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JUDICIAL POWER AND MOBILIZABLE HISTORY

RICHARD A. PRIMUS*

Supreme Court opinions in constitutional cases routinely discuss history that is not strictly necessary to the legal analysis at hand but which serves to establish the opinions' approach as consonant with larger ideas or patterns in American history. Consider, for example, the rival views of constitutional history that appeared in the Court's recent decision in *Gonzales v. Raich*.¹ In an opinion holding that the Interstate Commerce Clause authorizes Congress to ban the possession and use of home-grown marijuana, Justice Stevens not only reviewed a schematized history of Commerce Clause jurisprudence but also framed the issue presented within a history of drug control laws reaching back nearly a hundred years.² The Commerce Clause history was delivered in greater depth than would have been needed to justify the case's disposition, and the history of drug regulation was, as a logical matter, unnecessary to the Court's holding. Under the expansive commerce rationale that the Court expounded, Congress could ban the possession and use of home-grown marijuana even if there were no history of federal drug regulation. Nonetheless, the Court's framing of the issue within that history served a purpose, implying that the banning of drugs like marijuana and specifically the federal regulation of such drugs are long-standing aspects of the American political order.

Justice O'Connor dissented in *Raich*, but she was no less sensible of the role of history in framing constitutional issues. She simply located her views within a different historical narrative, opening her argument for limited federal power by invoking "historic spheres of state sovereignty,"³ declaring that criminal law and social policy are areas where "[s]tates lay claim by right of history,"⁴ and closing with an invocation of Madison's eighteenth-century description of the constitutional system as one in which most governmental authority would

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1. 125 S. Ct. 2195 (2005).

2. *Id.* at 2201-04.

3. *Id.* at 2220 (O'Connor, J., dissenting).

4. *Id.* at 2224 (quoting *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring)).

reside with the states.⁵ Nor was Justice O'Connor the only dissenter during the Supreme Court's recent Term to turn to history when protesting the Court's expansive implementation of the commerce power. Justice Stevens himself, the author of *Raich*, had less than a month before dissented in *Granholm v. Heald*, a case in which the Court construed the dormant federal power over interstate commerce to trump language in the Twenty-First Amendment that seems to authorize states to prohibit the importation of alcohol.⁶ In *Raich*, Justice Stevens wrote an expansive nationalist opinion that would seem to sweep anything vaguely commercial into the sphere of the federal commerce power, but in *Granholm*, he maintained that a specific feature of constitutional history imposed a limit on such nationalization. Only by ignoring the history of Prohibition and its repeal, Justice Stevens contended, could the Court conclude that the Constitution regards alcohol as an ordinary item of commerce, regulable on the same terms as any other.⁷ History properly remembered indicates otherwise, he wrote, and he accordingly read Section Two of the Twenty-First Amendment to remove interstate commercial traffic in alcohol from the reach of dormant commerce doctrine.⁸

Unless these rehearsals of history are empty exercises, which I do not believe them to be, they stand as illustrations of a basic feature of American constitutional discourse: a constitutional interpreter's sense of American history is likely to shape his or her approach to deciding constitutional issues. This is so both at the level of specific issues and at the level of constitutional law more generally. Justice Stevens's historical sensibility about alcohol in *Granholm* bore on a highly particularized issue, leading him to a view about an exception to a general rule. Justice O'Connor's historical sensibility about federalism in *Raich* operated more broadly, supporting a more general view about the role of the states. Indeed, a constitutional interpreter with a broad sense of the meaning or values of American constitutional history is likely to have that historical sense shape his or her approach to adjudication across a wide range of issues.

This is not to say that each constitutional interpreter holds a single view of the meaning of American constitutional history, much less

5. *Id.* at 2229.

6. 125 S. Ct. 1885, 1897-1905 (2005). The relevant provision of the Constitution provides that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST. amend. XXI, § 2.

7. *Granholm*, 125 S. Ct. at 1909 (Stevens, J., dissenting).

8. *Id.* at 1908-09.

to say that it is coherent in an analytic sense to speak of American constitutional history as having a “meaning.” As careful historians are keenly aware, there are serious intellectual hazards in trying to extract grand patterns, let alone grand arcs of normative meaning, from any rich and complicated historical record. Much of the best historical scholarship demonstrates the complexity of the past, and thematic interpretation in constitutional law often resists such complexity. Accordingly, the historian—and the historically oriented constitutional lawyer—ought to be skeptical about whether American history can be made to yield general moral lessons.⁹ Nonetheless, it is a feature of American constitutional discourse that narratives and images¹⁰ from American history are invested with meaning, and those meanings are sometimes presented as embodying deep truths about American constitutional history. These conceptions of history are among the influential sources of value in constitutional adjudication.

Courts play an important role in developing and transmitting narratives and images of constitutional history. The episodes that courts treat as relevant to constitutional adjudication gain a privileged status among the possible bases for historically based constitutional arguments, and the historical arguments that courts credit become established as sanctioned interpretations within constitutional discourse. Such judicial influence is, of course, not unique to historical argument. Courts also shape the way that nonjudicial actors think about other sources of constitutional argument, including the text of the written Constitution. If the *Granholm* Court holds that the dormant federal preserve implicit in the Interstate Commerce Clause prevails over Section Two of the Twenty-First Amendment, future lawyers are more likely to accept a narrow reading of Section Two, even if

9. See, e.g., Jack N. Rakove, *Two Foxes in the Forest of History*, 11 *YALE J.L. & HUMAN.* 191, 195-212 (1999) (book review) (characterizing the differences between a historian's view of history and the views present in the constitutional theory writings of Bruce Ackerman and Akhil Amar); see also PAUL CONNERTON, *HOW SOCIETIES REMEMBER* 13-14 (1989) (distinguishing historical reconstruction from social memory).

10. Throughout this Essay, I will use the phrase “narratives and images” to refer to the stock of historical materials that constitutional interpreters know, remember, or believe they know or remember. Among students of historical memory, there is some disagreement about the relative roles of narratives and images as well as the roles of kinds of memory-material that are not properly classified as either. Some people focus on narratives, presenting stories as the core of social memory. E.g., J.M. BALKIN, *CULTURAL SOFTWARE* 188-215 (1998). According to others, however, the basic unit of historical memory is not the narrative but the image. E.g., CONNERTON, *supra* note 9, at 27-29. J.M. Balkin mediates this difference in views by noting that the stories a society remembers often become sufficiently abstract as to be invocable with single words and phrases like “Lincoln” or “Pearl Harbor.” BALKIN, *supra*, at 203. At that point, either there is little difference between a narrative and an image or else the narratives have become summary images.

lawyers reading Section Two prior to *Granholm* would have been more likely to regard its text as authorizing states to ban the importation of alcohol. But in an important respect, the judiciary's influence over the shape of constitutional history differs from its influence over the meaning of constitutional text.

The difference—or at least the difference upon which I now focus—is a matter of availability heuristics.¹¹ It is not difficult to have a complete knowledge of the constitutional text, either by memory or by easy consultation. Nobody, however, can hold in his head all of American constitutional history, nor can all of that history be synthesized into a few easily consulted pages. The amount of raw material is simply too vast. Therefore, when courts make arguments from constitutional history, they argue from a small subset of all available historical materials, a subset limited to those aspects of history with which the judges are familiar. The resulting judicial opinions make particular aspects of constitutional history much more visible than others to the community of constitutional interpreters and imply that those aspects of history can stand for the lessons of history as a whole. The judicial power to shape the significance of history in constitutional argument thus includes not only considerable influence over what constitutional history is taken to mean but also the capacity to limit which elements of the past can count as worthy objects of interpretation. In so doing, and whether intentionally or not, they limit the ability of other constitutional interpreters to mobilize alternative aspects of history in support of other constitutional meanings.

To some extent, a parallel dynamic operates with constitutional text: some portions of the written Constitution are more prominent in lawyers' minds than others, largely by virtue of being the subjects of a greater number of Supreme Court decisions. *Granholm* featured a tension between an extremely familiar portion of the Constitution (the Commerce Clause) and a relatively obscure one (Section Two of the Twenty-First Amendment), and it might be noteworthy that it was the more familiar portion whose doctrinal rubric prevailed. But if the text of Section Two is less familiar to constitutional interpreters than that of the Commerce Clause, the history to which Justice Stevens appealed in *Granholm* is substantially more obscure still. After all, a constitutional interpreter can become fully acquainted with Section Two

11. On availability heuristics, see, e.g., JON ELSTER, MAKING SENSE OF MARX 466 (1985) (defining the "availability heuristic" as "the tendency to believe that the world at large is similar to the part of the world one knows"); see also JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 163-208 (Daniel Kahneman et al. eds., 1982) (exploring the availability heuristic in social perception and interaction).

simply by reading it. Absorbing a historical sensibility is a slower process.

Where a particular historical sensibility has not been absorbed, arguments from the remembered lessons of history are unlikely to have much persuasive power. Part of the discursive weakness of Justice Stevens's argument in *Granholm* lay in the fact that the history he invoked is not a prominent part of the mental apparatus with which most constitutional interpreters, including most of his judicial colleagues, approach the issues of constitutional law. It is, in other words, not prominent within the collective memory of the community of constitutional interpreters, by which I mean that it is not a salient part of the set of historical narratives and images that members of that community share with one another.¹² The history on which Justice Stevens founded his argument was therefore not readily mobilizable as a persuasive force in constitutional argument.

One contribution that law professors can make to constitutional discourse, I suggest, is the nurturing of new mobilizable histories. A "mobilizable history," as I will use the term, is a narrative, image, or other historical source that is sufficiently well-known to the community of constitutional decisionmakers so as to be able to support a credible argument in the discourse of constitutional law. It draws upon materials that are within the collective memory of constitutional interpreters; indeed, a necessary step in nurturing a new mobilizable history is to introduce new information into that collective memory or to raise the prominence of narratives and images that are already included in that memory but marginally so.¹³

12. I do not mean the term "collective memory" to imply the existence of a group mind independent of the minds of individuals. There is no such impersonal mind. By "collective memory" I mean instead the set of narratives, images, and tropes of historical memory, real and imagined, that is shared by and partly constitutive of a particular community. See CONNERTON, *supra* note 9, at 36-38 (contending that individuals recall their memories through memberships in social groups); BALKIN, *supra* note 10, at 203-04 (same). No fixed set of such memories is fully shared by every member of any society; instead, there is an overlapping set of memory-material that is shared to different degrees by different people within a society. The idea of collective memory as a stock of materials remembered in common is thus a helpful heuristic, and valid in a rough descriptive sense, rather than a claim that societies can be precisely defined by a set of memories held in common by every single person within them.

13. For one recent example of this kind of writing by law professors, see Peggy Cooper Davis, *Introducing Robert Smalls*, 69 *FORDHAM L. REV.* 1695 (2001) (presenting the historical career of Robert Smalls, an African-American Civil War hero and political activist, and arguing that Smalls's experiences and perspectives are relevant to the meaning of the Fourteenth Amendment). See also Richard A. Primus, *The Riddle of Hiram Revels*, 119 *HARV. L. REV.* (forthcoming 2006).

Part of the point of making more history than appears in judicial opinions into mobilizable history is to foster a broader exchange of ideas about our constitutional choices. And part of the point is bound to be instrumental, as different histories mobilized in constitutional argument will tend to support different outcomes in contested cases. But the contest in which mobilizable histories compete is not only about how concrete constitutional cases are decided. It is also about the content and indeed the grand meaning of American constitutional history itself. Problematic as it is from an analytic standpoint to speak of history as having a meaning, the practice of constitutional law regularly takes American history as a source of value,¹⁴ much as it takes political ideas like democracy or equality to be sources of value. Just as the content of democracy or equality is therefore subject to contest in constitutional argument, so is the content of American history.

Discursive struggles over the import of constitutional history are therefore not merely arguments about deciding concrete cases this way or that way. They are also contests over history as a value in itself and indeed a central value in the practice of American constitutional law. In a way analogous to the way that constitutional interpreters have visions of what democracy or equality or federalism should be, constitutional interpreters want constitutional history to be one thing or another, to stand for this or that set of ideals or propositions. Indeed, the viability of constitutional law itself may depend on history's being approached in this way. Without a shared sense that American history is a matter of normative value, the competing value of presentist political democracy would make it difficult to understand the legitimacy of a system in which constitutional authority is inherited from the past. Overcoming (or at least sidestepping) the central dead-hand problem of constitutional law thus encourages us to regard the constitutional past as a source of values that can be opposed to, and can ultimately overcome, the normative appeal of presentist democracy. And once the past has that kind of normative power, history—like democracy, equality, or federalism—becomes not only a modality of constitutional argument¹⁵ but a substantive component of what is contested in the discourse of constitutional law.

14. This value can be positive or negative: history sometimes furnishes heroic ideals to be honored, but it also sometimes furnishes cautionary tales or accounts of evils from which we should distance ourselves. See RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS 177-78* (1999) (viewing the opposition to Nazi and Soviet totalitarianism as an important twentieth-century influence on conceptions of rights).

15. Cf. PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 9-24* (1982) (including historical arguments in a typology of constitutional arguments).

I. THE FUNCTIONS OF HISTORICAL ARGUMENT

A. *Persuasive Power*

Historical arguments do not and should not always suffice to resolve constitutional issues. Nonetheless, historical arguments (or assumptions) often have persuasive or justificatory force in constitutional reasoning. By this claim I mean that it would seriously misunderstand the practice of constitutional decisionmaking to regard the category of historical arguments as mere makeweights or window-dressings designed to prettify results chosen on other grounds rather than as genuine factors in the process by which interpreters come to hold their views. To be sure, some invocations of history are makeweights, as are some instances of any form of argument. But as with any species of rhetoric, the suspicion that historical argument is rhetorical does not imply that the argument so characterized is empty or without consequences. On the contrary, it implies that the history invoked has actual persuasive value for some audience, even if not for the speaker who deploys the argument. Rhetoric cannot be effective if it does not work in the decisionmaking process of the interpreter whom the rhetorician seeks to persuade. Thus, although it is surely the case that some portion of historical argument in constitutional law does not genuinely reflect the grounds that move the speaker, the very fact that historical argument is a common trope in constitutional argument bespeaks a pervasive belief that history matters in constitutional decisionmaking.

The precise quantity of persuasion that historical argument achieves would be impossible to measure, and the persuasive influence of historical argument is varied and diffuse even when it is powerful. Moreover, even when history is explicitly an important consideration in a constitutional case, an interpreter's view of the historical component of the problem may not be sufficient to resolve the issue. Most of the time, interpreters reach conclusions about difficult constitutional issues through a mix of different kinds of reasoning—historical, textual, precedential, and otherwise—rather than on the basis of a single type of argument.¹⁶ But none of these nuances negates the basic point that the mobilizable stock of historical materials plays an important role in constitutional thought. Just as text and precedent can constrain constitutional reasoning, different understand-

16. See, e.g., Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189 (1987) (suggesting that the different types of constitutional arguments usually operate concurrently).

ings of history will yield different ranges of conclusions that constitutional interpreters are willing to accept.

B. Bolstering Constitutional Legitimacy: Deflecting the Dead Hand

Some of the reasons why constitutional discourse gives a fair amount of attention to arguments about American history lie plainly on the surface of the practice of constitutional law. To the extent that constitutional law is about construing the meaning of a document written mostly in the eighteenth and nineteenth centuries, history enters as an interpretive aid with regard to the constitutional text, offering clues about the meaning of particular words, phrases, and concepts.¹⁷ To the extent that constitutional law is a form of customary law, history offers a record of the traditional practices that comprise the constitutional system.¹⁸ On a third model, history offers something like comparative data, inviting interpreters to draw lessons about how particular legal regimes would play out in practice from analogies with the experience of the past.¹⁹ In a fourth vein, history can act as a cautionary tale, a record of mistakes or oppressions from which modern constitutional interpreters should distance themselves.²⁰ Each of these approaches uses history differently, and

17. See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 37-38 (1997) (describing the practice of interpreting constitutional text using writings of that era). The originalist tent can be construed broadly enough to include both "static originalists," for whom the relevant history for interpreting the meaning of a constitutional provision adopted in 1791 is that of 1791, and "multiple originalists," for whom the meaning of such a provision should be synthesized with the meanings that constitutional actors at subsequent moments generative of authoritative constitutional meaning attributed to those earlier texts. See generally 1 BRUCE ACKERMAN, *WE THE PEOPLE* (1991) (exemplifying the approach of a multiple originalist).

18. See, e.g., Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 5-6, 39 (1998) (arguing for an interpretive approach that encompasses all of constitutional history); Larry D. Kramer, *When Lawyers Do History*, 72 GEO. WASH. L. REV. 387, 387 (2003) (describing constitutional law as "customary law refracted through a text"). The traditionalist method of deploying history reduces the significance of special generative moments like those when constitutional texts were written or ratified and increases the significance of times during the normal run of history when constitutional ideas have been invoked and applied. For the traditionalist, history is less a haystack through which one looks for the needles of original understanding than it is an agglomerated record of what American constitutional practice actually has been and therefore presumptively still is.

19. See, e.g., Samuel H. Beer, *Political Science and History*, in *ESSAYS IN THEORY AND HISTORY* 41, 58-73 (Melvin Richter ed., 1970) (arguing that history, as "past behavior," can provide data for decisionmakers).

20. See PRIMUS, *supra* note 14, at 60-67 (describing a pattern in constitutional interpretation whereby interpreters react against the perceived abuses of history). The law of equal protection is often understood to exhibit this kind of relationship to history, seeking as it does to correct specific injustices of the past. See, e.g., Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U.

each could support a range of outcomes on various contested issues.²¹

At a deeper level, however, all of these approaches (and all other modes in which constitutional interpreters seek guidance from history) combine to play a role in constitutional thought that is larger than the resolution of any particular substantive issue. Taken as a whole, discursive engagement with history bolsters the legitimacy of the constitutional system itself, and in particular the institution of judicial review, by implicitly blunting the threat that emanates from the values of presentist democracy. The threat is well known: how, the question runs, can a democratic society permit its choices to be constrained by a Constitution written by a people long since departed?²² If the question can be answered, the answer must somehow tie the people today to their chronological predecessors, such that the people who are constrained are in some sense also the people who created the constraints.²³ Without a sense that the people today are meaningfully connected to that earlier people, our political culture's commitment to democracy would make it genuinely difficult to make sense of the idea of an authoritative Constitution inherited from earlier times. In other words, a consciousness of history and some notion that the past can be a repository of reasons for present action are necessary for constitutional law as we know it to be practiced at all.

I suggest that one of the functions of historical argument in constitutional law is to allay anxieties about democratic legitimacy by creating discursive connections between present-day participants in constitutional disputes and the long-departed others whose legacy is somehow to guide the resolution of those disputes. By asking and debating what earlier generations of constitution-making, or at least constitution-implementing, Americans understood the Constitution to require, we imagine ourselves in their places, or them in ours, thus

CHI. L. REV. 1161, 1170-78 (1988). *But see* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997) (describing how a focus on injustices of the past can limit the present scope of equal protection because present injustices may seem less clearly wrong than the stock of historical practices now regarded as clearly unconstitutional).

21. For further discussion of various ways in which history is used by constitutional theorists, see Amy Kapczynski, *Historicism, Progress, and the Redemptive Constitution*, 26 CARDOZO L. REV. 1041 (2005).

22. *See, e.g.*, PAUL W. KAHN, LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY 134-70 (1992) (arguing that this dead-hand problem is and always has been the central problem of constitutional theory).

23. For one proffered formulation of such a solution, see JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 173-77 (2001) (arguing that "the people" should be understood as a temporally extended entity).

collapsing the distance between us and them. The more successfully constitutional discourse helps us identify ourselves with those previous generations, the less inclined we will be to experience the constraints of an inherited constitution as impositions that deny the democratic autonomy of the present. Thus, to return to the example of *Raich*, both Justice Stevens's arguments about the history of Commerce Clause interpretation and Justice O'Connor's arguments about the Founding vision of decentralized government do more than bear on either the specific issue of marijuana regulation or the more general issue of the limits of federal commerce authority. As part of a larger web of historical engagement that identifies the interpreting community with a continuous historical project, such arguments also help to legitimize the constitutional system as a whole. By drawing constitutional discourse into a historical framework, these arguments help deflect the threat from presentist democratic values.

This deeper function of historical engagement in constitutional discourse can be executed even if there is no general agreement among constitutional interpreters about exactly how or why history should matter in constitutional interpretation. Clearly, there is no such general agreement. Different interpreters hold rival theories about the role that history should play, and constitutional interpretation as a practice muddles through without settling the contest among those theories. Although there is a noble intellectual aspiration to settle the contest and identify the proper way or ways to use history, constitutional adjudication does not as a practical matter seem to need that contest to be settled. Moreover, although some approaches to the methodological question should be rejected as intellectually implausible or incompatible with the basic values or commitments of American constitutional law,²⁴ it is not clear as a theoretical matter that any one theory of history's proper force in constitutional law is normatively correct in a way that should exclude all others. It may be the case instead that what constitutional discourse requires is some kind of engagement with history on which we, the community subject to the constitutional regime, can make sense of the Constitution's persistence as more than a brute fact of power. If so, this necessary function of history in constitutional interpretation might be executed just as well by the concurrent operation of multiple forms of historical

24. For example, I do not think that a reasonable constitutional theorist could believe that the authoritative meaning of a constitutional clause must be entirely governed by the interpretation given to that clause in, say, the contemporary writings of Roger Sherman, irrespective of evidence that the interpretation given in that source was a minority view among the drafters and ratifiers of the Constitution as a whole.

engagement as by the operation of a single, shared theory of historical authority in constitutional law.

C. Beyond Legitimacy: Materials over Methods

Once historical argument is present in constitutional law, however, it does more than provide generic support for the system's legitimacy. It also pushes interpreters in particular directions on concrete issues. To some extent, which positions historical argument will support is a function of which method of historical interpretation is in play. Perhaps even more important than the choice of a method, however, is the content of the shared stock of historical narratives and images that are prominent in the memories or imaginations of the interpreters. That collective memory defines what arguments can be mobilized in constitutional discourse, and it also shapes the normative tilt of an interpreter's general background assumptions about the meaning of American history. For again, although it is problematic to speak of history as having normative meaning, the practice of constitutional law often behaves as if it does. In other words, it treats American history as a source of value.

In this mode of engagement with history, constitutional history is a record of struggles and resolutions, with heroes and perhaps villains, but certainly with lessons about what values the Constitution embodies and indeed about what the story of America means, embodies, or represents. Multiple narratives and images compete to shape or dominate the overall moral themes of American history. There are, for example, narratives of progress and of preservation and of heroic ancestry and of increasing inclusion and of sustained local control and of inexorable nationalization. Sometimes these themes are explicitly articulated in constitutional argument, and sometimes the values they support in the mind of a particular interpreter do their work even when not articulated explicitly. But to whatever extent a constitutional interpreter subscribes to a view of American history dominated by one of these themes, that view is likely to shape the interpreter's decisionmaking about what the Constitution requires across a broad variety of contexts. After all, these more general themes do more than establish the meaning of a particular constitutional clause or doctrine. They attempt to establish what the whole constitutional story is about, providing a frame of value through which constitutional questions in general should be approached. They offer a general normative prism through which originalists practice their originalism, traditionalists their traditionalism, and so forth.

The general background themes of history are objects as well as sources of influence in constitutional thought. What an interpreter knows or believes she knows about the Founding or the Civil War or the history of women's disfranchisement or the abuses of local or federal power may influence her attitudes about which themes are important to the morals of American history, just as her thematic attitudes will influence her views of all of those particular aspects of history. The particular stories or images that are the interpreter's stock of historical knowledge is thus formed in tandem with the interpreter's conception of more general themes. As a consequence, the selection of which stories or images the interpreter is conversant with is vitally important to her overall dispositions when thinking about how historical argument should bear on constitutional decisionmaking. It is that stock of stories or images that are the raw materials for answering the question of what the story of the American Constitution is about.

II. THE JUDICIAL SHAPING OF KNOWN HISTORY

Judicial opinions both reflect and shape the stock of narratives and images from which the prevailing background attitudes about American constitutional history are taken. Judges share in the collective memory of the general constitutional culture, and they also share a thicker and more particular collective memory as a judicial community by virtue of their distinctive experiences: education in law schools, discourse within a small social and professional network, and so forth. The content of the collective judicial memory helps define the possibilities for judicial decisionmaking, because judges draw on the history they know when they write opinions. Simultaneously, judicial opinions shape those conceptions for the future, because judicial opinions are among the instruments through which other lawyers are taught to see the content and meaning of constitutional history.

The judicial shaping of constitutional history occurs on at least two different levels of the interpretive process. One is that judicial opinions interpret the meaning of events in constitutional history or the meaning of constitutional history as a synthetic whole. The other is that judicial opinions select which aspects or episodes from American constitutional history will be objects of interpretation in constitutional law. In other words, when judges make historical arguments, they are exercising both the power to interpret history and the power to choose which history is worth interpreting. The latter power is the power to shape the content of constitutional culture's collective memory, and the former power is the power to impart specific meanings to what is collectively remembered by assembling the raw materials of

memory into narratives or images with particular normative implications.

One should not overstate the power of judges to control the history that lawyers know. Judicial accounts of history and its meanings are not hegemonic, and counterhistories can and sometimes have been successfully deployed against prevailing doctrine. Consider, as a recent example, the deliberate academic project between *Bowers v. Hardwick*²⁵ and *Lawrence v. Texas*²⁶ to recast the history of the legal regulation of homosexuality, a project that culminated with the Supreme Court's own adoption of the newly proffered historical account.²⁷ But the judiciary's ability to select and interpret constitutional history should not be underestimated, either. Many leading constitutional theorists have maintained that judicial decision-making has the important beneficial effect of modeling principled decisionmaking for the wider public, providing an object lesson in how to think seriously about important and contested issues in the American polity.²⁸ It would be impossible to quantify the influence of such modeling on the way that lawyers or citizens in general think about constitutional issues, but to whatever extent these theorists are correct, judicial arguments about constitutional history are a species of the more general phenomenon whereby judicial opinions instruct the public in how constitutional law should be understood and discussed. That instruction occurs both by unmediated transmission from judges to readers of opinions and also, on a larger scale, through intermediaries like casebooks and law professors.²⁹ The law students who later become lawyers and judges read constitutional history as it is described in previous cases, such that the way constitutional history is presented in judicial opinions will influence the way that subsequent decisionmakers understand both the content and the meaning of history when they adjudicate constitutional questions.

25. 478 U.S. 186 (1986) (upholding state law criminalizing sodomy).

26. 539 U.S. 558 (2003) (overruling *Bowers* and holding that laws criminalizing sodomy between consenting adults violate the Due Process Clause of the Fourteenth Amendment).

27. See *id.* at 571-72 (citing William N. Eskridge, Jr., *Hardwick and Historiography*, 1999 U. ILL. L. REV. 631, 656) (doubting the accuracy of the *Bowers* Court's historical conclusions about homosexuality).

28. E.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 69-70 (1962); CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* 47-48 (2001); Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 75-77 (1986).

29. J.M. Balkin & Sanford Levinson, Commentary, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 973-75 (1998).

III. A COMPARISON: SHAPING HISTORY AND SHAPING TEXT

To some extent, judicial construction of constitutional authority can alter the underlying balance of argumentative resources regardless of whether the resource in question is historical as opposed to textual or precedential or of some other kind. Nonetheless, different kinds of constitutional authority are differently susceptible to being rendered more and less visible in constitutional discourse. Consider in this respect the contrast between arguments from history and arguments from the text of the written Constitution.

If a case turns on how to understand a given piece of constitutional text—say, Section Two of the Twenty-First Amendment, as in *Granholm*—an interpreter who disagrees with the Court's interpretation may have the opportunity to push back, offering a rival interpretation of that text. The dynamics by which the contest between such rival interpretations would resolve in practice are the subject of a large scholarly literature, as is the question of whether there is an institutional reason why the judicial interpretation ought to prevail by reason of being judicial. Where the question is merely about the meaning of the *text* of the Twenty-First Amendment, however, judicial adjudication of a constitutional question can leave the underlying sources of constitutional authority relatively unchanged. The Twenty-First Amendment is still there, in plain view, and rivals can still make arguments from its authority, even if courts are likely to reject those arguments in at least the short or medium term, whether for reasons of *stare decisis* or simply for the reasons for which the original decision was made. Thus, when the Supreme Court decides a case in a way that seems to be in tension with the text of the written Constitution, the text survives as an argumentative resource that can be mobilized against the Court's decision in the future. The Court does not rewrite the document to conform better to judicial doctrine. Instead, a gap develops between judicial doctrine and constitutional text, and the gap is visible to observers who read both the text and the judicial opinions.

This is not to say that the words of the document have permanently stable meanings, nor is it to deny that the Court's interpretations often shift our "common-sense" understandings of what a word in a legal document might mean. "Interstate commerce" meant something different to the common lawyerly intuition in 1970 than it meant in 1920, and the difference was largely due to the Supreme Court's having expanded its view of what Congress could regulate under the interstate commerce power. Nonetheless, many a law student wrinkled his nose at the Court's expansive construction of "inter-

state commerce” even when *Wickard v. Filburn*³⁰ had been the law for decades,³¹ just as many law students today see that the text of the Eleventh Amendment will not support what the Supreme Court does with Eleventh Amendment doctrine.³² The potential and sometimes highly visible gap between judicial doctrine and constitutional text is what enabled Attorney General Edwin Meese to insist on his distinction between constitutional law and the Constitution, and over a period of years he and others used that gap to advance a set of arguments against then-current doctrine, ultimately achieving notable, if only partial, success in altering constitutional law.³³ As long as the text of the Constitution is unaltered and highly visible, many readers will experience a tension between that text and a variety of judicial decisions. For them, as it was for Meese, the text is then a mobilizable resource that can be used to argue against prevailing judicial doctrine.

The situation is not exactly the same when the Supreme Court declares the meaning of some aspect of constitutional history. There are important similarities: judicial decisions in constitutional cases construe the meaning of history as well as the meaning of text, and persuasive or long-lasting constructions of either history or text can prompt the community of lawyers to approach the relevant text or the relevant history in the way that the Supreme Court has taught them. But for interpreters seeking to contest a juristocratic domination of constitutional meaning, history is often a less mobilizable resource than text is.³⁴ In part, history may be less mobilizable than text because Supreme Court decisions interpreting the meaning of constitutional history can do something closer to rewriting the underlying object of interpretation than decisions interpreting the meaning of text can. To be sure, the Court does not dispatch the marshals to burn history books with contrary interpretations of the American past.

30. 317 U.S. 111 (1942).

31. This was so before *United States v. Lopez*, 514 U.S. 549 (1995), was decided, and it will continue to be true despite the reaffirmation of *Wickard* in *Raich*.

32. This is a point that the Court itself is often willing to admit. See, e.g., *Alden v. Maine*, 527 U.S. 706, 727 (1999) (recognizing that Eleventh Amendment immunity is not demarcated by the text).

33. See OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, GUIDELINES ON CONSTITUTIONAL LITIGATION 8-10 (1988) (arguing that some constitutional doctrines are inconsistent with a plain-meaning understanding of the Constitution).

34. I do not mean that arguments based on history are less effective or less persuasive than arguments based on text. That may or may not be true. I mean to say that whatever the possible range of persuasive arguments based on one or the other of these modalities of argument may be, it may be harder to marshal the full potential (or any given proportion of that potential) of historical argument against judicial doctrine than it is to marshal the full (or the same proportion of) potential of a textual argument.

But given the vast range of possible histories from which to draw meaning, and given also the influence of court decisions in legal discourse, the Supreme Court's decisions can and often do obscure aspects of history other than those emphasized in the Court's own opinions.

This dynamic is a matter of availability heuristics. Unlike the constitutional text, which every lawyer knows where to find and can read in less than an hour, the full corpus of American constitutional history is not knowable to lawyers or indeed to anyone else. This is not just a matter of the indeterminacy of historical meaning: text, too, has indeterminate meaning, even if not in all of the same ways. It is also because there is just too much constitutional history for it all to be held in anyone's head, let alone to be held in anyone's head from all plausible perspectives. It cannot be presented in a few pages, pages that—like the constitutional text—are highly visible or at least easily available elements of American legal culture.³⁵ Given the lesser availability of deemphasized history, as well as the need to argue about whether history not made authoritative by prior Court decisions has any kind of authority in the first place, the universe of historical narratives and images that support arguments in constitutional law can be powerfully narrowed by what the Court makes visible or less visible.³⁶

The limitation of historical narratives and images is not only a matter of what incidentally becomes more and less visible as a result of which narratives a court tells. It is also a matter of the Court's power when it deliberately adopts some meanings of history rather than others. Given a well-known historical episode that could support more than one set of constitutional implications, a prominent judicial imprimatur on one of those sets of implications can help establish that reading as the prevailing constitutional meaning of the history. Other authoritative speakers can accomplish similar results, of course: Lincoln's Gettysburg and Second Inaugural Addresses are powerful bids to interpret some of the most important events in American con-

35. As noted above, even within those few pages of constitutional text, there are parts that are more visible than others to the community of constitutional interpreters, or to different interpreters within that community, and we more readily make arguments based on what is familiar. Nonetheless, a constitutional argument can draw nontrivial support from a less familiar part of the text, once someone calls our attention to it, because there is at least a default presumption that all parts of the text have meaning. We might call this presumption the "canon against surplusage." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

36. This is so both because the Court's simple power within the judiciary will prompt litigants to argue in terms compatible with the Court's interpretations and because its broader influence in legal discourse will familiarize the legal community with some narratives rather than others.

stitutional history, and to the extent that those texts are well known to the community of constitutional interpreters, they too can influence the choice of historical images that condition constitutional decision-making.³⁷ But given the special relationship of courts to constitutional law, historical interpretations offered by nonjudicial actors will generally be less influential than those offered by the Supreme Court, both because many constitutional interpreters consider the Court's authority clearer than that of any other actor and because appearance in a Supreme Court opinion makes a given interpretation of history more visible within constitutional discourse.

Indeed, the Court's opinions sometimes perform the double duty of bolstering a particular interpretation of history and reinforcing the idea that the courts are empowered to determine what constitutional history means. Consider, as contrasting examples, two remarkably similar passages about the authority of past Courts to construe the meaning of history, one taken from Justice Stevens's opinion in *Granholtm* and the other taken from Chief Justice Rehnquist's majority opinion in *United States v. Morrison*.³⁸ Dissenting in *Granholtm*, Justice Stevens made both explicit and implicit arguments about the special role of judges in interpreting constitutional history.³⁹ To support his view that Section Two of the Twenty-First Amendment gives states broad power to prohibit the importation of alcohol, Justice Stevens quoted a passage to that effect from a 1936 majority opinion by Justice Brandeis and another from a 1964 dissenting opinion by Justice Black.⁴⁰ One might think that the fact that Justice Black wrote in dissent would diminish the force of his view, but according to Justice Stevens, Justices Black and Brandeis shared an important characteristic that made them both authoritative interpreters of the Twenty-First Amendment: they had been there when the Amendment was adopted. "The views of judges who lived through the debates that led to the ratification," Justice Stevens wrote, "are entitled to special deference."⁴¹ Justice Brandeis was already sitting on the Court when the Twenty-First Amendment was proposed and adopted; Justice Black was not, but, as Justice Stevens reminds his readers, Black was at the time a United States Senator and participated in the passage of the Amendment in that capacity.⁴² Justice Stevens's claim of authority for

37. See, e.g., GARRY WILLS, *LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA* (1992).

38. 529 U.S. 598 (2000).

39. *Granholtm v. Herald*, 125 S. Ct. 1885, 1908 (2005) (Stevens, J., dissenting).

40. *Id.* & n.2.

41. *Id.* at 1908.

42. *Id.* at 1908 n.2.

Justice Black's dissenting 1964 view might rest on the fact that Black was a senator in the 1930s, but it seems more likely that the real ground on which Justice Black is supposed to be regarded as authoritative (despite the fact that his construction of Section Two appeared in a dissent) is that he was a Justice who was well positioned to remember the history of the 1930s. Justice Stevens did not, after all, canvass the views of 1930s senators who did not later sit on the Supreme Court.

Moreover, Justice Stevens's dissent in *Granholm* contains an unmistakable trope of the contest between youth, which is heedless of history, and old age, whose memory of the constitutional past should serve as a decisional guide. His historical argument against considering alcohol a commodity like any other for interstate commerce purposes began with the observation that "[t]oday many Americans, particularly those members of the younger generations who make policy decisions, regard alcohol as an ordinary article of commerce That was definitely not the view of the generations that made policy . . . in 1933 [at the time of] the Twenty-First Amendment."⁴³ Let the point be lost, Justice Stevens—who at eighty-five is the oldest member of the Court—offered himself as a personal witness to the constitutional history of Prohibition's repeal. "My understanding (and recollection) of the historical context," he wrote, "reinforces my conviction that the text of § 2 should be 'broadly and colloquially interpreted.'"⁴⁴ In this passage, Justice Stevens is not merely a judge. He is also a grandfather telling the children about the history of the tribe. His bid to shape the meaning of an episode in constitutional history thus combines two sources of authority, one derived from personal memory and the other from judicial office. His claim that judges living at the time of the Amendment's passage are entitled to special deference stands at the intersection of those two ideas.

Justice Stevens's attempt to shape the history relevant to Section Two was unsuccessful, at least in the immediate sense that it failed to persuade a majority of the Court in *Granholm*. His claim that judges who lived through a particular period in constitutional history are entitled to special deference in saying what that history means, however, has recently been deployed in winning causes as well. Consider the following passage from *United States v. Morrison*,⁴⁵ a passage pregnant enough to have attracted the attention of a handful of leading consti-

43. *Id.* at 1908.

44. *Id.* at 1909 (quoting *Carter v. Virginia*, 321 U.S. 131, 141 (1944) (Frankfurter, J., concurring)).

45. 529 U.S. 598 (2000).

tutional scholars.⁴⁶ *Morrison* held that the Fourteenth Amendment did not empower Congress to pass the civil remedy provision of the Violence Against Women Act, and in arguing for that conclusion, Chief Justice Rehnquist engaged the historical question of whether Reconstruction should be understood as a fundamental reworking of the American polity or merely a limited reform.⁴⁷ Chief Justice Rehnquist and the *Morrison* majority endorsed the limited-reform position, and to support that historical interpretation, the Chief Justice noted that the Supreme Court of the 1880s adopted that view in decisions like *United States v. Harris*⁴⁸ and the *Civil Rights Cases*.⁴⁹ But Chief Justice Rehnquist also specified that the deference due to the historical interpretations proffered in *Harris* and the *Civil Rights Cases* went beyond the normal force of *stare decisis*. Those decisions are authoritative historical interpretations, the Chief Justice wrote, because of “the insight attributable to the Members of the Court at that time. Every Member had been appointed by President Lincoln, Grant, Hayes, Garfield, or Arthur—and each of their judicial appointees obviously had intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment.”⁵⁰ Thus, just as Justice Stevens claims that judges who lived through the 1930s have special authority to interpret the Twenty-First Amendment, Chief Justice Rehnquist maintains that judges who lived through the 1860s have special authority to interpret the Fourteenth.

The limited interpretation of Reconstruction that prevailed in *Harris* and the *Civil Rights Cases* was far from unanimously held among Americans who had lived through the relevant constitutional events. A great many people who had participated in the Civil War and the adoption of the Reconstruction Amendments believed that Reconstruction worked a broader change in the constitutional system than

46. E.g., Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 104-05 (2000); Robert C. Post & Reva B. Siegel, Essay, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 481 n.201 (2000); Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992, 2017-18 (2003).

47. *Morrison*, 529 U.S. at 619-27.

48. 106 U.S. 629 (1882) (holding that Section Five of the Fourteenth Amendment did not empower Congress to apply the criminal conspiracy provisions of the Ku Klux Klan Act against private parties).

49. 109 U.S. 3 (1883) (invalidating portions of the Civil Rights Act of 1875 prohibiting racial discrimination in privately operated places of “public accommodation” such as theaters, hotels, and railroads).

50. *Morrison*, 529 U.S. at 622. Chief Justice Rehnquist’s argument about the 1880s Court’s special authority to construe the meaning of Reconstruction history is not original to *Morrison*—Justice Jackson made the same argument, in basically the same words, almost fifty years earlier, in *Collins v. Hardyman*, 341 U.S. 651, 657-58 (1951).

the Court acknowledged during the 1880s.⁵¹ But like Justice Stevens in *Granholm*, Chief Justice Rehnquist in *Morrison* promotes the idea that it is not merely contemporary interpretations but the interpretation of *judicial* contemporaries that is entitled to deference.⁵² In so doing, *Morrison* both promotes a specific interpretation of constitutional history—namely that Reconstruction worked only a limited change in the federalist balance—and also reinforces the idea that judges are empowered to declare the meaning of constitutional history.

If a court can say that historical events mean what a particular subset (and in particular a judicial subset) of its contemporary observers said that those events meant, the court has a significant chance of obscuring other readings of history that could be mobilized to support a contrary set of meanings. In that way, judicial attempts to settle historical interpretation by virtue of their decisional authority can be profitably compared to attempts to rewrite the constitutional text to eliminate tension between text and doctrine. Argumentative resources that might be mobilized against the Court's interpretation are at the very least obscured and perhaps simply ruled out of bounds: the historical interpretations of other interpreters are not authoritative and do not serve as the bases for constitutional argument.

51. Across the country, large numbers of African Americans and white egalitarians held meetings and rallies to denounce the *Civil Rights Cases*. See, e.g., STATE JOURNAL (Harrisburg, Pa.), Dec. 29, 1883 (describing a statewide convention of African Americans in Ohio called to discuss responses to the *Civil Rights Cases*); INDIANAPOLIS JOURNAL, undated, in John Marshall Harlan, Harlan Papers 440 [hereinafter Harlan Papers] (on file with author) (describing a meeting of colored citizens in Indianapolis), 441 (reporting a meeting to denounce the cases at the City Hall of New Bedford, Massachusetts); OMAHA REPUBLICAN, Oct. 30, 1883 (reporting a "meeting of colored people" with "quite a large attendance" called to denounce the decision); KENTUCKY REPUBLICAN, Nov. 3, 1883 (reporting a "mass meeting of colored citizens" addressing the Supreme Court's decision). One such meeting, held the week after the decision in Washington, D.C., attracted an estimated six thousand participants, a number which some contemporary observers claimed made it the largest political gathering ever yet held in the nation's capital. See WASH. POST, Oct. 23, 1883; NAT'L REPUBLICAN, Oct. 23, 1883. The Supreme Court's decision also provoked a group of black ministers and lawyers in Baltimore to publish a legal theory treatise setting forth a theory of the Reconstruction Amendments and denouncing the Court for betraying the project of Reconstruction. THE BHD. OF LIBERTY, JUSTICE AND JURISPRUDENCE: INQUIRY CONCERNING THE CONSTITUTIONAL LIMITATIONS OF THE THIRTEENTH, FOURTEENTH, AND FIFTEENTH AMENDMENTS (1889). And in Texas, state officials anticipated that African-American reaction would go beyond talk, politicking, and legal theory. In response to reports that several hundred blacks had actually taken up arms, the governor mobilized the state militia to put down a potential insurrection. GALVESTON DAILY NEWS, Oct. 30, 1883, at 4; and Oct. 31, 1883, at 1.

52. *Morrison*, 529 U.S. at 622.

The analogy to rewriting the constitutional text is a heuristic suggestion, not a comparison to be taken as woodenly true. As noted earlier, the Court does not dispatch the marshals to change the history books. Moreover, the Supreme Court is only one of many forces shaping people's background understandings of American history. Even if the Court explicitly said "only this history shall count," the legal community's familiarity with history would never be confined to that or any other static set of information and understandings, and the tension between the rulings of the courts and other things that lawyers know could be a mobilizable resource when people contest established doctrine.

That said, the history that forms the basis for constitutional argument is heavily shaped by case law, meaning both that Supreme Court decisions are taken to represent the narrative of history and that the history that judges purvey in their opinions powerfully shapes (and limits) the history that legal discourse will deploy.⁵³ As a practical matter, judicial decisions construing the import of constitutional history do not merely establish one or another reading of that history as authoritative. They also exercise an important influence on the visibility of different elements of constitutional history, thus shaping which elements of the past become historical narratives that will support arguments about constitutional law. Only those aspects of history that will support such arguments are worth contesting in constitutional discourse. Accordingly, past events and historical accounts that are not made visible within constitutional discourse are likely to be excluded from the set of tools that can be mobilized by people who wish to check or critique exercises of judicial power. The object of historically oriented constitutional interpretation thus itself changes based upon what the judges say. This is true to some extent of all modalities of constitutional argument, but the extent must be greater when the potentially available arguments from that modality are more diffuse, less codified, and less visible. When judges tell certain stories

53. As a matter of legal craft, there are arguments weighing in favor of allowing prior cases to establish a relatively settled set of historical meanings rather than permitting a constant contest about the valence of competing historical narratives. Among other things, the former alternative increases stability and consistency in legal interpretation. Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509, 518-19 (1996). Moreover, some constitutional scholars have argued that judges are actually pretty good synthesizers and interpreters of history, so it makes sense to let them do it. Friedman & Smith, *supra* note 18, at 88. But there are also negative consequences. Judicially synthesized history will systematically flatten the past by rejecting or at least obscuring many historical understandings other than the few that are chosen as official meanings, and stability achieved by making a few strains of history authoritative will limit not just uncertainty in the law but also the possibility of critique.

and not others, they affect not only how we will understand those particular stories but also the universe of stories of which we are aware, and can contest, in the first place.⁵⁴

IV. MOBILIZABLE HISTORY

Checking the judiciary's power to shape the resources of argument in constitutional history therefore calls on constitutional interpreters who are not judges to make affirmative efforts to foreground aspects of constitutional history different from those that are familiar from judicial opinions. For many law professors, this would require changing a common tendency in the setting of scholarly agendas. It is, after all, entirely common for there to be a flurry of law review articles about a new topic in the wake of some Supreme Court opinion touching or discussing that topic. (I will not be surprised if, in the next year, there is an uptick in the rate of publication of law review articles dealing with the history of the repeal of Prohibition.) Often, such articles are critical of the Court's action or reasoning and are intended as counterweights to judicial power. Nonetheless, critical academic analysis of that sort is only one way of balancing judicial power, and indeed it is a way that allows courts substantial power to choose the topics that the community of interpreters will think about. To balance the judicial influence over constitutional history, nonjudicial actors might be well served not to let courts drive their choices about what materials should be added to our collective constitutional memory.

To be sure, the idea of making history mobilizable in constitutional argument implies that there is some connection between the newly foregrounded history and the decisionmaking processes of courts or other authoritative actors. Successfully mobilized history might be defined as those historical narratives or images that constitutional decisionmakers eventually incorporate into their thought about contested issues but which they would not have considered absent some prior process raising the visibility of the relevant history. It does not follow, however, that the aspects of history worth mobilizing are only those that have clear bearings on specific live issues in current constitutional law. It can be sufficient, and indeed may be more important, for the history offered to be relevant to how we think about the broad canvass of American constitutional history; that is, that it

54. To borrow Robert Cover's language in describing the relationship of law and stories, we might say that all judicial authority is "jurispathic," but it can kill some kinds of alternative argument deader than others. Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 40 (1983).

affects the shape or strength of one or more of the thematic conceptions of history within the collective memory of constitutional interpreters.

That criterion of relevance embraces a great deal of historical scholarship other than that which seeks to illuminate the true content or meaning of decisions made by authoritative constitutional actors at earlier times in history. Such historical scholarship has traditionally been at the center of historical inquiry in constitutional law, with interpreters trying to establish that a convention or a court or some other authoritative actor created a piece of constitutional authority that now requires *X* instead of *Y*. The history that scholars should try to render mobilizable in constitutional argument can include that kind of history, but it should not be limited to that kind. The reason why not follows from a conception of the overall function of history in constitutional thought.

The criteria for the relevance of history in constitutional argument ought to follow from the best available theory of why constitutional decisions made by generations now departed should be accepted as legitimately constraining the democratic choices of the generations now living. If the problem of intertemporality were ultimately insoluble, such that democracy required the rejection of the past as a source of authority sufficient to constrain the freedom of the present, then certain kinds of historical inquiry now prominent among constitutional scholars would be significantly less helpful in constitutional decisionmaking. It would matter little, for example, what long-ago ratifiers believed themselves to have decided or what the traditional practices of American government had been. Perhaps the problem of intertemporality is soluble: many brilliant constitutional thinkers have addressed it, and each of us must judge whether any of them has succeeded. My own view, which I will not defend here, is that pragmatic considerations require the present polity to regard at least a subset of past decisions as continuing to bind them but that the authority to identify that subset ultimately resides in the present. However that may be, there are serious theoretical difficulties with regarding past constitutional decisions as binding simply because they were decided as they were and have not been subsequently amended, and constitutional theory has not yielded a generally convincing solution to this problem. The legal system must make peace with this problem if we are to have constitutional law as we know it, and all credible attempts to do so rely on creating a sense of national continuity sufficient to make people in the present feel themselves implicated by the events and decisions of the past.

Thus, as suggested earlier, one of the chief functions of historical argument in the practice of constitutional law may be the creation, through discursive engagement, of just such a sense of continuity, one that makes sense of behaving as if the Constitution were a binding intergenerational authority. This function is more subtle and more diffuse than any attempt to apply the outcomes of past constitutional struggles to present problems. Clearly, however, the fulfillment of this function in no way relies on limiting the historical engagement to those materials that reflect the views of the winners of earlier constitutional disputes. What matters for the fulfillment of this function is not what history tells us about what was done or decided but rather that the history offered succeeds in creating the necessary sense of continuity. To the extent that our concerns and values differ from those of the victors in earlier constitutional struggles, limiting the collective constitutional memory to accounts of what was decided by those who prevailed might impede rather than foster a sense of continuity with the constitutional past. Often, the need to create such a sense of continuity will mean that the history of earlier foregone alternatives may be more salient than the record of the earlier winners.⁵⁵

V. HISTORY AS A CONSTITUTIONAL VALUE

The central role that a sense of historical continuity must play in the practice of constitutional law means that the content of our constitutional history operates as a matter of normative value. We want the history to be one thing rather than another, to illustrate certain principles or ideals that make it worth being connected to. The normative stakes in choosing which history to deploy in constitutional discourse thus transcend proximate issues about how particular bits of history will bear on cases, because the struggle over the content of constitutional history is only partly a struggle about how those cases will be decided. It is also a struggle about a more general sense of the meaning of American constitutional history. Constitutional discourse is both a framework for adjudicating specific issues and a forum for shaping an account of the historical meaning of the constitutional system, or for that matter of America itself. Participants in the discourse care about both of those dimensions. Success in either dimension is

55. *But see* Kramer, *supra* note 18, at 422 (noting, in a mode of lament, that the views of early American constitutional history predominant among constitutional lawyers today tend to privilege the voices of figures like Alexander Hamilton, John Marshall, Daniel Webster, and Joseph Story, all of whom were big political losers in the constitutional struggles of their own time).

often both an end in itself and a means toward establishing one's preferred position in the other dimension.

In this respect, historical argument in constitutional law is less analogous to textual argument than it is to arguments from principles like federalism or democracy. American history, like federalism or democracy, is a substantive feature of the constitutional system. In a way comparable to the way in which constitutional decisionmaking is partly about choosing which of several possible federalisms we should have, or which of several conceptions of democracy our polity should embody, it is also partly about choosing what our history should be.⁵⁶

To be sure, there are differences between the contest over history and the contest over constitutional values like democracy. For one thing, arguments about history and democracy operate under different kinds of constraints. A theory of history must be reconcilable with a body of factual past occurrences. Democracy is not entirely a free-floating conceptual matter unconstrained by a record of practice either, but a creative theorist may have more room to argue that some aspect of American practice fails to live up to democratic ideals than any interpreter will have to argue, in the face of a well-established historical record to the contrary, that some occurrence in the American past is not part of our history. In other words, the argument about what our constitutional history is and means is more factually constrained than the argument about the content of constitutional democracy. But because history is itself a matter of value in constitutional discourse—that is, because constitutional interpreters want American history to be or to mean certain things, to embody particular values or lessons—arguments about constitutional history are constrained by considerations of value as well as considerations of fact. And the two kinds of considerations cannot always be distinguished.

56. One might argue that constitutional argument is also about choosing what the text of the Constitution should be, inasmuch as the possibility of arguing for amendment is also in principle available, but this contention is more abstract than real. Amending the Constitution is extremely arduous. See Stephen M. Griffin, *Constitutionalism in the United States: From Theory to Politics*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 37, 52 (Sanford Levinson ed., 1995) (noting that a mere thirteen of ninety-nine state legislative houses is sufficient to block amendment); Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 *AM. POL. SCI. REV.* 355, 362 (1994) (arguing empirically that the U.S. Constitution is among the most difficult in the world to change). The discourse of constitutional argument can alter how we read the text and which parts of the text are more familiar than others, but as a whole, the text is a more static source of argument than more abstract ideas like democracy or federalism. Indeed, the aspiration to make authority more static is one of the central motivations for writing a fixed constitutional text in the first place.

CONCLUSION

We all form our notions of the core commitments of constitutional law partly under the influence of thematic conceptions of American history, just as our notions of constitutional history are formed partly through the influence of what we think the core commitments of constitutional law should be. To sit comfortably within the rubric of constitutional law, a rule or an idea must cohere tolerably with the content of constitutional history. When the Supreme Court articulates a view of constitutional history that foregrounds some elements of that history and not others—as any view of history must—there is a risk that the elements of history it neglects will disappear from the view of the legal community. In other words, the judicial control of historical meaning is supported by the judicial influence over what history is visible. The possibility of healthy continuing contest over what history we should have, and what range of constitutional law it will support, requires that nonjudicial interpreters of the Constitution—including law professors—ensure that other parts of history are also visible and discussed.

Moreover, what constitutional history is or means is itself a central element of what is contested in constitutional law. Within the community of constitutional interpreters, people want the history to be one thing or another, to illustrate this or that set of ideals. The content of constitutional history is thus a matter of substantive normative value, even independent of its tendency to support particular doctrines or decisions. The deployment of historical argument in constitutional cases is only partly about trying to vindicate a specific position in those cases. It is also about trying to establish larger meanings of American constitutional history. And at a still larger level, the practice of engaging with history as a source of normative value may be indispensable to the continued legitimacy of constitutional law as we know it—not because there is a clear reason why history should be authoritative but because the normative demands of presentist democracy must be met or at least deflected if we are to behave as if an inherited Constitution binds the people here and now. Continuous engagement with constitutional history helps deflect the dead-hand problem by creating in us a sense of identification with what has gone before. As long as the practice of constitutional law requires some such sense of identification, the particular history that is used to create that identification will color a fair amount of constitutional thought.