

# Originalism and the Law of the Past

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Originalism has long been criticized for its “law office history” and other historical sins. But a recent “positive turn” in originalist thought may help make peace between history and law. On this theory, originalism is best understood as a claim about our modern law—which borrows many of its rules, constitutional or otherwise, from the law of the past. Our law happens to be the Founders’ law, unless lawfully changed.

This theory has three important implications for the role of history in law. First, whether and how past law matters today is a question of current law, not of history. Second, applying that current law may often require deference to historical expertise, but for a more limited inquiry: one that looks specifically at legal doctrines and instruments, interprets those instruments in artificial ways, and makes use of evidentiary principles and default rules when the history is obscure. Third, ordinary legal reasoning already involves the application of old law to new facts, an inquiry that might otherwise seem daunting or anachronistic. Applying yesterday’s “no vehicles in the park” ordinance is no less fraught—and no more so—than applying Founding-era legal doctrines.

## INTRODUCTION

In 2011, a federal appellate court rejected the United States’s claim to own a parking lot on the Alexandria waterfront.<sup>1</sup> According to the court, the plot in question used to lie in the Potomac riverbed, which was granted by Charles I to Cecilus Calvert in 1632 and then ceded by Maryland to the United States in 1791. Because it lay past the old high-water line, the plot remained in the District of Columbia after the rest of Alexandria was retroceded in 1846. At some point the reclaimed land was transferred to the Old Dominion Boat Club, which claimed

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1. *United States v. Old Dominion Boat Club*, 630 F.3d 1039, 1041 (D.C. Cir. 2011).

title under Maryland's rules of riparian ownership—not as they stand today, but as they stood in 1801, when Congress fixed in place the law governing Maryland's portion of the District.<sup>2</sup> “Thus,” the court concluded, “despite the fact that the plaintiff is the United States, the defendant is a private club in Virginia, and the year is 2011, the district court correctly held that [r]iparian rights within the District of Columbia are governed by Maryland law as it existed in 1801.”<sup>3</sup>

What is striking about this episode is precisely how *ordinary* it is, notwithstanding its unusual facts. Tracing a chain of title or a chain of legal authority decades into the past is normal lawyers' work. The kind of research necessary to adjudicate claims to riparian land in Maryland is also necessary to identify the scope of modern intellectual property rights,<sup>4</sup> to interpret our civil rights statutes,<sup>5</sup> and more. Courts solve today's cases through the application of yesterday's laws—not out of admiration for their ancient wisdom or fealty to the dead hand of the past, but simply because those old laws remain good law today.

Episodes like this one shed useful light on the debates over constitutional originalism. Much has been written about the special historical problems that originalism poses. Yet at its core, originalism demands no more of the past than ordinary lawyering does.

The recent “positive turn” in originalist scholarship takes the theory as a claim about positive law, something that varies from one society to another.<sup>6</sup> Today's law is equally free to rest a claim to property on an old conveyance or this morning's bona fide purchase. Similarly, today's law is free to rest a claim to government authority on older legal instruments. An executive-branch agency might trace the authority of its regulation to a prior statute, which traces its own authority to a constitutional grant of legislative power to Congress. Determining the regulation's validity requires looking to what law that statute made in the past, which might in turn require looking to what power the Constitution vested in the past. Viewed in these terms, originalism is unexceptional, no different from our law of property: it simply reflects a decision by today's law to grant continuing force to the law of the past.

This brief article suggests that this form of originalism may help explain the proper domains of history and law. Whether and how past law matters today is a question of current law, not history. This may be easier to see in the case of

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2. *Ibid.*, 1041-42.

3. *Ibid.*, 1042 (alteration in original) (citation omitted).

4. *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 156-62 (1985).

5. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 627-40 (1979) (Powell, J., concurring).

6. William Baude and Stephen E. Sachs, “Grounding Originalism,” *Northwestern Law Review* 113 (2019): 1455-91; William Baude, “Is Originalism Our Law?,” *Columbia Law Review* 115 (2015): 2349-408; Stephen E. Sachs, “Originalism as a Theory of Legal Change,” *Harvard Journal of Law and Public Policy* 38 (2015): 817-88.

property or statutes, but constitutional law is no different: giving current force to past rules is simply our way of allocating authority in the present.

To be sure, applying the law of the past requires knowledge of the past, and lawyers must often defer to historical expertise on the relevant questions. But we should also recognize that the legal inquiry is a refined subset of the historical inquiry. It looks to legal doctrines and instruments specifically, rather than intellectual movements more generally. It interprets these instruments in artificial ways, properly ignoring certain facts about their historical authors and audience. And when there is uncertainty, law also has various evidentiary principles and default rules that can give us confidence about today's law, even when yesterday's history remains obscure.

Applying this old law to new facts may seem daunting, even anachronistic. Yet here, too, originalism demands no more than ordinary lawyer's work. Deciding whether a "no vehicles in the park" ordinance forbids motorized wheelchairs and reviewing warrantless GPS searches under Founding-era trespass doctrines differ only in degree.<sup>7</sup> Such reasoning is part and parcel of any system that treats prior rules, not as mere curiosities, but as current and operative law.

## 1 WHY WE LOOK TO THE PAST

When lawyers invoke history, they may seem to commit a kind of category error. To Helen Irving, for example, "whether a law passed in 2015 is constitutionally valid or invalid" is "not a historical question."<sup>8</sup> The judge's job "is to interpret the law, not history"; judges improperly "outsource their legal decisions to historians" when they "draw on secondary histories to reach constitutional conclusions in particular legal disputes."<sup>9</sup>

Irving is right in one sense: the legal validity of modern statutes is indeed a question of current law. But whether our law currently chooses to outsource that question—in whole or in part, to history or to anything else—is also a legal question, not a historical one. A familiar rule like the Ex Post Facto Clause, for example, forbids courts to impose a greater sentence than applied at the time of the offense; asking what the maximum sentence then *was*, as our current law requires, involves *some* kind of historical inquiry, outsourced or no.<sup>10</sup>

As it happens, American law makes ubiquitous use of the past, and it does so for entirely understandable (if not unimpeachable) reasons. Numerous fields of

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7. *United States v. Jones*, 565 U.S. 400 (2012).

8. Helen Irving, "Outsourcing the Law: History and the Disciplinary Limits of Constitutional Reasoning," *Fordham Law Review* 84 (2015): 957-67, 960.

9. *Ibid.*, 961, 965.

10. See, e.g., *United States v. Seale*, 577 F.3d 566 (5th Cir. 2009) (en banc) (per curiam).

modern law are entirely defined by the accumulation of past rules. A county assessor's map is a graphical compilation of which parcels have been transferred to which persons; it reflects a complex set of historical claims, on questions of law as well as of fact (say, whether a given conveyance was valid when made). The text of the United States Code reflects a similar account of which past statutes have been enacted or repealed, which requires a careful analysis of past law.<sup>11</sup> Even the text of the Constitution, as a matter of current law, is defined by which amendments were validly adopted and when.<sup>12</sup>

These examples arguably reflect a more general feature of American law. The positive turn, together with an associated claim of "original-law originalism," maintains that the present law of the United States involves a similar chain of title: it comprises the rules which were law at the Founding and everything that has been lawfully done under them since.<sup>13</sup> Today's law reflects the accumulation of past law, including statutes validly passed and doctrines validly applied, but only so long as each of them can be traced back to the law of the Founding. Such arguments might be right or wrong, as a matter of current positive law, but that is not for history to decide.

At the very least, grounding today's judgments on prior law is a plausible means of structuring government power in the present. A court *could* allocate a disputed plot on the Alexandria waterfront to whichever party will make best use of it going forward. Instead, courts typically allocate property to the party with the best claim to own it already. By enforcing past transfers, current law preserves the current owner's ability to decide which uses are best. Presumptively relying on the law of the past similarly preserves each new generation's ability to govern. Adopting a new legal rule, today, makes a difference only if it will still be applied tomorrow, to people who will regard it as part of *their* legal past. As Judge Frank Easterbrook explained, "[w]e the living" enforce past laws to preserve the existing authority of lawmakers: "affirming the force of old laws is essential if sitting legislatures are to enjoy the power to make new ones," or else to leave well enough alone.<sup>14</sup>

This reliance is especially important in a government with many different officials, each with different views of what is best. If every judge, from night court to the Supreme Court, were equally in charge of pursuing the public good, it

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11. U.S. Nat'l Bank of Oregon v. Independent Insurance Agents of America, 508 U.S. 439 (1993).

12. John Harrison, "The Lawfulness of the Reconstruction Amendments," *University of Chicago Law Review* 68 (2001): 375-462.

13. Baude & Sachs, "Grounding Originalism," 1457, 1482-83.

14. Frank H. Easterbrook, "Textualism and the Dead Hand," *George Washington Law Review* 66 (1998): 1119-26, 1120.

would be difficult for the system to treat like cases alike.<sup>15</sup> Or if the legal slate were wiped clean with every new Congress, every election would be a “Flight 93” election. Relying on past law lets us give particular government officials particular limited authorities to affect that law, thereby lowering the stakes of any one official’s selection. (This is not to say that officials never strain at the bounds of their power; but law’s backwards-looking aspect allows us to judge whether such actions are legally proper, and perhaps to limit their worst excesses.) Relying on the past makes it possible for law to proceed one step at a time, rather than by doing, and re-doing, everything at once.

## 2 WHAT WE FIND THERE

If past law is required in theory, it still might be inaccessible in practice—requiring more certainty than responsible researchers can provide. (And responsible researchers may already be too much to ask, in a world full of ideological pressures and paying clients.) Again, however, the positive turn renders originalism much more tractable. By focusing specifically on the *law* of the past, and not on broader issues of linguistic meaning (to which audience?) or historical intent (whose?), originalism involves a highly limited version of the historical inquiry—one that uses limited evidence in limited ways, and one that can resolve controversies even in the face of occasional uncertainty. As a result, lawyers may be better able to reach defensible originalist conclusions than has generally been thought.

### 2.1 Limited Evidence

Research into past law properly consults a limited range of evidence. The past offers a wild cacophony of information about law and legal practice, but not all of it will feature in a modern legal inquiry. Present law typically gives force to past *doctrine*, not to that doctrine’s role in past society. How to identify legal doctrine is actively debated among philosophers; one standard view urges particular attention to the rules recognized by “the officials or the experts of the system.”<sup>16</sup> A modern lawyer, directed to investigate how the law stood in the past, might thus focus on operative legal texts and on “internal” accounts of legal doctrine (treatises, court cases, and so on), rather than on “external” accounts of

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15. William Baude, “Originalism as a Constraint on Judges,” *University of Chicago Law Review* 84 (2017): 2213-29, 2224-25.

16. H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 3d ed. 2012), 60.

law's wider reception and operation—unless, of course, the doctrines themselves direct attention to these widespread understandings.

This emphasis on internal legal sources runs against the grain of trends in legal and intellectual history more generally, which usually avoid such restrictive accounts in favor of broader reconstructions of the past.<sup>17</sup> Yet lawyers are not seeking internalist *explanations* of change over time, but rather internalist *conclusions* about the substance of past law, which is what current law happens to make relevant. So recommending that lawyers employ the tools of modern intellectual history—examining, say, “the way ordinary Americans understood issues of law and constitutionalism” in order “to complement the traditional top-down perspective”<sup>18</sup>—may not quite fit the bill. Whose perspectives matter is itself a question for legal philosophy and substantive law, which may depart from our democratic theories or our normative preferences.

Within this limited range, moreover, law often handles historical evidence in an artificially limited way. Which features of a legal text are relevant is itself a legal question. Sometimes the law demands a search for the author's intention (as with a holographic will), or for the modern public's understanding (as with a consumer warning label), or for the result of applying a complex set of canons of construction (as with statutes or treaties). What was required with respect to the Constitution is a contested question among both lawyers and historians,<sup>19</sup> but not one necessarily incapable of resolution; there may have been more disagreement over good government or good policy than over contemporary expert legal norms.<sup>20</sup>

Some topics adjacent to originalist research, such as the Founders' views on the nature of sovereignty or the proper role of the executive, do require broad immersion in the intellectual and political culture of the day. Yet the relevant legal doctrines, such as the scope of state sovereign immunity or the executive removal power, represent an extraordinarily narrow slice of any society's intellectual life. Often it is immersion into *legal* culture that is required. When faced

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17. Kunal M. Parker, “Writing Legal History Then and Now: A Brief Reflection,” *American Journal of Legal History* 56 (2016): 168–78, 169; Saul Cornell, “Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism,” *Fordham Law Review* 82 (2013): 721–55; Robert W. Gordon, “Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography,” *Law and Society Review* 10 (1975): 9–55.

18. Cornell, “Meaning and Understanding,” 726.

19. Jonathan Gienapp, *The Second Creation: Fixing the American Constitution in the Founding Era* (Cambridge, Mass.: Belknap Press, 2018); William Baude and Stephen E. Sachs, “The Law of Interpretation,” *Harvard Law Review* 130 (2017): 1079–1147, 1118–20; H. Jefferson Powell, “The Original Understanding of Original Intent,” *Harvard Law Review* 98 (1985): 885–948.

20. Baude and Sachs, “The Law of Interpretation,” 1141–42; Saul Cornell, “Constitutional Meaning and Semantic Instability: Federalists and Anti-Federalists on the Nature of Constitutional Language,” *American Journal of Legal History* 56 (2016): 21–28, 26–27; Powell, “Original Understanding,” 923–24.

with modern questions of French law, American judges consult French lawyers rather than sociologists; the same goes for the past. Knowing, for example, that unlawful searches or seizures would typically have been remedied only by private lawsuits—and knowing what sorts of defenses a government officer could advance—might be more useful to the doctrinalist, past or present, than understanding the Founders’ general attitudes toward privacy.<sup>21</sup>

With the researcher’s task thus confined, breadth of understanding is valuable, but only instrumentally. A linguist charting differences between Middle English and Old English would properly disregard an enormous wealth of data regarding the societies in which the two were spoken, in favor of a more specific account of internal linguistic rules and practices. So too the modern lawyer, charting differences between the Constitution and the Articles of Confederation, may properly ignore a substantial amount of information about the past.

## 2.2 Addressing Uncertainty

None of this should be read to understate the difficulty of forming reliable views about the past. But neither should one overstate it. Even skeptics of originalism may conclude, with Jack Rakove, that “reasonably definitive conclusions can be reached on at least some questions of original meaning”; “[a]fter all, historians ask what documents originally meant all the time.”<sup>22</sup> Irving notes that historians “commonly identify collective or dominant ideas, including intentions, in their subject era.”<sup>23</sup> They do this not by constructing detailed lives of imaginary figures—a “Joe the Ploughman,” in Rakove’s terms—but by weighing and discounting a wide variety of sources, each with its own biases or idiosyncrasies.<sup>24</sup> The inquiry into past law leads to a particular set of sources and a particular method of analysis; these produce reasonably definitive conclusions, much of the time.

Our own work has examined issues that generated little discussion among the Framers and Ratifiers—but that were addressed by myriad statutes, proposed bills, court cases, treatises, arguments of counsel or of Congressmen, and so

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21. William Baude and James Y. Stern, “The Positive Law Model of the Fourth Amendment,” *Harvard Law Review* 129 (2016): 1821-89, 1840-41.

22. Jack Rakove, Review of *Original Intent and the Framers’ Constitution*, by Leonard W. Levy, *American Journal of Legal History* 34 (1990): 72-74, 74; Jack N. Rakove, “Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism,” *San Diego Law Review* 48 (2011): 575-600, 577.

23. Irving, “Outsourcing the Law,” 963.

24. Gary Lawson and Guy Seidman, “Originalism as a Legal Enterprise,” *Constitutional Commentary* 23 (2006): 47-80; Rakove, “Poverty of Public Meaning Originalism,” 584-85.

on.<sup>25</sup> Many of these sources might have disagreed on particulars, but they established a relatively narrow range of plausible answers, all of which were rather different than the doctrines as practiced in some courts today. That is enough certainty to offer substantial support for some legal arguments over others.

Viewed as a claim of past law, moreover, originalism also offers resources for when the historical inquiry runs dry. Where evidence of some past rule is available, the law may counsel that we use it. Where such evidence is unavailable, the law often directs us to different sources. Madison, for example, suggested that all new laws are “more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications”; doctrines of precedent, among others, can help settle legal questions when there is no “demonstrable” answer offered by history.<sup>26</sup>

Judges may lack the resources to conduct these inquiries themselves.<sup>27</sup> Yet they also hear antitrust cases without producing cutting-edge microeconomic research, or decide issues of toxic-tort causation without ever donning lab coats. Their job is to decide cases in light of *other* people’s discoveries—usually the received view of a profession, formed long before any *amicus* briefs are due.<sup>28</sup> Law treats history in the same casually omnivorous way it treats everything else.

And legal uncertainty is hardly restricted to matters of history. Judges and juries frequently face questions that might stump expert economists or toxicologists. As to both law and fact, our legal system contains a wealth of shortcuts, default rules, and burdens of proof to resolve disputed questions when we lack certainty about the actual answers.<sup>29</sup> Thus, if there are no sources on Maryland’s riparian rights dating precisely from 1801, when Congress froze the law, that is no great catastrophe for a lawyer. A fleeting reference two decades before or after might be poor evidence for a careful historical study, but it would amply discharge a party’s burden in a legal proceeding—unless the other party could marshal evidence that something had changed in between.

Again, we do not mean to undersell the difficulty of many questions of past law. But any remaining difficulties, though unfortunate, are consequences of what the law commands in the present. The Old Dominion Boat Club did not

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25. E.g., William Baude, “Rethinking the Federal Eminent Domain Power,” *Yale Law Journal* 122 (2013): 1738-1825; Stephen E. Sachs, “Full Faith and Credit in the Early Congress,” *Virginia Law Review* 95 (2009): 1201-79.

26. James Madison, “No. 37,” in *The Federalist*, ed. Jacob E. Cooke (Middletown, Conn.: Wesleyan University Press, 1961), 231-9, 236; Caleb Nelson, “*Stare Decisis* and Demonstrably Erroneous Precedents,” *Virginia Law Review* 87 (2001): 1-84; William Baude, “Constitutional Liquidation,” *Stanford Law Review* 71 (2019): 1-70.

27. Irving, “Outsourcing the Law,” 961.

28. Cf. Sam Erman and Nathan Perl-Rosenthal, “Historians’ Amicus Briefs: Practice and Prospect,” in *The Oxford Handbook of Legal History*, ed. Markus D. Dubber and Christopher Tomlins (Oxford: Oxford University Press, 2018), 1095-1114; Joshua Stein, “Historians Before the Bench: Friends of the Court, Foes of Originalism,” *Yale Journal of Law and the Humanities* 25 (2013): 359-89.

29. Baude and Sachs, “Law of Interpretation,” 1111-12, 1145-46.

force anyone to learn early-nineteenth-century property law; Congress did. If originalism is legally required—again, a question solely of *modern* law—then the complaint that originalism asks too much of history is like a complaint that tax rates are too high. It is a complaint that our law is not any better than it is.

### 3 HOW WE USE IT

Whatever researchers might gain from the past, many have doubted its usefulness to the present. If we ask, as Irving puts it, “whether people in the 1780s would have wanted a state to be free to establish a bottle-recycling scheme”<sup>30</sup>—or, as Justice Alito joked, “what James Madison thought about video games”<sup>31</sup>—the enterprise seems absurd. As Mary Sarah Bilder notes, the actual Constitution was a rushed compromise, not an “airtight document” that settled all questions in advance.<sup>32</sup> Originalists have described the Constitution as a recipe for governance;<sup>33</sup> yet if “a brand-specific item on the list is unavailable,”<sup>34</sup> we cannot ask the recipe’s long-dead authors what to do.

This problem is vastly overstated. The difficulty of applying old law to new facts is in no way unique to *originalism*. It is the stuff of first-year law classes the world over. A town forbids “vehicles in the park” with an eye to cars, buses, and motorcycles. The case of motorized wheelchairs had not occurred to anyone, but the judges who face it “do not just push away their law books and start to legislate without further guidance”; rather, they “proceed[] by analogy” to principles with “a footing in the existing law,” after carefully investigating what that existing law might be.<sup>35</sup> Language has an important role to play (wheelchairs are “vehicles” in a way that flowerbeds are not),<sup>36</sup> but the inquiry is not merely linguistic: emergency vehicles are “vehicles,” but other legal rules may intervene to exempt them.<sup>37</sup>

These issues afflict last century’s statutes in the same way as last week’s. An imaginary Roman ordinance that mandated “no chariots in the park” would have posed the same problems for its interpreters—who would have needed further principles of Roman law (whatever their content) to guide its application to

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30. Irving, “Outsourcing the Law,” 965.

31. Transcript of Oral Argument, *Brown v. Entertainment Merchants Ass’n*, 564 U.S. 786 (2011) (No. 08-1448), 17.

32. Mary Sarah Bilder, “The Constitution Doesn’t Mean What You Think It Means,” *Boston Globe*, April 2, 2017, K1.

33. Gary Lawson, “On Reading Recipes . . . and Constitutions,” *Georgetown Law Journal* 85 (1997): 1823–36.

34. Irving, “Outsourcing the Law,” 964.

35. Hart, *Concept of Law*, 128–29, 274.

36. Frederick Schauer, “A Critical Guide to Vehicles in the Park,” *New York University Law Review* 83 (2008): 1109–34, 1122.

37. Baude and Sachs, “Law of Interpretation,” 1106–07.

a variety of ancient conveyances or circumstances. And if, by strange historical accident, a patch of land today were still governed by the “no chariots” ordinance, the process of applying this ordinance to modern ambulances would not look much different. We would need to know the legal content of the ordinance when it was made, the sorts of considerations that validly guided its application at the time, and so on. These questions are the bread-and-butter of ordinary legal reasoning. We do not know what James Madison thought about video games, but we do know how to apply general legal concepts to facts, even when the concepts are very old and the facts are very new.

We should not expect such reasoning to yield a single obvious answer. But neither do we need it to. Ordinary business contracts are hardly “airtight,” in Bilder’s terms, but we write them anyway: the parties’ choice to adopt an integrated agreement is a choice to rest their legal relations on inferences drawn from a single piece of text. Modern lawyers routinely defend or criticize the reasoning of *District of Columbia v. Heller* or *Citizens United v. FEC*, notwithstanding the existence of both majority and dissenting opinions;<sup>38</sup> as Jefferson Powell writes, “[t]here are better and worse answers in law, even in constitutional law.”<sup>39</sup> Future lawyers, writing two centuries hence, will have the same ability to assess *Heller* or *Citizens United* as we do—in David Ibbetson’s phrase, “try[ing] to determine the issue by attempting to apply the criteria that the court might possibly have applied.”<sup>40</sup> Just the same, today’s lawyers are fully capable of rendering an opinion on which side of a Founding-era dispute had the better claim.

Some of the modern Supreme Court’s most criticized uses of history involve debates over precisely such questions of law. Consider the debate between Justices Stevens and Scalia in *Citizens United*, on whether the Founders’ well-known suspicion of corporate power entailed specific limits on individuals’ speech rights when exercised through a corporate entity (say, the incorporated Pennsylvania Abolition Society).<sup>41</sup> Or consider the same Justices’ debate in *Heller*—in which the majority concluded, over vigorous dissent, that the Second Amendment itself made use of the law of the past (by incorporating a “pre-existing right” to bear arms rather than creating a “novel” one); that the scope of this preexisting right was not limited by the immediate purposes of those who chose to codify it in the text; and that the Amendment’s prefatory clause was

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38. 554 U.S. 570 (2008); 558 U.S. 310 (2010).

39. H. Jefferson Powell, “The Regrettable Clause: *United States v. Comstock* and the Powers of Congress,” *San Diego Law Review* 48 (2011): 713–72, 761.

40. David Ibbetson, “What Is Legal History a History of?,” in *Law and History: Current Legal Issues*, vol. 6, ed. Andrew Lewis and Michael Lobban (Oxford: Oxford University Press, 2004), 33–40, 35.

41. *Citizens United*, 389 (Scalia, J., concurring); *ibid.*, 427 (Stevens, J., concurring in part and dissenting in part); William C. diGiacomantonio, “For the Gratification of a Volunteering Society’: Antislavery and Pressure Group Politics in the First Federal Congress,” *Journal of the Early Republic* 15 (1995): 169–97.

legally relevant only to settle ambiguities in its operative clause.<sup>42</sup> These claims have generated a forest of historical criticism,<sup>43</sup> and we express no view on their correctness here. But it is hard to deny that they are quintessentially claims of legal interpretation, *as are their negations*—just as much the bread-and-butter of modern judges as “no vehicles in the park.”

The instinct to see such questions as unanswerable may reflect a difference in disciplinary outlook. Historical research often adopts the external perspective of the social scientist, recording and describing observable behavior, as opposed to the internal perspective of one who wishes to identify social rules and to use them as guides.<sup>44</sup> A mere observer might be content with ambiguity, concluding that the “dots” of past practice were plausibly joined by many different doctrinal lines. But someone actually advancing a legal claim, whether of past or present law, must put forward (in Ibbetson’s words) a view of “the picture that is obtained when the dots are joined together ‘properly.’”<sup>45</sup>

Those sorts of judgments involve legal reasoning, and not purely historical analysis. Saul Cornell has invoked as “representative” this observation by Gordon Wood: “It may be a necessary fiction for lawyers and jurists to believe in a ‘correct’ or ‘true’ interpretation of the Constitution in order to carry on their business, but we historians have different obligations and aims.”<sup>46</sup> The reverse is true as well. Certain schools of historical research may disclaim the ability to say whether one reading of a contract is more compelling than another, or whether a motorized wheelchair is best understood as a “vehicle” for statutory purposes. But lawyers do not, and judges cannot. To cast aside originalism simply because it asks unanticipated questions of the past is to cast aside the use of preexisting law—something the discipline of history has no authority to do.

## CONCLUSION

The positive turn treats originalism as a claim about the current force of past law. This is a claim about substance, not procedure. Unlike some past iterations of the theory, it does not promise a step-by-step guide to correct legal answers, any more than the scientific method promises a step-by-step guide to curing malaria.

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42. *Heller*, 577-78, 598-600, 603, 627 (opinion of the Court); *ibid.*, 651 (Stevens, J., dissenting).

43. E.g., Saul Cornell, “Originalism on Trial: The Use and Abuse of History in *District of Columbia v. Heller*,” *Ohio State Law Journal* 69 (2008): 625-40, 631-36 (arguing that the Court mistakenly used the nineteenth-century law of preambles).

44. Hart, *Concept of Law*, 55.

45. Ibbetson, “What Is Legal History a History of?,” 35, 40.

46. Cornell, “Originalism on Trial,” 626-27; Gordon S. Wood, “Ideology and the Origins of Liberal America,” *William and Mary Quarterly* 44 (1987): 628-40, 632-33.

Rather, it offers an account, under current law, of *what makes those answers correct*. So if, as Rakove argues, originalism in practice fails to “produce dispositive answers on every question”—or if it cannot fully discipline judges, who may prefer to “pick and choose the evidence that satisfies their predispositions”<sup>47</sup>—that does not displace current law’s reliance on the past, any more than the replication crisis in the social sciences discredits the scientific method as a whole.

The positive turn makes use of history only for limited purposes and in limited ways. It treats old law as current law only because—and to the extent that—current law so commands. What was thought and said in the past are questions of history; which of the answers supply legal rules today is a matter for jurisprudence and substantive law. Maybe the originalists are wrong about current law, or maybe current law is ill-advised. But either way, these latter questions are not ones that history can answer.

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47. Rakove, “Poverty of Public Meaning Originalism,” 579-80.