts would not have the power to enter a judgment because no “case” or “controversy” would have formed.⁶² The lesson of all of these examples is that it is very difficult to obtain correct historical answers when the initial question being answered is flawed by its exclusion ab initio of plausible routes of inquiry.

54. See, e.g., Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 367 (1994); William Ewald, *Unger’s Philosophy: A Critical Legal Study*, 97 YALE L.J. 665, 756 n.117 (1988).

55. 527 U.S. 706 (1999).

56. 2 U.S. 419 (1793).

57. *Alden*, 527 U.S. at 721-22.

58. *Id.* at 761 (Souter, J., dissenting).

59. *Id.* at 723.

60. Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1603-06 (2002).

61. *Alden*, 527 U.S. at 762-64 (Souter, J., dissenting).

62. Nelson, *supra* note 60, at 1567-1608.

We must conclude this particular discussion with an example from an amicus brief before the Supreme Court in the Second Amendment case, *District of Columbia v. Heller*.⁶³ The brief was written by a group of *professional historians*—all of whom “earned Ph.D. degrees in history, hold academic appointments in university departments of history, and specialize in the American Revolution, the Early Republic, American Legal History, American Constitutional History, Anglo-American Legal History, or related areas.”⁶⁴ They drew attention to historians’ recurring complaint about the shortcomings of “law office history.”⁶⁵ And they, incredibly, committed at least one major fallacy of question-framing, as well as a handful of other fallacies that we shall encounter in the coming Parts.

The Second Amendment reads, “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”⁶⁶ Our professional historians frame the question as follows:

As a problem for constitutional historians, the question can be elaborated and restated this way: Did the framers and ratifiers of the Amendment believe they were constitutionally entrenching an individual right to keep arms for personal protection? Or did they conceive the Amendment to achieve a different end, by affirming that a “well-regulated militia” of citizen-soldiers would preserve “the security of a free state,” principally by lessening the need for a republican government to depend on a standing army?⁶⁷

The Second Amendment, however, makes reference *both* to a right of the people to bear arms *and* to a well-regulated militia. By improperly framing the question as a false dichotomy, these professional historians ab initio missed the possibility—and therefore the evidence they sought naturally led them away from that possibility—that a well-regulated militia was to be maintained *by* protecting the people’s right to remain armed and trained. That, indeed, appears to be the conclusion adopted by the Supreme Court in *Heller*.⁶⁸

It is important to emphasize that the above is not to say that this third view is correct, but it is to say that it’s possible that it is correct. By

63. 554 U.S. 570 (2008).

64. Brief of Jack N. Rakove et al. as Amici Curiae Supporting Petitioners, *District of Columbia v. Heller*, No. 07-290 (Jan. 11, 2008), 2008 WL 157183, at 1 [hereinafter Brief of Rakove et al.].

65. *Id.* at 33.

66. U.S. CONST. amend. II.

67. Brief of Rakove et al., *supra* note 64, at 1-2.

68. *District of Columbia v. Heller*, 554 U.S. 570, 599-600 (2008).

improperly framing the question, however, the professional historians closed themselves off to its possibility. Law-office historians, it would seem, do no worse than their colleagues on the opposite side of their university campuses.

C. FALLACY OF QUIBBLING

The fallacy of quibbling is listed in Fischer's book under the category "fallacies of semantical distortion"⁶⁹ but fits here as well. It is "a form of equivocation which involves two or more people in a single argumentative exchange"; "[i]t occurs whenever the meaning of a term is changed as it changes hands, with a resultant argumentative distortion."⁷⁰ For example, Fischer explains how Max Weber's famous thesis of "a functional relationship between capitalism and the Protestant ethic rested upon a careful definition of these terms"; an opponent, however, "subtly shifted those definitions in his attempt at refutation."⁷¹ This is a question-framing problem because it distorts the components of a prior scholar's question.

At a high level of generality, this fallacy occurs in the debates over originalism, when the opponents of it distort the thought of originalists in order to refute them. This occurs in Stephen M. Griffin's *Rebooting Originalism*, where he argues that originalism depends on a view of history devoid of historical context.⁷² No originalist believes, however, that history can be done without taking historical context into account. Indeed, that is the *only* way to do history. Originalists do, as we shall see later, often commit errors with their evidence, but that is not because they maintain that historical context is irrelevant.

Similarly, to claim in 2007 that originalism fails because the Founders did not adhere to the "plain meaning" of legal texts⁷³ is to commit the fallacy of quibbling because: (1) no originalist seriously believes that legal texts must be interpreted by their "plain" rather than their "reasonable" or "contextual" meaning,⁷⁴ and (2) to understand the "plain" meaning of words

69. FISCHER, *supra* note 1, at 275.

70. *Id.*

71. *Id.*

72. Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1205 (2008).

73. See Saul Cornell, *The Original Meaning of Original Understanding: A Neo-Blackstonian Critique*, 67 MD. L. REV. 150, 150 (2007).

74. This includes the originalist, Randy Barnett, on whose definition Cornell relied. *Id.* Barnett defines originalism as seeking to discover the "objective original meaning that a reasonable listener would have placed on the words used in the constitutional provision at the time of its enactment." *Id.* at 150 (quoting Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620, 621 (1999)). An "objective" meaning to a "reasonable" observer may not be, and probably would not be, the "plain meaning" devoid of any legal background or linguistic context.

one often has to look at context—claiming otherwise would be preposterous. In other words, the author who claims “there is good reason to doubt that plain-meaning originalism is a historically accurate reflection of how many contemporaries would have interpreted the Constitution” because those contemporaries had a “deeply contextualist ... approach” to constitutionalism,⁷⁵ commits the fallacy of quibbling *both* by redefining originalism *and* by redefining plain meaning.

Changing the terms to defeat an opponent is generally a common practice, not just in historical arguments; but the latter of our two examples is also important for a crucial historical inquiry. If in seeking to discover whether the Founders were originalists—and therefore whether or not originalism is a self-defeating proposition—we change the definition of “originalism,” our historical analysis will be of doubtful utility. As Fischer observes, the historian will have disproved a thesis—in our case, that the Founders were plain-meaning interpreters of legal texts—but not *the* thesis he claims to have disproved.⁷⁶

IV. FALLACIES OF FACTUAL VERIFICATION

Fallacies of factual verification involve the types of evidence historians use to try to prove the truthfulness of a fact. Sometimes the evidence does not actually prove what the historian seeks to prove. This error occurs in certain patterns that can be described as fallacies, of which this part analyzes only a few. The most common one in the originalist literature is the fallacy of negative proof—the notion that an absence of evidence of something is itself affirmative evidence that something did not or could not exist.

A. FALLACY OF NEGATIVE PROOF

“The *fallacy of negative proof* is an attempt to sustain a factual proposition merely by negative evidence. It occurs whenever a historian declares that ‘there is no evidence that *X* is the case,’ and then proceeds to affirm or assume that not-*X* is the case.”⁷⁷ H. Jefferson Powell warned of something similar when he instructed originalists not to use “silence” as evidence of historical understanding,⁷⁸ though using silence as evidence may not always commit the fallacy of negative proof.⁷⁹

75. *Id.* at 151.

76. FISCHER, *supra* note 1, at 275.

77. FISCHER, *supra* note 1, at 47.

78. Powell, *supra* note 43, at 671-72.

79. If, for example, a particular power were an *attractive* power, an absence of any use of that power might suggest that it did not exist. The problem, however, is usually in the premise—

Notwithstanding Powell's early admonition, the fallacy of negative proof has been committed in a number of important contexts, the anti-commandeering literature and judicial opinions being of particular note. In *Printz v. United States*,⁸⁰ this fallacy rears its head several times. Justice Scalia writes for the Court that contemporaneous legislative exposition of the Constitution is strong affirmative evidence of the original meaning of the constitutional text.⁸¹ He then writes: "Indeed, it can be argued that the numerosness of these statutes [imposing obligations on state courts], contrasted with the utter lack of statutes imposing obligations on the States' executive (notwithstanding the attractiveness of that course to Congress), suggests an assumed absence of such power."⁸² That statement commits the fallacy of negative proof. Use of a power is evidence of the existence of that power; claiming that there is no evidence of use is tantamount to claiming that there is no evidence of the power. The Court's proposition thus takes the form "there is no evidence of *X*, therefore not-*X* must be the case." The Court repeats this same proposition at other points in the opinion.⁸³

Justice Scalia's reliance on an absence of evidence, to be sure, is not a perfect example of the fallacy of negative proof because it does provide us with *some* important evidence. Specifically, Justice Scalia explains that if the power *did* exist, it would have been an *attractive* power to use and therefore we might suppose that it would have been used.⁸⁴ We shall see shortly that this assumption was likely wrong and there is another explanation for why the federal government may not have used this power. But we should note that *if* the assumption is correct, then demonstrating an absence of evidence would be *some* proof that the power did not exist.

Both the majority and the dissent commit a more complete version of this fallacy when they make too much of the circumstances surrounding President Wilson's "requesting" rather than demanding the states' aid in implementing the draft. The majority takes Wilson's posture to mean that

thinking that something would have been an attractive power, or that something would have been said if people thought it, and so on. Those are often faulty assumptions, which goes to show the danger of silence generally, even if using silence as evidence is not always negative proof. See *infra* pp. 181-83 (discussing the anti-commandeering opinions).

80. 521 U.S. 898 (1997).

81. *Id.* at 905.

82. *Id.* at 907-08 (emphasis removed).

83. *Id.* at 916 ("To complete the historical record, we must note that there is not only an absence of executive-commandeering statutes in the early Congresses, but there is an absence of them in our later history as well . . .").

84. "Conversely if . . . earlier Congresses avoided use of this highly attractive power [of the commandeering of state officers to enforce federal laws], we would have reason to believe that the power was thought not to exist." *Id.* at 905.

he believed it necessary to request rather than to commandeer the state officers, evidence that commandeering is unconstitutional.⁸⁵ But there could be any number of *political* reasons to request rather than to commandeer. The absence of the power's use does not mean the power did not exist. The dissent, for its part, writes: "If there were merit to the Court's appraisal of this incident, one would assume that there would have been some contemporary comment on the supposed constitutional concern that hypothetically might have motivated the President's choice of language."⁸⁶ That there was no evidence of Wilson having been concerned about the constitutionality of commandeering does not mean that Wilson was not concerned about the constitutionality of commandeering. To say otherwise is to commit the fallacy of negative proof. It cannot be stressed enough how common this faulty mode of reasoning has become in judicial opinions. It has become almost second nature.

One anti-commandeering scholar committed this same fallacy when, discussing the commandeering of state courts, he wrote: "[G]iven that the Anti-Federalists' real and imagined fears for the loss of state autonomy were easily aroused, the absence of any outcry from them concerning the prospect of jurisdictional (or other) coercion, is itself strong evidence that such a prospect was not part of the perceived message of The Federalist."⁸⁷ In other words, there is no evidence of *X* (the existence of the power would be evinced by an outcry against it), and therefore not-*X* (the power does not exist).

But there might be another explanation for both the absence of the outcry and the absence of any historical use. First, suppose there was no outcry because the Anti-Federalists *wanted* the federal government to commandeer state officials because they feared a federal bureaucracy above all. Second, suppose that the Federalists reassured the Anti-Federalists that the federal government would use state officials to execute federal laws to assuage their concerns. But then suppose the Federalists took power early in the republic and decided to create a federal bureaucracy after all in a kind of bait-and-switch. There would be no evidence of early historical use because the Federalists did not want to use the state officials when it could create a federal bureaucracy, whose officers would have federal attachments, instead. That, indeed, is the narrative put forward by Wesley J. Campbell in his *Yale Law Journal* article, *Commandeering and*

85. *Id.* at 917.

86. *Id.* at 953 (Souter, J., dissenting).

87. Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 142.

Constitutional Change.⁸⁸ Although his evidence is not unequivocal, it is strikingly persuasive.⁸⁹

Having assailed significant portions of the conservative Justices' historical analysis in *Printz*, the liberal Justices' historical analysis in another federalism context—sovereign immunity—must be challenged as well. We need only revisit *Alden v. Maine*, where the dissenters committed the fallacy of negative proof repeatedly. The dissenters at one point write, “There is no evidence . . . that any concept of inherent sovereign immunity was understood historically to apply when the sovereign sued was not the font of the law.”⁹⁰ Elsewhere the dissenters point to the “fact” that “no State declared that sovereign immunity” was an “inalienable and natural right[.]” as evidence that sovereign immunity was not so considered.⁹¹ As we have discussed earlier, however, Caleb Nelson offers a treasure trove of *affirmative* evidence demonstrating that the founding generation overwhelmingly considered sovereign immunity to be a doctrine of personal jurisdiction—which would make irrelevant which sovereign was the font of the law.⁹²

Negative proof is not constrained to federalism decisions. Campbell again shows how Justice Scalia's concluding statement in his *City of Boerne*⁹³ concurrence, again on the free exercise issue, commits this fallacy. Scalia had written:

88. Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L.J. 1104 (2013).

89. Campbell's discussion of the impost debates proves that the anti-federalists would have preferred that state officers execute federal laws, but it does not prove that the Constitution permitted commandeering of state officials without state consent. See *id.* at 1112-26. In the ratification debates, Hamilton tried to assuage the anti-federalists by claiming the federal government would “make use of” or would “employ” state officials to execute federal law. *Id.* at 1129-30. It still does not follow that the Constitution permitted commandeering. Campbell makes the strongest case from this part of the evidence as follows: “During the impost controversy, defenders of state autonomy had insisted that hiring federal collectors posed a greater threat to state sovereignty than commandeering state collectors. With the impost controversy coloring the entire debate, it was unnecessary for Federalists to explain that state officers would be compelled to enforce federal law. And surely contemporaries would not have thought that Federalist silence signaled a tacit denial of federal commandeering power.” *Id.* at 1132-33.

Campbell offers more direct evidence that a federal commandeering power was contemplated in his discussion of the Oath Clause, which, he argues, was understood to imply that state officers would have to enforce federal laws, *id.* at 1134-35, and of the debate over *posse comitatus*, in which the Federalists suggested that the greater power to call forth the state militias included the lesser powers to call upon the civil authority—the county sheriff and his posse of local citizens—to enforce the federal laws, *id.* at 1140-41. For his discussion of the Federalist bait-and-switch and the Anti-Federalists' political blunders that contributed to it, see *id.* at 1144-48, 1153-57, 1166.

90. *Alden v. Maine*, 527 U.S. 706, 761 (1999) (Souter, J., dissenting).

91. *Id.* at 772.

92. Nelson, *supra* note 60, at 1567-1608.

93. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

It seems to me that the most telling point made by the dissent is to be found, not in what it says, but in what it fails to say. Had the understanding in the period surrounding the ratification of the Bill of Rights been that the various forms of accommodation discussed by the dissent were constitutionally required (either by State Constitutions or by the Federal Constitution), it would be surprising not to find a single state or federal case refusing to enforce a generally applicable statute because of its failure to make accommodation. Yet the dissent cites none—and to my knowledge, and to the knowledge of the academic defenders of the dissent’s position, none exists.⁹⁴

But Campbell shows that the dearth of cases is explained far more by a skepticism toward claims of religious belief in the first place (and hence there would be no need for any accommodation), rather than a view that there should be no such accommodations for genuinely religious beliefs.⁹⁵

The U.S. Court of Appeals for the District of Columbia Circuit in the *Noel Canning v. NLRB*⁹⁶ decision also relied (though only partly) on the absence of historical practice in deciding whether the President could fill a vacancy during an intra-session recess rather than “the Recess” in between official sessions of the Senate (known as the inter-session recess). The court emphasized the importance of early congressional practice: “The interpretation of the [Recess Appointments] Clause in the years immediately following the Constitution’s ratification is the most instructive historical analysis in discerning the original meaning.”⁹⁷ The court then noted that there was a striking absence of appointments during intra-session recesses.⁹⁸ The problem, however, is that intra-session recesses of the kind that occur today were extremely rare in the early republic. As the court recognized, “it is true that intrasession recesses of significant length may have been far less common in those early days than today.”⁹⁹ Yet the court nonetheless proceeded to declare that it is still “the case that the appointment practices of Presidents more nearly contemporaneous with the

94. *Id.* at 542.

95. Wesley J. Campbell, Note, *A New Approach to Nineteenth-Century Religious Exemption Cases*, 63 STAN. L. REV. 973, 976 (2011).

96. *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 133 S. Ct. 2861 (U.S. 2013).

97. *Id.* at 501.

98. *Id.* (“The available evidence shows that no President attempted to make an intrasession recess appointment for 80 years after the Constitution was ratified.”).

99. *Id.* at 502.

adoption of the Constitution do not support the propriety of intrasession recess appointments.”¹⁰⁰

This conclusion does not seem correct. The historical evidence may tell us nothing at all one way or the other; but it surely does not tell us that an act undertaken in a given condition is unconstitutional because it was not exercised under that condition in early congressional history, if that condition simply did not exist in that early history. To be sure, if the historical evidence demonstrated that there were an equal number of intrasession recesses and intersession recesses but that recess appointments only occurred during the latter, that would be much stronger evidence that the power was thought not to exist. It would still be negative proof and we would have to be careful in using it—but it would be *better* negative proof than that used by the *Noel Canning* court.

Fortunately, the *Noel Canning* decision also points to the kind of *affirmative* historical evidence that lawyers and historians can and should use. The court astutely noted that President George Washington seemed to understand the clause to require that the vacancy itself arise during a recess:

If not enough time remained in the session to ask a person to serve in an office, President Washington would nominate a person without the nominee’s consent, and the Senate would confirm the individual before recessing. Then, if the person declined to serve during the recess, thereby creating a new vacancy during the recess, President Washington would fill the position using his recess appointment power.¹⁰¹

The court provided additional historical evidence from the writings of Edmund Randolph and Alexander Hamilton.¹⁰² It might be objected that this affirmative evidence is just the other side of the same coin: There was no evidence that George Washington did *X* (because he in fact did *Y*), and therefore *not-X*. But that is not quite the same thing. The evidence that Washington did *Y* suggests that he thought *Y* was the case, providing us with affirmative proof that *Y* perhaps was the case.

We might illustrate with another example of affirmative historical evidence. Robert Natelson has quite exhaustively looked at uses of the term “the Recess” in founding-era writings and concludes that the term *always* referred to the gap between formal sessions of the legislature, although the

100. *Id.*

101. *Id.* at 508 (citation omitted).

102. *Id.* at 508-09.

word recess could itself refer to any time the legislature was not sitting.¹⁰³ His evidence demonstrates that the words most likely would not have allowed the President to make appointments without the advice and consent of the Senate if the Senate was not in an actual, intersession Recess. This is evidence that *Y* is the case, i.e., that the word *was* used in some particular way, which is not the same thing as saying the word *was not* used in some *other* way and therefore that *other* way is not the case.

The fallacy of negative proof does not occur only in judicial opinions. Our previously introduced group of professional historians commit this fallacy in the amicus brief they wrote for the Supreme Court's consideration in *D.C. v. Heller*. They argued that "[e]xplicit Anti-Federalist references to a private right to arms were conspicuously few in number and failed to generate political support" was evidence that an individual right to bear arms did not exist.¹⁰⁴ They emphasize this negative proof repeatedly in their brief.¹⁰⁵ The irony serves to remind us that all historians, whether lawyers-turned-historians or professional historians, are prone to commit methodological errors.

In the above example, the negative proof may *seem* powerful juxtaposed with the affirmative proof that the populace at the time spoke commonly of the right in the context of militias. But that does not make the negative proof anymore real proof. It could easily be the case—and the professional historians' own primary sources seem to suggest as much—that many if not most individuals owned arms for self-defense and recreational activities and saw no need to state an uncontroversial proposition. As the historians themselves write, gun "ownership and use were not major issues in eighteenth-century America."¹⁰⁶ Ironically, the authors rely on a sarcastic statement by Noah Webster in response to Anti-Federalist requests that a private right to bear arms be protected. He had asked why not add to the proposed prohibition on infringing the right to bear arms the following: "That Congress shall never restrain any inhabitant of America from eating and drinking, *at seasonable times*, or prevent his

103. Robert G. Natelson, *The Origins and Meaning of "Vacancies that May Happen During the Recess" in the Constitution's Recess Appointments Clause*, 37 HARV. J.L. & PUB. POL'Y 199, 213-27. It should be noted that the majority in *National Labor Relations Board v. Noel Canning*, 134 S.Ct. 2550, 2561 (2014), stated that the word "recess" was ambiguous but relied on dictionary definitions and other usages, not on its use with respect to parliamentary procedure.

104. Brief of Rakove et al., *supra* note 64, at 22.

105. *Id.* at 10 & n.2 ("It is noteworthy that no [early state rights declarations] made any reference to the private ownership and personal use of firearms."); *id.* at 17 ("Lee identified a number of fundamental rights deserving recognition, but said nothing about firearms."); *id.* at 22 ("In contrast to the numerous discussions of the militia during the ratification debates, explicit references to the private ownership of firearms were few and scattered.").

106. *Id.* at 12.

lying on his *left side*, in a long winter's night, or even on his back, when he is fatigued by lying on his *right*."¹⁰⁷ But this shows just how ludicrous was the idea that the government would ever infringe on the people's rights to bear arms, which is why there was only limited discussion of the issue. That the discussion was limited therefore gives us very little indication of whether this right was ultimately protected by the text of the Amendment.

B. FALLACY OF REVERSIBLE REFERENCE

Fischer defines reversible reference as “a chameleonlike statement which changes its color with its context and which might variously be used to prove the proposition that *X* is the case or that not-*X* is the case, as the author wishes.”¹⁰⁸ It is the use of evidence to prove a proposition when precisely the opposite proposition might also adequately explain the same evidence. Fischer provides a rather humorous example from Carl Bridenbaugh's book *Cities in the Wilderness*.

To support the proposition that “[c]asting rubbish and refuse of all kinds into the streets without let or hindrance was a confirmed habit of both English and American town-dwellers”—that is, that colonial towns were filthy and strewn with trash—Bridenbaugh offered three pieces of evidence.¹⁰⁹ They were: “that a law was passed against littering in New Amsterdam in 1657, that the law was enforced upon an early American litterbug named John Sharp in 1671, and that provision was made in 1670 for weekly trash removal by the car men of the city.”¹¹⁰ We immediately see the problem. Each of these pieces of evidence can be consistent with either the proposition that colonial American streets were strewn with trash or the opposite proposition—that colonial American streets were kept clean due precisely to these laws and regulations.¹¹¹ Fischer points out, importantly, that the evidence can also be consistent with any position between these two opposites.¹¹²

There are many straightforward examples of this fallacy. We must harp once more on the dissenting opinion in *Alden v. Maine*. At one point, the dissent offers evidence that “[s]everal colonial charters . . . expressly specified that the corporate body established thereunder could sue and be sued” for the proposition that “[t]he American Colonies did not enjoy

107. *Id.* at 24.

108. FISCHER, *supra* note 1, at 44.

109. *Id.*

110. *Id.*

111. *Id.* at 44-45.

112. *Id.* at 45.

sovereign immunity.”¹¹³ Yet this is a reversible reference; it is literally meaningless. It can stand for the stated proposition, or it can stand for precisely the opposite proposition that the American Colonies did enjoy sovereign immunity which is why some colonies had to abrogate sovereign immunity or expressly consent to suit in their charters.

Our professional historians’ use of the fallacy of negative proof also seems to commit the fallacy of the reversible reference. To recapitulate, these historians argued from the fact that “references to the keeping of firearms are so few and terse” that the individual’s right to bear arms was a “minor . . . question,” and therefore that the Second Amendment’s preamble, which has to do with the hotly debated issue of militias, is the “true guide to its original meaning.”¹¹⁴ Yet this absence of historical evidence can also be proof of precisely the opposite proposition: that the individual’s right to bear arms was unflinchingly accepted and uncontroversial (recall Noah Webster’s sarcasm to this effect), and therefore it is unremarkable that the Framers of the Second Amendment protected this individual right.

Finally, we can point to an instance in the debate between Michael McConnell and Philip Hamburger over the meaning of the Free Exercise Clause in which this fallacy was perhaps just barely averted.¹¹⁵ McConnell relies at one point on James Madison’s insistence on including a religious exemption to the militia clause in the Federal Constitution as evidence “that Madison believed freedom of religion to include exemption from generally applicable laws in some circumstances.”¹¹⁶ As Philip Hamburger criticized, however, “Yet other conclusions at least as probable as McConnell’s can be drawn from Madison’s proposal of a military exemption: For example, Madison may have assumed that a conscience or free exercise clause would not provide any right of exemption.”¹¹⁷ After all, if the Free Exercise Clause already provided such exemptions as McConnell would like for us to believe, why would Madison need to include one in the militia clause?

One does not commit a fallacy of reversible reference if one acknowledges that a contrary interpretation is possible and attempts to support one particular interpretation with good arguments. McConnell averts committing the fallacy because he examines the debates in more depth and offers reasons why Madison’s position may still have been

113. *Alden v. Maine*, 527 U.S. 706, 764 (1999) (Souter, J., dissenting).

114. Brief of Rakove et al., *supra* note 64, at 4.

115. Hamburger, *supra* note 34; McConnell, *supra* note 31.

116. McConnell, *supra* note 31, at 1454.

117. Hamburger, *supra* note 34, at 927.

consistent with a general exemption in the Free Exercise Clause.¹¹⁸ For example, the Free Exercise Clause applies to the federal government, but the militias are controlled by the states; or perhaps the Framers intended more firmly to ensure exemptions in military matters; or perhaps they worried that leaving out an exemption would be construed as evidence that no exemptions for free exercise were ever contemplated.¹¹⁹

Explaining, as McConnell does, why an alternative explanation for the evidence can be rejected is absolutely necessary for avoiding the fallacy of reversible reference. McConnell narrowed his claim in his first reference to the militia clause debate by stating that it will reveal that Madison believed in exemptions “in some circumstances.”¹²⁰ He must temper his ultimate claim as well, and he thus concludes that the exemption discussion in the militia clause debates “strongly *suggests* that the *general* idea of free exercise exemptions was part of the legal culture.”¹²¹

V. FALLACIES OF FACTUAL SIGNIFICANCE

Generally, fallacies of factual significance are errors in the selection of facts important to a particular question.¹²² For example, Fischer describes the “prodigious fallacy” as “mistak[ing] sensation for significance”; it is the erroneous idea that historians must describe the rare and spectacular rather than the mundane and common.¹²³ If one agrees that what he describes is indeed a fallacy (I’m not convinced that it always must be), then it is a fallacy of factual significance because it suggests that historians are drawing conclusions from insignificant evidence. What I call the originalist’s fallacy would fall under Fischer’s larger category of fallacies of factual significance.¹²⁴

The originalist’s fallacy is the notion that we must look only to evidence from before the enactment of a constitutional provision to understand its meaning. Professors Calabresi and Prakash adhere to a version of this idea: “[E]ven after having demonstrated a textual ambiguity,” they write, “no originalist should rely exclusively upon the Constitution’s postenactment ‘legislative’ history, which is, after all, the history that is least likely to reflect the original understanding. It is better to

118. McConnell, *supra* note 31, at 1501.

119. *Id.*

120. *Id.* at 1454.

121. *Id.* at 1501 (emphasis added).

122. *Cf.* FISCHER, *supra* note 1, at 64.

123. *Id.* at 70-71.

124. *See id.* at 64-100. I hesitate to describe any of the other fallacies which fall into this category because Fischer may have overstated the fallaciousness of quite a few of the techniques and modes of argument he described. Others are also difficult to detect.

examine exhaustively the pre-ratification material first and only look at the post-ratification material if it is absolutely necessary to do so.”¹²⁵ (When understood against the article to which they were responding, as I shall explain shortly, I think their view may not ultimately be inconsistent with the view I espouse here.¹²⁶) Another scholar has written, “[A]s a methodological matter, it seems somewhat strange for originalists to prefer post-ratification materials with concrete implications for winners and losers over pre-ratification materials.”¹²⁷ This notion seems to follow naturally from the idea that the text’s meaning is “fixed” at the time of enactment.¹²⁸

Philip Hamburger may have adhered to this view in his response to Michael McConnell on free exercise when Hamburger ignored the evidence from the earliest judicial opinions. “Although interesting,” writes Hamburger, the evidence from nineteenth-century judicial opinions is “only indirectly pertinent to the question of what late eighteenth-century Americans thought about exemptions.”¹²⁹ Hamburger focuses on pre-enactment evidence.

McConnell, however, surveyed state cases from as early as 1813.¹³⁰ It is of course possible (and maybe even probable) that the court did not understand the free exercise of religion in the state constitution as the framers of the New York constitution would have understood it thirty-five years earlier,¹³¹ but as the first case interpreting it and only a generation removed from the framing surely this evidence is worth some, if not significant, weight. If the evidence from the eighteenth-century was overwhelmingly contrary, then perhaps these early cases can be dismissed; but if the evidence is not overwhelmingly to the contrary, surely the post-enactment nature of the judicial opinions—which will always be post-enactment—does not inherently undermine its worth.¹³²

125. Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 550-51 (1994).

126. See *infra* text accompanying notes 141-143

127. Jeremy D. Bailey, *The Traditional View of Hamilton's Federalist No. 77 and an Unexpected Challenge: A Response to Seth Barrett Tillman*, 33 HARV. J.L. & PUB. POL'Y 169, 171 (2010).

128. For a general discussion, see Lawrence B. Solum, *Semantic Originalism* 2-4 (Illinois Public Law Research Paper No. 07-24), <http://dx.doi.org/10.2139/ssrn.1120244>.

129. Hamburger, *supra* note 34, at 917 n.8.

130. McConnell, *supra* note 31, at 1504 (citing and discussing *People v. Philips*, Court of General Sessions, City of New York (June 14, 1813)).

131. The state constitution was framed in 1777. See *id.* at 1411, n.2; Hamburger, *supra* note 34, at 924.

132. A thirty-five-year gap may, however, be too long for the opinion to have much worth. McConnell does recognize that these opinions have less weight the farther in time they are from the framings. McConnell, *supra* note 31, at 1513 (“None of these decisions was handed down

One more recent and explicit example of this fallacy appears in an article on the Recess Appointments Clause.¹³³ The author writes,

The disadvantages of omitting preratification material should be obvious. Statements and practices arising after the ratification may not have been part of the ratifiers' original understanding. When postratification sources do shed light back into the tunnel of time, that light is usually weak and uncertain. Even statements by people who participated in the constitutional debates, such as Edmund Randolph, Alexander Hamilton, and Christopher Gore, are of limited value if made after the Constitution was already law. Memories fade and incentives change. Thus, the best evidence of the original force of the unamended Constitution comes from sources arising before the thirteenth state, Rhode Island, ratified the document on May 29, 1790.¹³⁴

But why? It is not at all obvious that pre-enactment evidence is any better than post-enactment evidence. If one source expounding on the meaning of a constitutional provision is dated May 28, 1790, is it really of more force than a different source dated May 30, 1790, expounding on the same provision? Surely not. Perhaps an improved test, then, would be to use that evidence which is nearest in time to enactment whether it dates from before or after the event. Indeed, that seems to be the standard that Fischer provides and which he calls the rule of "immediacy":

[A]n historian must not merely provide good relevant evidence but the best relevant evidence. And the best relevant evidence, all things being equal, is evidence which is most nearly immediate to the event itself. The very best evidence, of course, is the event itself, and then the authentic remains of the event, and then direct observations, etc.¹³⁵

Other considerations, such as motive and incentive, also come into play. But although incentives surely change over time, and perhaps immediately post-enactment, incentives must always be taken into account in assessing the worth of *any* material, whether pre- or post-enactment. What the Federalists were *assuring* the public about the Constitution's meaning before ratification ought to carry more weight than what the Anti-Federalists were *accusing* it of meaning. Although both sides may have had

within twenty years of the first amendment, and they are therefore weak indicators of the original understanding.”).

133. Natelson, *supra* note 103.

134. *Id.* at 204-05.

135. FISCHER, *supra* note 1, at 62.

motives to distort, the Anti-Federalists, who opposed the Constitution, had more motive to exaggerate. But *after* ratification it may very well be that the motives of the Federalists changed. Now they had their Constitution; perhaps all those assurances they gave did not need to be adhered to anymore.¹³⁶

We have already seen that something of this sort may have occurred with the discussions over commandeering of state officials: The Federalists assured the Anti-Federalists that state officers would or at least could have the responsibility to implement federal programs. When the Federalists won the initial elections, however, they decided to create a federal bureaucracy to implement such programs. The post-enactment actions of the Federalists may therefore carry less weight than their pre-enactment assurances. Therefore, an even better test for good evidence would be nearest in time with least motive to distort.

Kesavan and Paulsen offer another plausible test for the use of both pre-enactment and post-enactment history: “Post-Founding evidence is probative of original linguistic meaning and should be consulted even when the Founding-era evidence is seemingly unambiguous. . . . [E]vidence from even a lower-priority category of second-best evidence of constitutional meaning may reinforce (or undermine) conclusions derived from a higher-priority category of second-best evidence of constitutional meaning.”¹³⁷ In other words, consistent post-enactment evidence might support, amplify, and clarify our pre-enactment evidence.

Just as useful, however, is post-enactment evidence that seems to offer another interpretation of the pre-enactment evidence. It may lead us to question our interpretation of the pre-enactment evidence. Consider *Chisolm v. Georgia*.¹³⁸ Although as we have seen there was pre-ratification evidence that the text of Article III left sovereign immunity intact—because “cases” or “controversies” could not form without personal jurisdiction over the states¹³⁹—it clearly was not obvious to everyone, including four out of

136. I should like to be clear on this point. Even if the Federalists had motive to sugarcoat certain aspects of the Constitution to achieve ratification, if the Federalists and Anti-Federalists came to agree that that sugarcoated interpretation was the one everyone was enacting, that interpretation is perhaps the most plausible in terms of historical understanding. In other words, even if the Federalists didn’t really believe what they were saying, taking them at their word would have interpretive value. In any event, the point is only that incentives to distort exist both before and after an event, even if the nature of the incentives—or the distortions—might change.

137. Vasav Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1182 (2003).

138. 2 U.S. 419 (1793).

139. See *supra* notes 60-62 and accompanying text.

five Supreme Court justices, that the Constitution left it intact.¹⁴⁰ The popular reaction against *Chisolm*, which was decided only a few years after the founding, might tell us a lot about how the people understood the words of Article III. It is quite plausible to argue that the uproar over *Chisolm* reflected general disagreement with its conclusion; this evidence is not inherently suspect merely because it arises after ratification.

The point is that there is no *necessary* connection between a change in time and a change in motive. Barring a persuasive explanation as to why the Ratification itself might have affected the public's use of the word "happen," or its understanding of "sovereign immunity," there is no logical reason to give more evidentiary weight pre-1789 than to post-1789 evidence so long as the absolute temporal distance is about the same.

Let us conclude by revisiting what Calabresi and Prakash said.¹⁴¹ They disavowed post-enactment legislative history because they felt their adversaries in the debate over the unitary executive had used such history to *create* ambiguity in the text.¹⁴² Lessig and Sunstein, they argued, used the statutes enacted by the first Congress as evidence of how they understood their power to structure the executive branch; but Congress was an *institutional rival* of the President, and hence their post-enactment view of presidential power is unreliable.¹⁴³ I think that is a fair argument to make; taking that into account is consistent with the rule of immediacy, modified by incentives to distort. But I also think it would not be unfair to suggest that the First Congress, perhaps more than any other Congress since, took seriously the idea that it was left to them to figure out just how this new Constitution of theirs was to work and what it meant. Indeed, moving forward a few decades, was Henry Clay's impassioned plea for the independence of the Treasury Department only a function of his institutional interests?¹⁴⁴ And even if it was, wasn't Andrew Jackson's contrary view¹⁴⁵ merely a function of his institutional interests? I think the matter is too complicated merely to assert that post-enactment history is the worst kind of evidence.

140. Of course, the state of Georgia never appeared to defend, fearing that any appearance could be construed as a waiver of sovereign immunity. The justice therefore did not have the benefit of their argument. *Chisolm*, 2 U.S. at 419 ("And now Ingersoll, and Dallas, presented to the Court a written remonstrance and protestation on behalf of the State, against the exercise of jurisdiction in the cause; but, in consequence of positive instructions, they declined taking any part in arguing the question.").

141. Calabresi & Prakash, *supra* note 125, at 550-51.

142. *Id.* at 554-55.

143. *Id.* at 549.

144. Cass R. Sunstein & Lawrence Lessig, *The President and the Administration*, 94 COLUM. L. REV. 1, 81-82 (1994).

145. *Id.* at 79-81.

VI. FALLACIES OF NARRATION

Narration is one of the more common forms historians use to tell stories.¹⁴⁶ Although there are many elements to narration, the one involving the most common errors is the element of “time and temporal integrity.”¹⁴⁷ Most errors in legal histories similarly involve, not surprisingly, the element of time.

A. FALLACY OF ANACHRONISM

Fischer argues that the fallacy of anachronism underlies most of the more specific fallacies of narration.¹⁴⁸ The fallacy consists in the “description, analysis, or judgment of an event as if it occurred at some point in time other than when it actually happened.”¹⁴⁹ There are many kinds of anachronisms with which most of us should be familiar. One particularly insidious kind is judging a period by an atemporal standard. Fischer uses an example of an historian, Leonard Levy, who had criticized Thomas Jefferson for being unlibertarian.¹⁵⁰ Yet, as Fischer writes,

Levy formed in his own mind an idea of what civil liberties *should* entail—an idea which has *some* relevance in *some* of its particulars to *some* of Jefferson’s associates Then he proceeded to condemn Jefferson, sometimes explicitly, sometimes by innuendo, for not living up to this exalted atemporal standard. In short, Levy analyzed and evaluated Jefferson by measuring his acts and attitudes against the standards of the ACLU and tallying all the discrepancies. The result is objectionable not merely because it is unfair to Jefferson but also because it distorts and falsifies the texture of Jeffersonian thought.¹⁵¹

The socialist historian E.P. Thompson alluded to a fallacy of this sort when he famously described the “enormous condescension of posterity.”¹⁵²

An example of the fallacy of anachronism occurs in the article *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*¹⁵³ The authors seek to

146. FISCHER, *supra* note 1, at 131.

147. *Id.* at 132.

148. *Id.*

149. *Id.* at 132-33.

150. *Id.* at 133.

151. *Id.* at 134.

152. EDWARD P. THOMPSON, *THE MAKING OF THE ENGLISH WORKING CLASS* 12 (1963).

153. Steven G. Calabresi et. al., *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*, 85 S. CAL. L. REV. 1451 (2012)

determine which rights were “really deeply rooted” at the founding by exploring state bills of rights in 1787 and 1791.¹⁵⁴ In their tables cataloguing a variety of rights they are investigating, they include “Blaine Clauses.”¹⁵⁵ The failed federal Blaine Amendment and its successful state counterparts sought to bar public funds to private individuals for use at a religious school or organization.¹⁵⁶ They resulted from Protestant agitation against private Catholic schools.¹⁵⁷ The first state equivalent was passed in 1854,¹⁵⁸ and the federal Blaine Amendment was introduced in 1875 and narrowly defeated in 1876.¹⁵⁹ Why would the authors even look for any such amendments in 1787? Doing so is a completely a-historical and fruitless enterprise.

But what the authors conclude from this exercise is not just fruitless but also, I think, erroneous. They write,

There were some clauses bearing on religion that were surprisingly not present at the time of the founding. We found no clauses pertaining to witness qualification on the basis of religion, no clauses mandating a legislative duty to protect religion, no bans on religious qualifications for holding office; and no Blaine Amendment provisions forbidding any taxpayer money from ever going to any institution including a school under sectarian control. The total absence of Blaine Amendment provisions at the founding is striking because it reemphasizes the extent to which those provisions are likely a product of nineteenth century anti-Catholic, anti-immigrant biases.¹⁶⁰

The lack of Blaine Amendments at that time surely tells us absolutely nothing about the causes of their passage when they actually occurred 60–100 years later. In itself, this tells us nothing more than does pointing out that there were no equivalents to the Blaine amendments in 1572 or 1627 in France—in which case, we learn that the amendments have nothing to do with an aversion to French Huguenots. We now see the problem: It would be an arduous task to list all the moments in history in which there were no such amendments so that we may exclude those moments as contributing to the creation of the amendments.

154. *See id.*

155. *Id.* at 1463-64.

156. Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 *FORDHAM L. REV.* 493, 495 (2003).

157. *Id.*

158. *Id.* at 507 n.49.

159. *Id.* at 509-10.

160. Steven G. Calabresi et. al. *supra* note 153, at 1477 (footnote omitted).

To use a more obvious and relevant example, consider if the authors had searched for state constitutional prohibitions on same-sex marriage. They would find none; could they conclude from this “finding” that a belief in heterosexual marriage was not “really deeply rooted” in 1789? I think not.¹⁶¹

The fallacy of anachronism occurs in one particularly egregious form almost every day in both public and scholarly debates over modern constitutional questions. The fallacy occurs anytime someone asks, “What would the Founders do?” Or “What would James Madison think?” I suspect that most scholars who speak and write in these terms do so for simplicity’s sake.¹⁶² Even the professional historians in the *Heller* amicus brief could not resist the temptation of making such a claim.¹⁶³ The inescapable truth is that *we just don’t know*. We can only ask questions such as, what principles did the Founders’ espouse? Then we must do our best to apply those principles to modern problems. But we cannot claim to know what they *would have done* only had they known of our modern problems. Perhaps the Founders would have changed their minds entirely about the proper scope of the Fourth Amendment had they framed it against the backdrop of NSA metadata collection. But it’s fruitless, and anachronistic, to speculate.

B. FALLACY OF PRESENTISM

The fallacy of presentism is particularly important for originalist historians. It is a “complex anachronism, in which the antecedent in a narrative series is falsified by being defined or interpreted in terms of the consequent.”¹⁶⁴ It consists in the “mistaken idea that the proper way to do history is to prune away the dead branches of the past, and to preserve the green buds and twigs which have grown into the dark forest of our contemporary world.”¹⁶⁵ Fischer’s examples are of historians who make

161. Another question is whether state constitutions is a place to look to answer the authors’ question in the first place. We might recall that the Framers did not want a Bill of Rights because they were afraid that by enumerating them, that would imply other fundamental rights (those deeply rooted ones) might not be protected.

162. See, e.g., Michael W. McConnell, *What Would Hamilton Do?*, 35 HARV. J.L. & PUB. POL’Y 259 (2012).

163. Brief of Rakove et al., *supra* note 64, at 36. They recognize that it “can be tricky to answer” questions about “what the Founders would think about various aspects of contemporary life.” *Id.* And yet they proceed to venture a confident answer on their particular question: “But as the historians of the Revolutionary era we are confident at least of this: that the authors of the Second Amendment would be flabbergasted to learn that in endorsing the republican principle of a well-regulated militia, they were also precluding restrictions on such potentially dangerous property as firearms . . .” *Id.*

164. FISCHER, *supra* note 1, at 135.

165. *Id.* at 135.

the conscious choice to look only to those past threads in history that have been most influential on the modern world.¹⁶⁶

Several examples arise where the author seems unaware that he is defining the antecedent in terms of the consequent. An example occurs in the dissent in *Printz v. United States*. To bolster his argument that the state officers engaged in federal executive functions and thus the Constitution contemplated a commandeering power, Justice Stevens wrote, “[T]he First Congress enacted legislation requiring state courts to serve, functionally, like contemporary regulatory agencies in certifying the seaworthiness of vessels.”¹⁶⁷ Such agencies are part of the modern executive branch. More specifically, Stevens argued, “The statute sets forth, in essence, procedures for an expert inquisitorial proceeding, supervised by a judge but otherwise more characteristic of executive activity.”¹⁶⁸

Justice Scalia rightly attacks this mode of reasoning: the dissent’s assertion “is cleverly true—because contemporary regulatory agencies have been allowed to perform adjudicative (“quasi-judicial”) functions. . . . It is foolish, however, to mistake the copy for the original, and to believe that 18th-century courts were imitating agencies, rather than 20th-century agencies imitating courts.”¹⁶⁹ In other words, the dissent tried to show that state judges did executive functions by showing that many of the functions they performed are *today* considered executive. But this commits the fallacy of presentism by defining the antecedent judicial precedent in terms of the consequent role of executive agencies.

For his part, Justice Scalia commits the same fallacy in the very same opinion! In response to Justice Souter’s reliance on a passage in *The Federalist* that would seem to imply that executive officers—but also state legislatures—can be commandeered, Scalia wrote that a “problem” with this “reading is that it makes state *legislatures* subject to federal direction.”¹⁷⁰ This reading is problematic for Scalia because the Court had recently held “that state legislatures are *not* subject to federal direction.”¹⁷¹ Justice Scalia has committed the fallacy of presentism: He has defined the antecedent (whether commandeering was constitutionally permissible in the past based on a contemporaneous statement) in terms of a consequent (a later Supreme Court decision). It is fallacious to conclude that Hamilton’s

166. *Id.* at 136 (discussing John Herman Randall’s *The Making of the Modern Mind*); *id.* at 137 (discussing Bernard Berenson’s *Aesthetics and History*); *id.* at 138-39 (discussing Geoffrey Barraclough’s *History in a Changing World*).

167. *Printz v. U.S.*, 521 U.S. 898, 950-51 (1997) (Stevens, J., dissenting).

168. *Id.* at 951.

169. *Id.* at 908 n.2 (majority opinion) (citations omitted).

170. *Id.* at 912.

171. *Id.*

statement cannot have the meaning ascribed to it by the dissent merely because of a holding of the Court nearly two hundred years later. As Wesley Campbell has written, although Scalia's statement is true *in light of* the subsequent Supreme Court decision, Hamilton's statement in *The Federalist* "would hardly be inconsistent with *Hamilton's* views" on "commandeering of state legislatures."¹⁷²

The fallacy occurs when, in *Alden v. Maine's* predecessor case *Seminole Tribe*,¹⁷³ the dissent colored its view of sovereign immunity at the founding—the antecedent—with the particular conception of sovereign immunity in the Eleventh Amendment—a consequent.¹⁷⁴ But as Caleb Nelson has argued, the Eleventh Amendment was written in terms of subject-matter jurisdiction, possibly for a number of good reasons; sovereign immunity *generally*, however, was considered a matter of personal jurisdiction.¹⁷⁵ In the dissent's version of history, the "antecedent in a narrative series is falsified by being defined or interpreted in terms of the consequent," and thus commits the fallacy of presentism. All of this is not to say that evidence marshalled by either side was not useful; it's not to say that this problem was not amenable to historical resolution; the point is rather that the evidence would have been much more meaningful if older, unfamiliar, and forgotten concepts had been unearthed.

Originalists and other legal historians commit a slightly different form of the fallacy that stems from an inability to see that the past world was often so different from the contemporary world and that we are myopically searching only for elements familiar to our modern eyes and ears. The result is that we often miss those elements directly relevant to the development of the modern concept over time because they look unfamiliar in their historical forms. Two examples from the originalist literature, I think, might display this fallacy at work: the histories of executive power and of judicial review.

Lawrence Lessig and Cass Sunstein may have identified this fallacy in the work of many unitary executive theorists. They argue that where modern unitarians see only "executive power" in the Vesting Clause of Article II, the founding generation understood there to be an "executive" power *and* an "administrative" power. This lost distinction would explain why several clauses in Article II seem redundant today: If the President has all "executive" power, why must he have the enumerated authority to

172. Campbell, *supra* note 88, at 1137 n.135 (emphasis added).

173. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

174. *Id.* at 101-02, 109-16 (Souter, J., dissenting).

175. Nelson, *supra* note 60, at 1602-08.

demand the opinions of department heads, unless some of those departments were not purely “executive” in nature? It also explains Congress’s original distinction between the departments of war and foreign affairs—to be led by *principal officers* removable by the President—and the department of Treasury, led by a *department head* that was not directly removable by the President.¹⁷⁶ Of course, it may be that *they* are the ones committing an anachronism, as Calabresi and Prakash point out, by seeking in the framers’ understanding a notion of “administrative power” taken from the nineteenth (or twentieth), not the eighteenth, century.¹⁷⁷

Philip Hamburger devotes an entire book purporting to correct the misconception of judicial review created by the fallacy of presentism in much of the conventional history on judicial review. This history and its implications, Hamburger explains, “rest on the fragile assumption that there is little evidence of judicial review from the decade and a half after 1776” and before, and so the conventional history concludes “that American judges must have created this power.”¹⁷⁸ More specifically, these histories conclude that John Marshall is the “founding father of judicial review” and *Marbury v. Madison* “its authorizing text.”¹⁷⁹

There are variations on this theme, but all essentially agree that the doctrine seems to have been created by American judges. To cite some examples, Gordon Wood wrote that it was the reaction to legislative supremacy in the 1780s that led to a “new appreciation of the role of the judiciary” and to a “growing recourse to judicial settlement.”¹⁸⁰ Elsewhere he has written that the origins of judicial review “had to flow from fundamental changes taking place in the Americans’ ideas of government and law.”¹⁸¹ Jack Rakove argued that it was a “puzzle . . . to understand how the quarter-century after the adoption of the first state constitutions made possible so significant a departure in American thinking about the nature of judicial power,”¹⁸² and that “before judicial review could become legitimate, Americans first had to accept a concept of judicial independence that they could not have easily formulated, much less endorsed, before the

176. Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 22-42, 72-73 (1994).

177. Calabresi & Prakash, *supra* note 125, at 567-68.

178. PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 1-2 (2008).

179. *Id.* at 3.

180. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787, at 454 (1969).

181. Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More Out of Less*, 56 WASH. & LEE L. REV. 787, 793 (1999).

182. Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1063 (1997).

Revolution.”¹⁸³ Others similarly maintain that the power of judicial review was nowhere present in the Constitution, and so it had to be invented by American judges.¹⁸⁴

All of these scholars could not find much evidence of judicial review in the 1780s and 90s, let alone before the Revolution, because they were looking for a peculiarly modern conception of something which has subsequently become known as “judicial review.” Yet that is not necessarily how the founding era’s judges would have thought about their acts striking down laws as contrary to some higher law. As Hamburger explains,

[T]he problem is not so much evidentiary as conceptual. The trouble arises from the very notion of judicial review, which is a concept so tightly focused on modern concerns that it renders many of the early decisions almost irrelevant. If judicial review is today considered prototypically a review of legislation, then early decisions about executive and judicial acts do not appear very central. Similarly, if judicial review is associated with cases, then other types of decisions, such as resolutions and advisory opinions, seem anomalous.¹⁸⁵

Once we recognize the terms and context in which judges in the eighteenth century would have understood their actions—in the terms of judicial *duty* rather than *review*—Hamburger argues that all of the evidentiary problems evaporate. All of a sudden, judicial review is merely one component of a robust tradition of deciding cases in accord with a certain duty which, even though it usually did not include striking down legislative acts, took but a mere extension to encompass judicial “review” of legislation. “With this conceptual adjustment,” writes Hamburger, “what was previously little more than an evocative blur becomes an expansive and well-defined landscape, filled with vivid details. The evidence . . . thus requires a change in paradigm—a return from the modern notion of judicial review back to the old, forgotten ideal of judicial duty.”¹⁸⁶

Hamburger demonstrates throughout his book how English judges had a duty to act in accord with the law of the land, a duty which led them often to strike down custom inconsistent with common law,¹⁸⁷ corporate acts inconsistent with corporate charters,¹⁸⁸ royal acts inconsistent with the “law

183. *Id.* at 1034.

184. *See* HAMBURGER, *supra* note 178, at 10-11 (quoting and citing sources).

185. *Id.* at 14.

186. *Id.* at 16.

187. *Id.* at 180-81.

188. *Id.* at 185.

of the land,"¹⁸⁹ acts of a single house of parliament,¹⁹⁰ and occasionally colonial acts.¹⁹¹ A vocal minority even believed that acts of parliament could be thus declared unconstitutional.¹⁹² "There was no need[, therefore,] for an American development of a new judicial power, let alone a revolutionary creation of such a power, for the ideals of law and judicial duty endured within the framework of the common law."¹⁹³ It was this notion of "judicial duty" that "gave Americans a formal mechanism for enforcing constitutional law against all parts of government."¹⁹⁴

If Hamburger is right, he has identified a kind of fallacy of presentism in the literature. The historians who claim that judicial review was a radical departure or innovation, or something invented by Marshall or by American judges in the 1780s and 90s, miss the broader picture because they are looking for something *modern*—a concept of judicial "review" of legislative acts—that was in fact but a small and necessary extension of a much broader concept of law that no longer resonates to modern ears.

C. FALLACY OF TUNNEL HISTORY

The fallacy of tunnel history consists in "split[ting] the past into a series of tunnels, each continuous from the remote past to the present, but practically self-contained at every point and sealed off from contact with or contamination by anything that was going on in any of the other tunnels."¹⁹⁵ It might manifest, for example, in the idea that everything can be explained by economic history, or by military history, or by political history, without understanding that these "tunnels" are not in fact self-contained. Believing otherwise can lead to the commission of numerous fallacies, such as fallacies of factual significance or question-framing.

Tunnel history is not the same thing as proving what you set out to prove because of your precommitments; but one manifestation of tunnel history is defining something as essentially one thing or another because of an unwillingness to see many threads in history interact. We can think of numerous constitutional theorists who seem to believe that the Constitution is a representation of only one particular historical thread. The view that

189. *Id.* at 194.

190. *Id.* at 215.

191. *See id.* at 235-36, 255-61.

192. *Id.* at 250-54.

193. *Id.* at 281.

194. *Id.* at 394.

195. FISCHER, *supra* note 1, at 142 (quoting J.H. HEXTER, REAPPRAISALS IN HISTORY 194 (1961)).

the Constitution represents essentially Lockean liberalism,¹⁹⁶ or the view that the Constitution represents essentially classical republicanism,¹⁹⁷ or the view that the Constitution is an overwhelmingly democratic, process-oriented document,¹⁹⁸ all come to mind.

VII. FALLACIES OF GENERALIZATION

All historians generalize. To ask whether a historian should generalize is as silly, writes Fischer, as asking whether he should use words.¹⁹⁹ Nevertheless, generalizations are often abused. Fischer defines a generalization as a statement “of statistical regularity,” or a “descriptive statement which is inferred from particular facts by a special process of reasoning” that “explains what, how, when, where, and who,” though often not why.²⁰⁰ The fallacies of generalizations that historians commonly commit “consist in a confusion of quantitative and impressionistic procedures”; they are all “procedural errors, by which false inferences are derived from true particulars.”²⁰¹ We shall see that originalist historians are not immune from these fallacies. But the important point to remember is that *all* historians commit them, and so *all* historians can become better by avoiding them—including originalist historians.

A. FALLACY OF STATISTICAL SAMPLING

A fallacy of statistical sampling occurs in generalizations “which rest upon an insufficient body of data—upon a ‘sample’ which misrepresents the composition of the object in question.”²⁰² We might guess that this fallacy is particularly relevant to originalist historians because they tend to focus on just what a few Federalists thought. To be sure, there is some justification for doing so, if we believe that what these few Federalists thought were likely to reflect or to influence what intelligent readers of the period thought. Thus, focusing on what these Federalists thought could be consistent with a theory of originalism that centers on the understanding of a hypothetical reasonable and knowledgeable observer.²⁰³ This focus might be less meaningful for an originalism that centers on the original public

196. *See generally* RICHARD EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION* (2014).

197. WOOD, *supra* note 180, at 426-29 (1969).

198. *See generally* JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

199. FISCHER, *supra* note 1, at 103.

200. *Id.* at 104.

201. *Id.*

202. *Id.* at 104-05.

203. *See* Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 *GEO. L.J.* 1113, 1132 (2003) (making the case that the notes from the Constitutional Convention are relevant to this version of originalism).

meaning, however—a meaning that does not assume reasonable and knowledgeable observers but rather actual people with actual understandings.²⁰⁴ For that theory, the evidence from the ratifying conventions is much more likely to be important. Of course, when it comes to more impressionistic points—such as the general principles and aims of the Constitution—what a few Federalists thought might be more important. So long as one is clear on what one is seeking to answer, and on the limitations of the evidence, it may not be unreasonable to rely on what just a few Founders thought. But this practice might occasionally, and unsurprisingly, be abused.²⁰⁵ This fallacy must be avoided meticulously because critics of originalism often charge its proponents with cherry-picking facts to suit their particular legal agendas.

B. FALLACY OF THE LONELY FACT

The fallacy of the lonely fact is an extension of the previous fallacy but “deserves to receive special condemnation.”²⁰⁶ “It may be defined as a statistical generalization from a single case.”²⁰⁷ We can use the same example from before: making broad generalizations from the views of a single founder. There are many accounts of executive power, especially from the conservative perspective, that depend very heavily (though not

204. Cf. Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 724 (2011).

205. Martin Flaherty gives us some possible examples of poor generalization from the originalist literature:

[C]onstitutional discourse is replete with historical assertions that are at best deeply problematic and at worst, howlers. Robert Bork’s *The Tempting of America* is filled with authoritative historical conclusions yet cites scarcely any primary or, for that matter, secondary sources. Paul Kahn, in a study entitled *Legitimacy and History*, boldly divides American constitutional thought into six successive “models of construction,” but does so on the basis of few primary works for any given period and with scant reference to secondary literature. . . . The illustrations could go on. The point of most (though not all) of them is not that the particular assertion may or may not be tenable. Rather, it is that habits of poorly supported generalization—which at times fall below even the standards of undergraduate history writing—pervade the work of many of the most rigorous theorists when they invoke the past to talk about the Constitution.

Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 525-26 (1995) (footnotes omitted). Jesse H. Choper, to add another example, argues based only on *The Federalist* that “the assertion that federalism was meant to protect, or does in fact protect, individual constitutional freedoms . . . has no solid historical or logical basis.” *Id.* at 526 n.15 (citing JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 244 (1980)).

206. FISCHER, *supra* note 1, at 109.

207. *Id.*

necessarily exclusively) on the views of Alexander Hamilton.²⁰⁸ But the liberals commit this fallacy, too. At least two scholars, for example, have relied *solely* on Federalist No. 77 as a “refutation” of a Hamiltonian unitary executive theory because Hamilton seems to say that displacing Federal officers would require the approval of the Senate.²⁰⁹

This fallacy is not committed just by originalists; it can be committed by all legal thinkers who use history to make an argument. Ronald Dworkin was no exception. In *Law’s Empire*, he claimed that the Framers of the Fourteenth Amendment could not have intended to desegregate schools; his evidence is a single statement from the floor manager of the 1866 Civil Rights Act.²¹⁰ Originalist historians and judges should be particularly careful to avoid this fallacy of the lonely fact.

C. FALLACY OF STATISTICAL SPECIAL PLEADING

The fallacy of special pleading is a particularly insidious fallacy. It “occurs whenever an investigator applies a double standard of inference or interpretation to his evidence—one standard to evidence which sustains his generalization and another to evidence which contradicts it.”²¹¹ Fischer offers an example in David Donald’s *The Politics of Reconstruction*,²¹² in which the author tried to argue that Republicans in safe districts tended to be radical and those in competitive districts tended to be moderate.²¹³ The problem was that the evidence showed that both moderate and radical republicans won elections by nearly identical margins (about 59 percent).²¹⁴ Donald, however,

proceeded to “interpret” his evidence until it conformed to his hypothesis. He argued that in some states, where there was an allegedly powerful Republican organization, a majority of 52 percent was security itself for a radical, but that in another state, a majority of 58 percent was too small to serve the same purpose.

208. See, e.g., John Yoo, *Unitary, Executive, or Both?*, 76 U. CHI. L. REV. 1935, 1976-85, 1992-96 (2009); cf. Bailey, *supra* note 127, at 170 (describing Hamilton as the father of the unitary executive).

209. David M. Driesen, *Toward A Duty-Based Theory of Executive Power*, 78 FORDHAM L. REV. 71, 101-04 (2009); Heidi Kitrosser, *Accountability and Administrative Structure*, 45 WILLAMETTE L. REV. 607, 621-22 (2009).

210. Flaherty, *supra* note 205, at 526 n.15 (citing RONALD DWORIN, *LAW’S EMPIRE* 360 (1986)).

211. FISCHER, *supra* note 1, at 110.

212. DAVID DONALD, *THE POLITICS OF RECONSTRUCTION 1863-1867* (1965).

213. FISCHER, *supra* note 1, at 111.

214. *Id.* at 111-12.

One qualification was heaped upon another with an industry and an ingenuity which were worthy of a better cause.²¹⁵

One example arises in a different amicus brief in *Heller*. In the Brief for Professors of Linguistics and English, the linguistics professors seem to explain away usages of the phrase “to bear arms” when not used in a military context and apply a different standard when analyzing those occurrences in a military context. They write:

Examples of the idiomatic usage of “bear arms” during the time of the founding abound. In each instance where “bear arms” (or “bearing arms” or “bear arms against”) is used without additional language modifying the phrase, it is unquestionably used in its ordinary idiomatic [military] sense. It is only in usages where additional specifying language is added, such as “bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game,” that any intent to bend, even change (in the case of killing game), the idiom is apparent.

For example, the Declaration of Independence denounces the British monarch for “constrain[ing] our fellow Citizens taken Captive on the high Seas to *bear Arms against* their Country.” No one doubts that “bear Arms against” in that passage means “to be engaged in hostilities with.” In a later echo, Thomas Jefferson, as Secretary of State, wrote in dissent from advice by Alexander Hamilton and Henry Knox to President Washington . . . : “[A]nd if the suggestion be true . . . it is equally true that more than ten times that number of Americans are at this moment on board English ships of war, who have been taken forcibly from our merchant vessels, at sea or in port wherever met with, & compelled to *bear arms against* the friends of their country.”²¹⁶

A suspicious special pleading has occurred here. The linguists *explain away* other usages of “to bear arms” by claiming that those other examples are qualified or modified by “additional specifying language,” such as bear arms *for the defense of themselves* or *for the purpose of killing game*. And yet they refuse to apply this same “additional specifying language” standard to the use of the phrase that they prefer: bearing arms *against* the state or *against* an enemy. Only these latter examples have military connotations; yet they are *equally* modified by “additional specifying language,” namely,

215. *Id.* at 112.

216. Brief for Professors of Linguistics & English Dennis E. Baron, Ph.D. et al. in Support of Petitioners, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290), 2008 WL 157194, at 20-21 (citations omitted).

against the state or *against an enemy*. After all, the Second Amendment does *not* say, “the right of the citizens to keep and bear arms *against*” Why the military uses modified by “against” are the “ordinary” usage, whereas only the non-military uses contain “additional specifying language,” is unclear. The linguists have committed the fallacy of special pleading.

VIII. SOME LESSONS AND CONCLUSIONS

This article has shown throughout that certain methodological errors commonly occur in originalist literature and judicial opinions of all political persuasions. History is not easy to do properly, but if originalists avoid these errors, then valuable and correct historical conclusions are possible. I have not meant to suggest that any particular judges or scholars will have to revise their ultimate conclusions on sovereign immunity, commandeering, judicial review, the Second Amendment, and the like, but that their reasoning would be significantly improved by correcting the existing errors pointed out here. Sometimes historical conclusions might even change as a result.

This article has also aimed to show, then, that criticisms of “law office history” are overblown. It is true that when litigants use history they will often use it selectively to aid their clients. But that does not mean that judges and academics cannot arrive at correct historical answers using proper methodologies. It also does not mean that professional historians are immune from the problems they denounce. As we have seen, even professional historians have committed numerous historians’ fallacies in their own briefs to the courts. But it would be preposterous to suggest that historians should not do history.

David Hackett Fischer’s whole point was that historians frequently commit certain errors, and modern historians and originalists are no different. But these errors can be avoided with practice. Although a much more extensive analysis would be required to demonstrate this proposition, I suspect as well that originalists need little more to become better and more useful historians. The skills necessary to be a good historian—critical thinking, analogical reasoning, proper evidentiary weighing—are skills that lawyers and judges use every day. Judges weigh sources for credibility and relevance all the time. If lawyers cannot do history merely because we are not historians, then I wonder whether we really can do this thing called “law” at all. Further, irrespective of the great debate among professional historians over historiography and historical methods, the relationship between, for example, the Eleventh Amendment and *Chisolm* cannot be disputed no matter what historical methodology one adopts. With no

offense intended to professional historians, it would seem that judges and lawyers need not commit to any particular side of the methodological debates to come up with historical answers useful to at least some questions relevant to the law.

In sum, if lawyers can and should do history, then there is nothing missing from their toolkit other than a guide of common methodological errors, which it has been the aim of this article to supply.