Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History

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In this article, Professor William Fisher surveys how recent work in American legal history has been influenced by four methodologies developed by intellectual historians. He then identifies nine possible purposes of legal history and evaluates how the four methodologies might further each objective.

INTRODUCTION

This article describes and assesses the recent increase in use by American legal historians of methods of reading and analysis originally developed by intellectual historians. Part I sketches the methodological turmoil that, in the past two decades, has characterized the field of intellectual history. Part II considers how each of the four reasonably distinct methodologies that have emerged from that turmoil—Structuralism, Contextualism, Textualism, and New Historicism—have influenced the study of the development of American legal doctrine and legal thought. Finally, Part III argues that these methodological innovations are best evaluated from a purposive or pragmatic standpoint; it considers nine possible uses of history in general and legal history in particular, then considers which of the four methodologies, if any, is best suited to the attainment of those ends.

I. MODERN AMERICAN INTELLECTUAL HISTORY

Intellectual history refers, broadly, to the history of what people have thought about and believed—inferred, most often, from what they have written. It is conventionally juxtaposed to the history of political institutions, the history of economic systems, and the history of social life.

In the United States, intellectual history achieved its maximum prestige and influence among the historical disciplines during the second quarter of the

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twentieth century. Vernon Parrington's three-volume *Main Currents in American Thought* set the tone for that generation.[1] The great intellectual historians who followed Parrington—Merle Curti,[2] Ralph Gabriel,[3] and Perry Miller[4]—typically painted on smaller canvasses but shared Parrington's central ambition: to chart "the dreams and purposes . . . in the turbulent adventures of the American people."[5]

Buoyed by the successes of those ventures and by the post-war confidence of the nation as a whole, the next cohort of intellectual historians, led by Louis Hartz and Daniel Boorstin, sought to construct "a fresh vision of the meaning of America . . . . According to this approach, a unifying framework of ideas and values . . . created a distinctive American people [and] explained the durability of their society and institutions."[6] The Hartz-Boorstin synthesis was popular and powerful during the 1950s, but ultimately proved disastrous.[7] Its premises—that societies tend to be integrated and that a shared culture maintains that integration—were soon undermined by sociologists and anthropologists. And its central assertion—that there exists a coherent, durable "American character"—was falsified by an enormous body of work in social history that exposed the variety of groups and ideologies that, together, have comprised American culture.[8] The unfortunate result was to discredit, for many years, not just the post-war consensus interpretation, but the entire field of intellectual history.

In the late 1970s, after a bleak period of approximately fifteen years, the field was revitalized and transformed by a methodological shift known as the "linguistic turn."[9] Drawing on recent advances in linguistics (especially the work of Saussure, Whorf, and Sapir), anthropology (especially the work of Geertz), the history of science (especially the work of Kuhn), and philosophy

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1. Vernon Louis Parrington, MAIN CURRENTS IN AMERICAN THOUGHT: AN INTERPRETATION OF AMERICAN LITERATURE FROM THE BEGINNINGS TO 1920 (1930).

2. *See, e.g.*, MERLE CURTI, THE GROWTH OF AMERICAN THOUGHT (1943).

3. *See, e.g.*, RALPH HENRY GABRIEL, THE COURSE OF AMERICAN DEMOCRATIC THOUGHT: AN INTELLECTUAL HISTORY SINCE 1815 (1940).

4. *See, e.g.*, PERRY MILLER, THE NEW ENGLAND MIND: THE SEVENTEENTH CENTURY (1939). Two great historians of the same generation whose work bridged the disciplines of intellectual history and political history are Richard Hofstadter, *see, e.g.*, RICHARD HOFSTADTER, THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT (1948), and Arthur M. Schlesinger, Jr., *see, e.g.*, ARTHUR M. SCHLESINGER, THE AGE OF JACKSON (1945).

5. John Higham, *Introduction* to NEW DIRECTIONS IN AMERICAN INTELLECTUAL THEORY xi (John Higham & Paul K. Conklin eds., 1979); *see also* ROBERT ALLEN SKOTHEIM, AMERICAN INTELLECTUAL HISTORIES AND HISTORIANS 124-49 (1966) (detailing Parrington's contributions to the field of intellectual history); John Higham, *The Rise of American Intellectual History*, 56 AM. HIST. REV. 453, 459-61 (1951) (praising Parrington's "wonderful intellectual portraits" while noting his mistakes and deficiencies).

6. Higham, *supra* note 5, at xi-xii.

7. *See* Daniel T. Rodgers, *Republicanism: the Career of a Concept*, 79 J. AM. HIST. 11, 12-25 (1992) (providing brief synopses of the Hartz and Boorstin approaches).

8. *See* John P. Diggins, *Consciousness and Ideology in American History: The Burden of Daniel J. Boorstin*, 76 AM. HIST. REV. 99, 111-12 (1971); William W. Fisher III, *The Defects of Dualism*, 59 U. CHI. L. REV. 955, 972-74 (1992); John Higham, *The Cult of the "American Consensus": Homogenizing Our History*, 27 COMMENTARY 93, 98-99 (1959).

9. John E. Toews, *Intellectual History after the Linguistic Turn: The Autonomy of Meaning and the Irreducibility of Experience*, 92 AM. HIST. REV. 879, 881 (1987) (book review).

(especially the work of Wittgenstein), intellectual historians reconceived their task as the study of the cultural production of meaning—in particular, how "meaning is constituted in and through language."[10] Repudiating the positivist and empiricist assumptions that hitherto had dominated intellectual history (and that continue to dominate the fields of political, economic, and social history), they reconstructed their work on the assumption that languages are partially "self-contained system[s] of 'signs' whose meanings are determined by their relations to each other" rather than by their correspondence to external referents.[11]

The enthusiasm with which in recent years most intellectual historians have taken this "turn" has not, however, eliminated methodological controversy in the field. On the contrary, disputes over method are sharper now than ever. Most of the active participants in the debates fall into four rough categories. To depict these four groups as distinct "schools" would be an exaggeration. But they are coherent and stable enough to warrant description as alternative approaches.

The first of the four groups consists of those historians strongly influenced by Structuralism.[12] Of the relatively few authors who took this tack, by far the most sophisticated and notorious was Michel Foucault.[13] Foucault's ideas are impossible to summarize briefly, but most of his work (particularly his early work) exemplified and defended the following methodological principles: All human thought is structured by language. The historian's job is to map the deep structure of the linguistic system that provided the vocabulary and consequently organized the thought of the members of a culture (or of a discipline within a culture) in the past. Each linguistic and conceptual system will have "its own peculiar objects of study ('empiricités') and its own unique strategy for determining the relationships ('positivités') existing among the objects inhabiting its domain"—as well as its own devices for repressing or obscuring things about which one cannot speak.[14] Extant histories exaggerate the continuities between the languages and outlooks of different epochs; those accounts

10. *Id.*

11. *Id.* at 881-82. *See also* Michael Ermath, *Mindful Matters: The Empire's New Codes and the Plight of European Intellectual History*, 57 J. MOD. HIST. 506, 510-12 (1985) (book review); Martin Jay, *Should Intellectual History Take a Linguistic Turn? Reflections on the Habermas-Gadamer Debate, in* MODERN EUROPEAN INTELLECTUAL HISTORY: REAPPRAISALS AND NEW PERSPECTIVES 86, 87-88 (Dominick LaCapra & Steven L. Kaplan, eds., 1982).

12. This is not the place to attempt a synopsis of Structuralism. For useful studies, see TERENCE HAWKES, STRUCTURALISM & SEMIOTICS (1977); PHILIP PETTIT, THE CONCEPT OF STRUCTURALISM: A CRITICAL ANALYSIS (1975); ROBERT SCHOLES, STRUCTURALISM IN LITERATURE: AN INTRODUCTION (1974).

13. Foucault himself consistently denied that he was either a structuralist or a historian. *See* MICHEL FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE 3-11 (A.M. Sheridan Smith trans., 1972); Michel Foucault, *History, Discourse, and Discontinuity*, SALMAGUNDI, Summer-Fall 1972, at 225, 235 n.4 (Anthony M. Nazzoro trans.). However, at least his early work is generally—and rightly—regarded as both structuralist and a form of intellectual history. *See, e.g.*, David A. Hollinger, *Historians and the Discourse of Intellectuals, in* NEW DIRECTIONS IN AMERICAN INTELLECTUAL THEORY, *supra* note 5, at 42, 58.

14. Hayden V. White, *Foucault Decoded: Notes from Underground*, 12 HIST. & THEORY 23, 27 (1973).

must be displaced by studies highlighting the "disjunctures," the radical discontinuities, in the history of consciousness.[15] Extant histories also misleadingly direct readers' attention to the "social, economic, and political contexts" of texts or the biographies of their authors. None of these is illuminating. A text is useful only as a symptom; it enables the historian to diagnose the disease (the mind-limiting linguistic system) that afflicted the culture from which the text came.[16]

Members of the second group commonly describe themselves as "Contextualists." They take the position that, because the meaning of a document is radically dependent upon the systems of words and concepts in which the author moved when he or she was writing, the central job of the intellectual historian is to reconstruct that context and then to interpret the text in light of it. What they typically write (and consider most worth writing) are histories of the "discourses" (by which they mean the language systems and associated belief-systems) of particular communities. What fascinates them is how the conversations among the members of such a group were organized and bounded by a set of common assumptions of which the members themselves often were not even aware.[17] For some, like J.G.A. Pocock, the point of excavating those assumptions is to understand the ways in which the members of the community thought and behaved—on the theory that "[m]en cannot do what they have no means of saying they have done; and what they do must in part be what they can say and conceive that is."[18] For others, like Quentin Skinner, the point is to enable one to interpret accurately and "authentically" a great text that emerged from such a community—on the theory that its meaning is equivalent to the intent of its author, which can only be ascertained once one knows the author's conceptual vocabulary, what she considered straightforward, what she considered problematic, and how she sought to modify or transcend the conventions with which she worked.[19] Important work undertaken on the latter set of premises include Skinner's study of Machiavelli,[20] John Dunn's and Peter Laslett's explications of Locke,[21] and the effort of Allan Janik and Stephen Toulmin to

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15. *Id.*

16. *See* id. at 27-31; *see also* MARK POSTER, FOUCAULT, MARXISM, AND HISTORY: MODE OF PRODUCTION VERSUS MODE OF INFORMATION 70-94 (1984).

17. *See, e.g.*, DOROTHY ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE (1991) (emphasizing the mentally imprisoning power of American social scientists' common commitment to a set of exceptionalist assumptions); Hollinger, *supra* note 13 (explaining the role of discourse in intellectual history). Daniel Rodgers is the most vocal of the critics of this aspect of contextualist intellectual history. *See* Rodgers, *supra* note 7, at 11; Daniel T. Rogers, *Fine for Our Time*, 13 INTELL. HIST. NEWSL. 41, 43-44 (1991) (review of THE ORIGINS OF AMERICAN SOCIAL SCIENCE).

18. Joyce Appleby, *Ideology and the History of Political Thought*, 2 INTELL. HIST. NEWSL. 10, 15 (1980) (quoting J.G.A. Pocock). For a work founded on this theory, see J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975).

19. *See, e.g.*, QUENTIN SKINNER, THE FOUNDATIONS OF MODERN POLITICAL THOUGHT (1978); Quentin Skinner, *Meaning and Understanding in the History of Ideas*, *in* MEANING AND CONTEXT: QUENTIN SKINNER AND HIS CRITICS 29, 30-67 (James Tully ed., 1988); *see also* DAVID A. HOLLINGER, IN THE AMERICAN PROVINCE: STUDIES IN THE HISTORY AND HISTORIOGRAPHY OF IDEAS 3-4 (1989).

20. *See* QUENTIN SKINNER, MACHIAVELLI (1981).

21. *See* JOHN DUNN, LOCKE (1984); PETER LASLETT, JOHN LOCKE: TWO TREATISES OF GOVERNMENT 92-120 (1967).

situate Wittgenstein's philosophy in the intellectual culture of *fin-de-siècle* Vienna.[22]

Members of the third group style themselves Postmodernists or "Textualists." Their work is inspired and shaped by the following objections to Contextualism—which they regard (rightly) as their principal methodological rival. First, languages are not the tight systems of interrelated signs the Contextualists presume them to be; consequently, each document produces, not a single determinate meaning, but a multiplicity of meanings. As David Harlan, invoking Derrida, says: "language . . . is a play of unintended self-transformations and unrestrained self-advertisements."[23] As a result, texts will always escape the efforts of both their authors and intellectual historians to tie them down.[24] Second, it is futile to try to give meaning to an ambiguous text by looking to its *con*text since the context is equally dependent on interpretation for its meaning.[25] Dominick LaCapra explains: "For the historian, the very reconstruction of a 'context' or a 'reality' takes place on the basis of 'textualized' remainders of the past."[26] Third, contextualist readings of great works are too often reductive, treating them as nothing more than expressions of or responses to the ideas of their authors' contemporaries and neglecting their transcendent potential.[27] Fourth, an historian can never escape either her own concerns or the layers of prior interpretation that have encrusted all substantial texts—and so recovery of the "original" meaning or context of any given text is impossible. The historian completes the text, at least provisionally, and cannot avoid her responsibility for doing so by invoking its context.[28] Finally, Contextualism runs the risk of depoliticizing intellectual history, both by obscuring the extent to which texts and their conventional interpretations consist of politically loaded privilegings of particular views over others and by abandoning the effort to bring old texts to bear on contemporary concerns. In the words of John Keane:

> The new [contextualist] history turns a blind eye to the important dictum that unrecognized power is everywhere, that (at least in all hitherto existing societies) relations of command and obedience have become routinized or 'sedimented' in the institutionalized forms of life within which speaking and acting subjects are formed. . . .
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22. *See* ALLAN JANIK & STEPHEN TOULMIN, WITTGENSTEIN'S VIENNA (1973).

23. David Harlan, *Intellectual History and the Return of Literature*, 94 AM. HIST. REV. 581, 585 (1989).

24. *See* John Keane, *More Theses on the Philosophy of History*, *in* MEANING AND CONTEXT: QUENTIN SKINNER AND HIS CRITICS, *supra* note 19, at 204, 211-12 (recognizing the "unintended consequences" of communication and, therefore, the impossibility of gaining "absolute knowledge" of a text); Dominick LaCapra, *Rethinking Intellectual History and Reading Texts*, *in* MODERN EUROPEAN INTELLECTUAL HISTORY: REAPPRAISALS AND NEW PERSPECTIVES, *supra* note 11, at 47, 79-80.

25. See LaCapra, *supra* note 24, at 80-82.

26. DOMINICK LACAPRA, RETHINKING INTELLECTUAL HISTORY: TEXTS, CONTEXTS, LANGUAGE 27 (1983).

27. *See, e.g.*, *id.* at 87 (criticizing WITTGENSTEIN'S VIENNA, *supra* note 22, as an "extremely reductive interpretation" of both the text and context of the philosopher's work).

28. *See* Harlan, *supra* note 23, at 587-89; Dominick LaCapra, *Canons and their Discontents*, 13 INTELL. HIST. NEWSL. 3, 10 (1991).

> . . . [The new history's] aim of producing a 'real history' of political ideologies more closely resembles an official history that unwittingly defends the spell-binding hold of past ideologies over the present. In spite of its modest and detached intentions, the new history clings to an old and suspect motto: *Tout comprendre, c'est tout pardonner.*[29]

How, then, do the Textualists think intellectual history should be practiced? At a minimum, they contend, historians should change their tone of voice—should become more openly perspectival, should acknowledge that there are many plausible interpretations of any given document.[30] Next, historians should assume toward the past a posture that is neither positivist nor nihilistic—should try to achieve, in other words, a "tense interaction between empirically based reconstruction of the past and dialogic exchange."[31] Such a posture liberates historians to ask of old texts frankly anachronistic questions—questions that pertain to the historians' current concerns and would have meant little to the authors of those texts. How do Thorstein Veblen's economic theories illuminate the character of late-twentieth-century welfare capitalism?[32] What might Kant, once his work has been purged of "outdated foolishness," tell us about our situation today?[33] What is the contemporary significance of seventeenth-century philosophic grammar?[34] Finally, intellectual historians should "brush history against the grain," bringing to the surface critical or transformative interpretations of canonical texts, including ways in which they may have subverted the ideological contexts in which they were written.[35]

The fourth approach, New Historicism, was originally developed in the 1980s by a group of literary critics (most of whom happened to specialize in the English Renaissance) who sought a methodological alternative to both New Criticism and Deconstruction. Very recently, their writings have captured the attention of a growing group of intellectual historians. New Historicism is not as novel as its name suggests (or as some of its adherents contend); in several respects, it resembles the other approaches already discussed. Like the Textualists, the New Historicists tend to be highly sensitive to the ambiguity of all texts, their susceptibility to multiple readings. Also like the Textualists, they typically adopt a staunchly (even obsessively) antifoundational posture when reading documents; they insist that "we can have no access to a full and authen-

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29. Keane, *supra* note 24, at 213, 217.

30. *See, e.g.*, Allan Megill, *Recounting the Past: "Description," Explanation, and Narrative in Historiography*, 94 AM. HIST. REV. 627, 636 (1989); Hayden White, *The Burden of History*, *in* TROPICS OF DISCOURSE: ESSAYS IN CULTURAL CRITICISM 27, 47-48 (1978) (encouraging the use of "impressionistic, expressionist, surrealist, and . . . even actionist modes of representation" to foster "'creative comment' on the past and present").

31. Dominick LaCapra, *Intellectual History and Its Ways*, 97 AM. HIST. REV. 425, 427 (1992).

32. *See, e.g.*, JOHN P. DIGGINS, THE BARD OF SAVAGERY: THORSTEIN VEBLEN AND MODERN SOCIAL THEORY 218-25 (1978).

33. *See* Richard Rorty, *The Historiography of Philosophy: Four Genres*, *in* PHILOSOPHY IN HISTORY 49, 52 (Richard Rorty, J.B. Schneewind & Quentin Skinner eds., 1984), *quoted in* Harlan, *supra* note 23, at 603; *see also* P.F. STRAWSON, THE BOUNDS OF SENSE: AN ESSAY ON KANT'S Critique of Pure Reason 15-17 (1966) (attempting to breathe new life into Kant's theories).

34. *See generally* NOAM CHOMSKY, CARTESIAN LINGUISTICS: A CHAPTER IN THE HISTORY OF RATIONALIST THOUGHT (1966) (noting the parallels between the era of Cartesian linguistics and our own).

35. *See* LaCapra, *supra* note 31, at 435-37 (attributing the phrase to Walter Benjamin).

tic past . . . unmediated by the surviving textual traces of [our own] society."[36] All history is perspectival; its "factuality" is an illusion.[37] Like the Contextualists (and unlike the Textualists), the New Historicists are intensely interested in the cultural and ideological settings of all texts—their relationships to "contemporaneous social institutions and non-discursive practices."[38]

Three aspects of the New Historicist methodology, however, are genuinely novel. The first pertains to the kinds of material they deem worthy of analysis. While the Textualists typically concentrate on "great" or canonical texts (read noncanonically) and the Contextualists typically seek to identify the common themes and assumptions in the writings of the members of a discursive community (and then interpret individual texts in light of those assumptions), the New Historicists typically focus on small events or anecdotes (often ones they have discovered serendipitously) that they believe are suggestive of the "behavioral codes, logics, and motive forces controlling a whole society."[39] These suggestive anecdotes or "historemes"[40] typically bridge the worlds of literature and history; each has "something literary about it, but . . . is nevertheless directly pointed towards or rooted in the real."[41]

Second, New Historicists are as much concerned with the ways that texts influence their cultural contexts as they are with the ways texts are shaped by their contexts. Multiple causation—a complex "circulation" of literary and nonliterary artifacts—is what they expect to find when analyzing any cultural phenomenon.[42] One manifestation of this perspective is that, whereas Contextualists are primarily interested in using discursive and ideological contexts to make sense of ambiguous texts, the New Historicists sometimes reverse the line

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36. Louis A. Montrose, *Professing the Renaissance: The Poetics and Politics of Culture, in* THE NEW HISTORICISM 15, 20 (H. Aram Veeser ed., 1989).

37. *Id.* at 23, 29-30 (discussing the scholar's inability to produce unbiased histories since she may appeal to no completely objective frame of reference which "transcends . . . gender, ethnicity, class, age, and profession"); *see also* Marjorie Garber, *Descanting on Deformity: Richard III and the Shape of History, in* THE HISTORICAL RENAISSANCE: NEW ESSAYS ON TUDOR AND STUART LITERATURE AND CULTURE 79, 80 (Heather Dubrow & Richard Strier eds., 1988) (emphasizing "the way in which 'time's deformed hand' writes, and thus defaces, history"). This conviction helps explain the New Historicists' irritatingly self-critical pose. They regularly insist that all their critiques are necessarily partial and that "every act of unmasking, critique, and opposition uses the tools it condemns and risks falling prey to the practice it exposes." H. Aram Veeser, *Introduction* to THE NEW HISTORICISM, *supra* note 36, at xi.

38. Montrose, *supra* note 36, at 17; *see also* R.B. Kershner, *Dances with Historians*, 45 GA. REV. 581, 583-84 (1991) (book review).

39. Veeser, *supra* note 37, at xi.

40. Joel Fineman, *The History of the Anecdote: Fiction and Fiction, in* THE NEW HISTORICISM, *supra* note 36, at 49, 57.

41. *Id.* at 56-57. Stephen Greenblatt, for example, begins each chapter of his two books with an anecdote. *See* STEPHEN GREENBLATT, RENAISSANCE SELF-FASHIONING: FROM MORE TO SHAKESPEARE (1980); STEPHEN GREENBLATT, SHAKESPEAREAN NEGOTIATIONS: THE CIRCULATION OF SOCIAL ENERGY IN RENAISSANCE ENGLAND (1988). Similarly, in a recent essay, Greenblatt employs an evocative account of a walk to Nevada Falls in Yosemite National Park as the vehicle for a sweeping analysis of the relationship between art and capitalism. *See* Stephan Greenblatt, *Towards a Poetics of Culture, in* THE NEW HISTORICISM, *supra* note 36, at 1, 8-10 [hereinafter Greenblatt, *Toward a Poetics of Culture*].

42. GREENBLATT, SHAKESPEAREAN NEGOTIATIONS, *supra* note 41, at 10-11. For a good illustration of an analysis inspired by this expectation, see Richard Helgerson, *Barbarous Tongues: The Ideology of Poetic Form in Renaissance England, in* THE HISTORICAL RENAISSANCE: NEW ESSAYS ON TUDOR AND STUART LITERATURE AND CULTURE, *supra* note 37, at 273-74.

of inquiry, asking what cultural condition would have had to obtain at the time a particular text was written in order to have generated a particular "formally disturbing . . . feature" in the text.[43] In other words, the meaning of the context is sometimes inferred from the text, rather than vice versa.

Finally, New Historicists are much more likely than their methodological rivals to point to multiple, conflicting, polyphonous contexts that surround any given text. Underlying this penchant are some fundamental convictions: Cultures are rarely coherent and unified; groups struggle for discursive power just as they struggle for political dominance. For much the same reason, one should not expect to find, in any society, a "closed and static, singular and homogenous" ideology;[44] the world views in circulation will typically be "heterogeneous and unstable, permeable and processual."[45] A single belief system may achieve some degree of hegemony, but its grip on the population will inevitably be qualified by "the specific though multiple social positionalities of the spectators, auditors and readers who variously consume cultural productions" and by "the relative autonomy—the specific properties, possibilities and limitations—of the cultural medium" through which the belief system is transmitted.[46]

To summarize, since the 1970s, four reasonably distinct methodologies have been debated and applied by intellectual historians: Structuralism, Contextualism, Textualism, and New Historicism. Although the first of the four has few adherents and little currency today, the other three remain vital.

II. LEGAL HISTORY AS INTELLECTUAL HISTORY

Since the 1950s, most scholarship in American legal history has taken the form of social, political, or economic history—studies of how the development of particular systems of legal rules reflected or affected the shifting fortunes of socioeconomic classes (e.g., entrepreneurs, workers, farmers), political parties (e.g., Federalists, Jacksonians), or economic systems (e.g., slavery, free-market

43. MARJORIE LEVINSON, MARILYN BUTLER, JEROME MCGANN & PAUL HAMILTON, RETHINKING HISTORICISM: CRITICAL READINGS IN ROMANTIC HISTORY 59 n.21 (1989).

44. Montrose, *supra* note 36, at 22.

45. *Id.* One of the principal grounds on which the first wave of New Historicists criticized the reigning interpretation of the English Renaissance (exemplified by the work of E.M. Tillyard) was that it erroneously asserted the existence of "a unified, hence 'hegemonic' culture in the Renaissance, presumptively stilling all 'contestation' in [its] pursuit of an illusory 'coherence.'" John H. Zammito, *Are We Being Theoretical Yet? The New Historicism, the New Philosophy of History, and "Practicing Historians,"* 65 J. MOD. HIST. 783, 786 (1993).

46. Montrose, *supra* note 36, at 22. In thus distancing themselves from a strong version of the theory of cultural hegemony, the New Historicists are moving in the same direction as political historians who concern themselves with the concept of ideology. *See, e.g.*, Joyce Appleby, *The American Heritage: The Heirs and the Disinherited*, 74 J. AM. HIST. 798 (1987); Edward Countryman, *Of Republicanism, Capitalism, and the "American Mind,"* 44 WM. & MARY Q. 556, 557 (1987) (praising Gordon Wood's THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 for its analysis of "not only the complexities of a shared language and mentality but also [of] the transformation that mentality underwent"); Ralph Lerner, *The Constitution of the Thinking Revolutionary, in* BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 38, 66 (Richard Beeman, Stephen Botein & Edward C. Carter II eds., 1987).

capitalism, welfare capitalism).[47] In the past two decades, however, a growing group of legal historians have been employing modes of inquiry and analysis best described as intellectual history. In these studies, law is characterized, not as a weapon in the war of parties and interest groups, but as a discursive system, connected in myriad ways to the development of other discursive systems (economic theories, political theories, popular ideology, etc.).

The legal historians pursuing this new line have assumed widely varying postures toward the methodological debates described in the preceding section. Some have done their work (in many instances, excellent work) in apparent ignorance of the raging controversy. Others, aware of the methodological discussion, have explicitly aligned themselves with one of the contending camps. Still others have sought to contribute to the methodological controversy, suggesting ways in which their monographs confirm or cast doubt upon the value of particular approaches.[48]

This Part of the article surveys and catalogues the growing body of legal-history scholarship that takes the form of intellectual history, tracing the ways it has been affected, consciously or unconsciously, by the pertinent methodological theories.

A. *Structuralist Legal History*

Of the four approaches, Structuralism surprisingly has had the greatest overt effect on legal history. As suggested above, this approach had only a modest following among intellectual historians in general. By contrast, Structuralism profoundly influenced the scholarship of a substantial group of legal historians. The seminal works in this vein were two essays by Duncan Kennedy: a monumental, largely unpublished manuscript entitled, "The Rise and Fall of Classical Legal Thought,"[49] and a loosely related 1979 article entitled, *The Structure of Blackstone's Commentaries*.[50] Kennedy described the method

47. The classic essays in American legal history were all written in one of these veins. *See, e.g.*, LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW (1973); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977); JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956). Much of the best monographic work continues to take these forms. *See, e.g.*, Christine Rosen, *Differing Perceptions of the Value of Pollution Abatement Across Time and Place: Balancing Doctrine in Pollution Nuisance Law, 1840-1906*, 11 LAW & HIST. REV. 303 (1993); Barbara Y. Welke, *When All the Women Were White, and All the Blacks Were Men: Gender, Class, Race, and the Road to* Plessy, *1855-1914*, 13 LAW & HIST. REV. 261 (1995).

48. The methodological ruminations of writers in this last group have often been colored by diffidence—or bravado. Legal historians (especially those who teach in law schools) are typically uneasy about their provincial status. Methodologically, they experience themselves as do Bostonians or Chicagoans in relation to the worlds of fashion or theater. Sophistication and innovation are presumed to be centered elsewhere. Representing oneself as being "in the know" (or, more bravely still, able to contribute something new) takes a certain conceit—a conceit only a few legal historians both have and are willing to acknowledge. (A variant of this analogy was suggested to me by Duncan Kennedy.).

49. Duncan Kennedy, The Rise and Fall of Classical Legal Thought 1975 [hereinafter Kennedy, *Classical Legal Thought*] (unpublished manuscript, on file with *Stanford Law Review*). Only one, highly concentrated portion of this manuscript has yet appeared in print. *See* Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. L. & SOC'Y 3 (1980) [hereinafter Kennedy, *Toward a Historical Understanding of Legal Consciousness*].

50. Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979).

underlying these studies as "structuralist or phenomenological, or neo-Marxist, or all three together."[51] Its central premise was that a principal purpose of legal thought is "to deny the truth of our painfully contradictory feelings about the actual state of relations between persons in our social world"[52]—in other words, to disguise or "mediate" a "fundamental contradiction"[53] that afflicts American culture as a whole and taints the lives of all of its members. Kennedy described that contradiction as follows:

> Most participants in American legal culture believe that the goal of individual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it. Others (family, friends, bureaucrats, cultural figures, the state) are necessary if we are to become persons at all. . . . But at the same time that it forms and protects us, the universe of others . . . threatens us with annihilation and urges upon us forms of fusion that are quite plainly bad rather than good. . . . The kicker is that the abolition of these illegitimate structures, the fashioning of an unalienated collective existence, appears to imply such a massive increase of collective control over our lives that it would defeat its purpose.[54]

The systems developed by Blackstone for classifying and analyzing legal rules, Kennedy argued, functioned effectively to reduce the salience of this contradiction for eighteenth-century Englishmen and Americans.[55] Subsequent generations of legal thinkers criticized some of Blackstone's strategies, while preserving and generalizing others. The net effect, over the course of a century and a half, was the abstraction and refinement of a distinctly "liberal" style of legal thought—so called because it posits subdivision of the social universe into two radically opposed spheres: "civil society" and "the state."[56] The first is "a realm of free interaction between private individuals who are unthreatening to one another because the other entity, 'the state,' forces them to respect one another's rights."[57] Once perfected, however, this liberal style was short lived; in the early twentieth century, it succumbed to the same process of corrosive criticism that had earlier purified it and cleared the landscape of its rivals.

In his unpublished manuscript, Kennedy used this *grand recit* to make sense of the histories of several doctrinal fields, including constitutional law, the law of federalism, contracts, and torts.[58] In the 1980s, an important cohort of legal historians—many of them affiliated with the Conference on Critical Legal Studies—applied his interpretive method to yet other fields. The essays of this group by no means merely replicated Kennedy's argument; each was in many respects original. But the central themes of Kennedy's approach—the ubiquity of deep conflicts in Western culture and liberal theory; the presumption that systems of legal argument and thought are shaped largely by the need

51. *Id.* at 209
52. *Id.* at 210.
53. *Id.* at 213.
54. *Id.* at 211-12.
55. *See id.* at 218-19.
56. *Id.* at 217.
57. *Id.*
58. *See* Kennedy, *Classical Legal Thought*, *supra* note 49.

to mediate those conflicts; and the tendency of those systems to break down over time—can be found in all.[59]

Gregory Alexander, for example, argued that the law of trusts in Anglo-American culture has long been afflicted with a fundamental contradiction: It is impossible simultaneously to protect fully both a testator's freedom to control the uses of his or her property after death and the freedom of devisees to use and dispose of their bequests as they wish.[60] Nineteenth-century American lawyers, obsessed with freeing property from feudal restraints on alienation, developed various doctrines to obscure this contradiction, including the idea of "repugnancy" (the principle that restraints are void when incompatible with the "nature" of the estate on which they are imposed) and the separation of law and equity.[61] At the end of the century, Alexander contended, the efforts of legal scholars to rationalize the law of trusts—and, in particular, to deal with the problem of spendthrift trusts—discredited these mediating devices.[62] The next generation of lawyers sought once again to mask the underlying contradiction (invoking, for example, balancing tests and the criterion of economic efficiency), but those devices will likely prove no more durable.[63]

Elizabeth Mensch's study of the development of property law in colonial New York follows the same vein. Two opposed conceptions of property rights, she argued, clashed in colonial lawsuits and popular discourse: "voluntarism" (in which entitlements derived from use and occupancy or from distributions of land from the towns) and "hierarchy" (in which entitlements derived from the King and were shielded by principles of security).[64] Lawyers struggled to find doctrines that would mitigate the tension between these principles. Successful for a time, those devices collapsed during the period of the American revolution.[65]

In 1984, Duncan Kennedy, the originator of this mode of analysis, renounced one of its central features. In a published conversation with Peter Gabel, he insisted that his original conception of the "fundamental contradiction" had outlived its usefulness—that it had become a "lifeless slogan" and (more seriously) that it had been seized upon by liberal and conservative scholars to justify their own programs for either incremental social change or defense of the status quo.[66] Partly as a result, in the late 1980s the production of

59. In addition to the essays discussed below, see James L. Kainen, *Nineteenth Century Interpretations of the Federal Contract Clause*, 31 BUFF. L. REV. 381 (1982); Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975.

60. *See* Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1189 (1985).

61. *Id.* at 1224-27.

62. *See id.* at 1208-09.

63. *See id.* at 1254.

64. Elizabeth V. Mensch, *The Colonial Origins of Liberal Property Rights*, 31 BUFF. L. REV. 635, 641-60 (1983).

65. *See id.* at 647.

66. *See* Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 15-16 (1984). Kennedy is adamant, however, that renunciation of the fundamental contradiction did not entail abandonment of the larger structuralist method. *See id.* at 15. "I remain," he insisted in a conversation with the author, "a Structuralist to my toes."

scholarship in this vein diminished sharply. A few legal historians still make explicit use of the method pioneered by Kennedy, but typically only as a component of or prelude to a methodology shaped more powerfully by Postmodernism.[67]

B. *Contextualist Legal History*

The impact upon legal history of Contextualism has been less overt but more pervasive and apparently more durable. Very few legal historians cite or appear aware of the methodological writings of Quentin Skinner or J.G.A. Pocock,[68] but a large and rapidly growing body of work in American legal history incorporates many features of the mode of analysis they pioneered.

A prominent and recent example is Herbert Hovencamp's much heralded book, *Enterprise and American Law*. In its opening lines, Hovencamp insists that it "should be read as intellectual history and not as political, social, or economic history."[69] His central thesis is that the dramatic developments in American constitutional law, labor law, and antitrust law between 1836 and 1937 are best understood, not as the outgrowths of battles among selfish interest groups (as has traditionally been thought), but rather as precipitates of a general "way of thinking about policy problems,"[70] which in turn was derived, not from legal theorists, but from economic discourse. More specifically, Hovencamp contends that the leaders of the legal establishment during the mid and late nineteenth century were steeped in classical political economy, the central tenets of which were: the market, left to itself, works well; the state should not play favorites; good laws are laws that increase the size of the social pie; and the state should not be involved in determining how the pie is divided and distributed.[71] Those convictions, not a desire to protect their own class interests, best explain the content of the statutes and judicial opinions they produced and the terminology in which those edicts were expressed.[72]

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67. *See, e.g.*, Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of Authorship*, 1991 DUKE L.J. 455, 463-66 (briefly deploying a structuralist analysis of the history of copyright law but then rejecting it on the ground that "it does not go far enough, and fails to advance our understanding of those features of copyright doctrine—such as the somewhat shopworn principle of 'aesthetic non-discrimination,' the Kaleidoscopic law of 'works made for hire,' or the curious lore of renewal—that are not obviously concerned with delimiting the public and private spheres"); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1154-1178 (1985) (employing a structuralist methodology in the early stages of the analysis but ultimately abandoning it as limited and "misguided"). For a possible exception to this generalization, see Rudolph J. Peritz, *A Counter-History of Antitrust Law*, 1990 DUKE L.J. 263, 268 (relying on Foucault and Hayden White in offering "a structured analysis of antitrust discourse, which [he calls] a 'genealogy' or a 'counter-history'").

68. William Novak is a rare counter example. In the opening chapter of his fine book on the history of the concept of the police power, he associates himself with Skinner, Pocock, Dunn, and Wood, gleaning from their work the principle that "language is not epiphenomenal; it is an important, inseparable part of social structure." WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 24 & n.24 (1996).

69. HERBERT HOVENCAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937, at ix (1991).

70. *Id.* at 1.

71. *See id.* at 3.

72. For an earlier essay using the same methodology to reach similar conclusions concerning the foundations of antitrust law, see James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L.J. 257 (1989).

A more nuanced and multidimensional application of the same methodology undergirds Reva Siegel's essay, *Home as Work.*[73] The principal object of her study is the unsuccessful effort by a group of antebellum feminists to persuade state legislatures to recognize wives' domestic labor by according them legal rights to a portion of the marital assets to which their husbands had title.[74] Siegel argues persuasively that three social and intellectual traditions provided these feminists the rhetorical resources to wage their campaign: utopian communitarianism (in particular, the conceptions of gender equality and material feminism that figured in many antebellum utopian experiments);[75] abolitionism (in particular, the free labor ideology and the principle of self-ownership developed and popularized by some segments of the abolitionist movement);[76] and the separate spheres ideology (in particular, the conception of women's responsibility for the spiritual welfare of their husbands, children and, by extension, the whole of society and the associated proposition that a wife's work in the private sphere is as socially valuable as a husband's economic or political work in the public sphere).[77] The feminists' invocation of each of these languages and attitudes was partially—but only partially—transformative; to advance their cause they drew upon and, to some degree, modified the more egalitarian or liberatory components of each belief-system, but their inability to free themselves altogether from the more conservative dimensions of those discourses largely accounts for the limitations of their movement and its ultimate failure.[78] In short, Siegel deploys effectively all of the features of the contextualist method: an intense historicism;[79] painstaking excavation of the concepts and assumptions that shaped the discourse of a particular community; and careful exploration of the respects in which the members of that community depended upon or were able partially to transcend the languages and beliefs of other, contemporaneous discursive communities.[80]

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73. Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073 (1994).

74. *See id.* at 1086-91.

75. *See id.* at 1094-98.

76. *See id.* at 1098-108.

77. *See id.* at 1108-12.

78. *See id.* at 1189.

79. "[T]o transform history into grist for theory—so that acts and demands become instances and examples—would obscure what is ultimately most remarkable about the joint property tradition, the simple fact that it was." *Id.* at 1081.

80. The contextualist approach also infuses Siegel's careful study of the relationship during the late nineteenth century between physicians' evolving conceptions of the origins of human life and the intensifying criminalization of abortion. *See* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 280-323 (1992). The same method undergirds (albeit less overtly) many of the best histories of family law. *See, e.g.*, NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK (1982) (tracing the origins of the Married Women's Property Acts in New York partly to a combination of Jacksonian egalitarianism, the cult of domesticity, and a perceived need to clarify the rights of creditors); MARYLYNN SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA (1986) (tracing the legal status of women in eighteenth and early nineteenth-century New England partly to the region's tradition of radical Protestantism).

In the last few years, similar (though not always so finely wrought) contextualist legal histories have been appearing with ever greater frequency.[81] Nathaniel Berman, for example, contends that understanding the transformation of international law in the period between the First and Second World War requires "explicating its underlying framework of assumptions"—a framework that "was not always fully apparent to the interwar writers themselves, much less to their post-World War II successors."[82] That framework (which Berman labels "international legal modernism") turns out to have been derived, to a significant degree, from "an array of early twentieth-century movements for cultural renewal in other domains."[83] Similarly, Stephen Siegel argues that, to decipher the writings of the late nineteenth-century treatise writer Joel Bishop, one must not only steep oneself in the writings of Bishop's scholarly contemporaries (i.e., other classical legal theorists), but also locate the roots of the concepts and terms Bishop employed. Only through an appreciation of Bishop's indebtedness to an Americanized version of Scottish moral philosophy, for example, can one determine precisely what Bishop had in mind when he suggested that God participates in the decisionmaking of well-qualified and impartial judges.[84] In a recent essay, Martha Lees argues that the vocabularies and concepts with which state courts once sought to resolve the issue of the constitutionality of residential zoning[85] can be traced in large part to three sets of attitudes in general circulation in the early twentieth century: the "cult of domesticity"; the pastoral ideal; and the beliefs associated with the nascent public-health movement.[86]

Another important group of contextualist essays looks for interpretive guidance to the displacement (sometime during the nineteenth century) of the ideology of classical republicanism by the ideology of classical liberalism.[87] These articles contend that the form and content of many legal norms—ranging from the content of state constitutional provisions governing confiscations of private property to Chief Justice Shaw's seemingly inconsistent responses to

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81. In addition to the studies discussed below, see BARBARA FRIED, ROBERT HALE AND PROGRESSIVE LEGAL ECONOMICS (forthcoming 1998); Elizabeth B. Clark, *"The Sacred Rights of the Weak": Pain, Sympathy, and the Culture of Individual Rights in Antebellum America*, 82 J. AM. HIST. 463 (1995); Daniel R. Ernst, *Common Laborers? Industrial Pluralists, Legal Realists, and the Law of Industrial Disputes, 1915-1943*, 11 LAW & HIST. REV. 59 (1993); Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. OF LEGAL HIST. 38 (1992); Michael Klarman, Judicial Review, the Court's Countermajoritarian Capacity, and the Future of Constitutional History (Nov. 15, 1994) (unpublished manuscript, on file with the *Stanford Law Review*).

82. Nathaniel Berman, *"But the Alternative is Despair": European Nationalism and the Modernist Renewal of International Law*, 106 HARV. L. REV. 1792, 1795 (1993).

83. *Id.* at 1798 (citation omitted); *see also* Nathaniel Berman, *Modernism, Nationalism, and the Rhetoric of Reconstruction*, 4 YALE J.L. & HUMAN. 351 (1992) (elaborating on the methodology).

84. *See* Stephen A. Siegel, *Joel Bishop's Orthodoxy*, 13 LAW & HIST. REV. 215, 244-50 (1995).

85. In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 389-95 (1926), the United States Supreme Court resolved this question once and for all, establishing that cumulative zoning is indeed constitutional.

86. Martha A. Lees, *Preserving Property Values? Preserving Proper Homes? Preserving Privilege?: The Pre-Euclid Debate over Zoning for Exclusively Private Residential Areas, 1916-1926*, 56 U. PITT. L. REV. 367, 369 (1994).

87. For a skeptical review of this characterization of the history of American political culture, see Rodgers, *supra* note 7, at 32-37.

the problems of industrial accidents and "closed shops"—are best understood by ascertaining whether the pertinent lawmakers were moved primarily by the worldview of republicanism, the worldview of liberalism, or some combination of the two.[88]

Much of my own work has taken similar forms. For example, I have argued that the disparate and seemingly contradictory statements and rules issued by state legislatures and courts during the early nineteenth century concerning the legal status of slaves are best interpreted as outgrowths of disagreements among antebellum Southerners on three issues: the character and proclivities of the typical negro; the most persuasive justification for the institution of slavery; and whether Christianity or the Code of Honor provides the best moral guide for a white man.[89]

The popularity of the contextualist method among legal historians is likely, if anything, to increase in the immediate future. Many historians' plans for future projects draw on it. And two recent manifestos seeking to shape the direction of work in the field implicitly commend contextualist inquiry.[90]

C. *Textualist Legal History*

Textualism's impact upon legal history has thus far been less substantial, but its currency and influence appear to be increasing. To date, only one American writer has explicitly invoked the textualist approach when examining the development of legal doctrine or thought.[91] In an essay unabashedly titled, *The Metaphysics of American Law*, Gary Peller begins by outlining a postmodern hermeneutic theory that closely tracks the arguments of the textualist intellectual historians.[92] It is fundamentally misleading, Peller insists, to conceive of legal discourse—or indeed any form of discourse—"as a neutral medium

88. *See, e.g.*, WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991) (discussed in the text accompanying note 157 *infra*); Alfred S. Konefsky, *"As Best to Subserve their Own Interests": Lemuel Shaw, Labor Conspiracy, and Fellow Servants*, 7 LAW & HIST. REV. 219 (1989); William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985).

89. *See* William W. Fisher III, *Ideology and Imagery in the Law of Slavery*, 68 CHI.-KENT L. REV. 1051, 1057-80 (1993). A similar methodology underlies William W. Fisher III, *Ideology, Religion, and the Constitutional Protection of Private Property: 1760-1860*, 39 EMORY L.J. 65 (1990).

90. *See* Berman, *Modernism*, *supra* note 83, at 354 (seeking to transform "the current practice of international legal history" through an exemplary contextualist inquiry); Richard J. Ross, *The Legal Past of Early New England: Notes for the Study of Law, Legal Culture, and Intellectual History*, 50 WM. & MARY Q. 28, 40 (1993) (calling for an "intellectual history" of law in the colonial period that would explore "how broad-scale changes in intellectual moods and foundational concepts affected the legal system and colonists' understandings of the law").

91. A recent essay by Saul Cornell might be counted as an exception to this generalization. *See* Saul Cornell, *Moving Beyond the Canon of Traditional Constitutional History: Anti-Federalists, the Bill of Rights, and the Promise of Post-Modern Historiography*, 12 LAW & HIST. REV. 1 (1994). But Cornell's methodology is less innovative than his title suggests. Some aspects of Textualism—specifically, impatience with the search for authorial intent and sensitivity to the ways that "nodes of contradiction" within canonical texts provided "the cultural space for resistance and contestation"—do inform his account of the Antifederalists. *Id.* at 22. But other aspects of Textualism—most importantly, an appreciation of the semantic ambiguity of texts and the tense relationship between presentism and fidelity to the past—are notably absent. On balance, the essay is best seen as another manifestation of the increasingly dominant contextualist methodology discussed in Part II.B., *supra*.

92. Peller, *supra* note 67, at 1154-58.

which merely reflects social events";[93] the words and concepts we employ, in law or ordinary conversation, limit what we can say and thereby limit what we can think. One implication of that fact is that a quest for the author's "intent" is chimerical—partly because "linguistic conventions constrain subjective intent into objectively given forms" and more seriously because "there is no point of private or individual intent that is separate from the social representational practices."[94] It is equally misleading, Peller argues, to think that "representational terms, 'signifiers,' have a direct correlation with the concepts represented, their 'signified' meaning."[95] "The signified concept is itself never present but always already a re-presentation. This re-presentation is a signifier containing traces referring to other signifiers within a chain of differentiation."[96]

> This analysis suggests that meaning is created socially through the economy of difference within representational contexts. Thus, there is no re-presentation, only interpretation. And meaning is indeterminate to the extent that it is never positively present in an expression; it is always deferred or absent. The attempt to fix the meaning of an expression leads to an infinite regress. One must follow traces pointing away from expressions to other terms, which themselves contain traces leading to still other terms, and so on. Meaning does not "exist" anywhere; it is constructed in differential relations, in the blank spaces and silences of communications.[97]

The indeterminacy of an individual text, Peller argues, cannot be cured through reference to its discursive *con*text. "Any attempt to fix the meaning of a text by the specification of context runs up against the problem that any given context is open to further description. Context does not exist somewhere. Context is constructed by the interpreter according to her calculus of relevance and irrelevance."[98] Nor can it be cured by charting the "underlying representational structures which are imagined to animate" the text (i.e., through a structuralist inquiry), because those "representational structures can never be conclusively determined; their relational meaning depends on the representational practice in which they are found."[99] Nor, finally, can it be cured through invocation of the hermeneutic conventions developed by a "community of interpretation" because such a group lacks a positive, fixed content.[100] An interpretive community, in other words, must be constructed just as the meaning of the text itself must be constructed.[101]

Armed with these insights, Peller turns his attention to a particular historical problem: the displacement in early twentieth-century American legal thought of Classicism by Legal Realism. That transition is conventionally understood,

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93. *Id.* at 1159.
94. *Id.* at 1162 & n.9 (citation omitted).
95. *Id.* at 1163.
96. *Id.* at 1165.
97. *Id.* at 1167-68.
98. *Id.* at 1172.
99. *Id.* at 1173.
100. *Id.*
101. *Id.* at 1174-75.

Peller notes, to have been "radical."[102] The Classicists' epistemological naiveté and political conservatism were exposed and discredited. In their place, the Realists established the sophistication of pragmatism, pioneered a frank recognition of the political character of all legal decisionmaking, and a progressive social agenda.[103] Peller contends, however, that this interpretation fails to recognize the narrowness—indeed the conservatism—of the Realists' vision. "It reduce[d] the conception of politics from the wide notion of struggle over the exercises of contingent social power to the narrow conception of how to adapt to the limited possibilities presented by the functional necessities of social life."[104] The ultimate cause of this constricted outlook was a deep and profoundly constraining conceptual structure—a structure Realism shared with Classicism. Peller refers to this structure as "the subject/object dichotomy, the notion that the social world can meaningfully be described by separating subjective and objective realms of social life."[105] The manner in which this structure figured in Realism, Peller concedes, differed somewhat from the manner in which it figured in Classicism. But Realism failed to challenge or even bring to light the structure itself.[106] Revealing it—and revealing its contingency—should assist us in transcending it.

In a crucial respect, Peller's study of this important transitional moment in American legal history conforms to the methodological recommendations of the textualist intellectual historians: He has abandoned the obsessive historicism of the contextualist approach in favor of a "tense interaction between empirically based reconstruction of the past and dialogic exchange."[107] His analysis of Realism oscillates between explications of texts themselves and reflections upon how those texts illuminate and are illuminated by the defects of present-day legal thought and practice. This intertwining of historicist and presentist inquiries is even more evident in an essay Peller wrote a few years later on the "Legal Process Theory," the dominant style of American legal scholarship during the 1950s.[108] The essay begins with close readings of the principal legal process texts,[109] detailing the authors' efforts to differentiate the competencies of legislatures, courts, administrative agencies, and private parties and to match each of those tribunals with a particular type of legal problem.[110] Peller then argues persuasively that this approach grew out of—and derived much of its wide appeal from—its resonance with the efforts of American intellectuals in other academic fields during the 1950s to fashion distinctions "between controversial issues of values and noncontroversial questions of

102. *Id.* at 1154.

103. For an interpretation of Realism in this general vein, see William W. Fisher III, Morton J. Horwitz & Thomas A. Reed, *Introduction* to AMERICAN LEGAL REALISM xi (William W. Fisher III, Morton J. Horwitz & Thomas A. Reed eds., 1993).

104. Peller, *supra* note 67, at 1153.

105. *Id.* at 1154.

106. *See id.*

107. *See* LaCapra, *supra* note 31, at 427.

108. Gary Peller, *Neutral Principles in the 1950s*, 21 U. MICH. J.L. REFORM 561 (1988).

109. *See id.* at 566-72.

110. *See id.* at 591-99.

framework and structure within which substantive conflict would take place."[111] Peller next reveals a fundamental defect in the Legal Process argument. According to these theorists, the reason why courts should defer to legislatures when controversies cannot be resolved by neutral principles is that legislatures are democratically elected; their determinations thus reflect the will of the people.[112] That rationale logically requires a court reviewing a legislature's resolution of a particular controversy to take seriously a claim advanced by the losing party that some social or political practice, such as race or gender discrimination, prevents the legislature from being democratic. In the 1970s, legal theorists (like John Ely and Jesse Choper) pursuing analogous inquiries did just that,[113] but none of the Legal Process theorists of the 1950s was willing to do so. In Peller's view, their disinterest stems, in part, from the fact that they were all white males from the Northeast intellectual elite who, because of their class position, saw the world as essentially just and fair.[114] Despite its overt judgments, the reading is compelling, lending credence to the Textualists' advocacy of such a deliberately compromised, presentist stance.

A recent article by Mark Barenberg on the origins of the Wagner Act (the foundational statute of modern American labor law) combines explication and evaluation in a similarly illuminating fashion.[115] The article investigates the ideas of Robert Wagner and his contemporaries concerning the ways that law could and should respond to labor strife. Barenberg carefully maps the economic and ideological setting of Wagner's venture—including mass labor unrest, various other forms of political disruption, and the configuration of power in Congress in the 1930s. Against this background, Barenberg tries to make sense of Wagner's outlook, contending that it interwove several strands of progressive thought, including the (anti-) epistemology of popularized Deweyan pragmatism, the vision of law and society propounded by Legal Realism, the social psychology of communitarian progressives, and the political economy of second-generation institutionalist economists.[116] Finally, Barenberg shows how the content of the Wagner Act issued from those commitments. All of this Pocock and Skinner would find familiar and commendable. Barenberg, however, does not stop there. He goes on to ask of Wagner questions that a committed contextualist historian would condemn as hopelessly anachronistic: Are all "cooperationist innovations" bad? Is "self-interested rationalism" or "symbolic reconstructionism" a better methodology for understanding labor relations? Barenberg acknowledges that Wagner did not address such issues in terms we would find familiar. More importantly, he concedes that the historical context in which Wagner was working was substantially different from our

111. *Id.* at 565.

112. *See id.* at 561.

113. *See* JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980); JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

114. *See* Peller, *supra* note 108, at 563-66.

115. *See* Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1381 (1993).

116. *See id.* at 1403-10.

own. The principal challenges Wagner faced were pulling the country out of the Great Depression and reconstituting "a democratic, capitalist order during the class-fractured emergence of a mass consumptive economy."[117] The problems we face, by contrast, include "heightened international competition and capital mobility, chronic sluggishness in productivity growth, and the rollback of organized labor."[118] Nevertheless, Barenberg argues that Wagner's vision "sheds light on current economic and sociological theories of labor-management cooperation."[119] Recast in modern, theoretical terms, Wagner's outlook can be used (1) to enhance sensitivity to the power of labor law (and law in general) to shape rather than merely manage the preferences and interests of all affected parties[120] and (2) to reveal solutions better able than seniority systems and deferred compensation, for example, to solve the problems identified by contemporary economists concerned with "internal labor markets."[121] In short, Barenberg approaches Wagner in the way LaCapra commends: "We awaken the dead in order to interrogate them about problems of interest to us . . . ."[122]

In their effort to bridge the gap between presentism and historicism, the two articles by Peller and the one by Barenberg seem genuinely methodologically innovative. At least in Peller's case, that innovation seems to flow naturally from a postmodern or textualist theory of history. In other respects, however, all three articles fail to exploit fully the methodological potential of Textualism. Most importantly, none adopts an openly perspectival stance when interpreting texts; on the contrary, all three exude confidence in the rightness, the truth of the interpretations they offer. In *Metaphysics of American Law*, that confidence seems to derive (despite Peller's protestations to the contrary) from a structuralist approach. In the other two articles, it derives from successful efforts to situate the texts in their discursive contexts. There is nothing necessarily wrong with these inquiries, but they are not recognizably textualist.

Nor does one find in the work of either Barenberg or Peller much evidence of the third of the Textualists' recommendations—that historians "brush history against the grain" by showing how canonized documents can be interpreted to subvert the canon itself.[123] Only one piece of legal history seems fairly to fit that description: Clare Dalton's manuscript, *Losing History*.[124] In the 1868 case of *Rylands v. Fletcher*, the English House of Lords held that the builder of a reservoir was strictly liable to the lessee of a nearby mine when the water in the reservoir burst through an abandoned mine shaft and flooded the lessee's

117. *Id.* at 1388.

118. *Id.*

119. *Id.* at 1389.

120. *See id.* at 1462-65.

121. *Id.* at 1465-89. To be sure, Wagner does not get off scot free. Barenberg chastises him for a number of blindnesses—the most important of which was underestimating "management's awareness and fear of the potency of the very process of *cultural* change [Wagner] extolled." *Id.* at 1495.

122. LaCapra, *supra* note 28, at 9.

123. *See* note 35 *supra* and accompanying text.

124. Clare Dalton, Losing History: Tort Liability in the Nineteenth Century and the Case of *Rylands v. Fletcher* (1987) (unpublished manuscript, on file with the *Stanford Law Review*).

property.[125] It was of no moment that the builder was unaware of the mine shaft and the hazard that it posed. This holding seems inconsistent with the orthodox understanding of the trend of tort law in England (and the United States) during the nineteenth century—namely, toward ever more general application of the negligence principle. The way that *Rylands* conventionally has long been reconciled with (and indeed used to support) the orthodox account has been to interpret the case as limited to circumstances in which the defendant was engaged in "ultrahazardous activity." In her manuscript, Dalton painstakingly explicates the opinions of the six judges who heard the appeal, showing that only one of the six forthrightly advanced a vision of tort liability consistent with the negligence principle.[126] Three others adhered to a rival "'activity-based' vision of liability," and the remaining two clung to an older approach that sought to determine tort defendants' liability by reference to the deteriorating common law forms of action.[127] She goes on to show that the positions taken by the judges were not anomalous.[128] Dalton's interpretation of the case effectively undermines the traditional history of tort law in two respects. First, it shows that the influence of the negligence principle was not as strong in 1868 as is usually supposed, and second, it shows that the ultimate triumph of that principle was not as foreordained as is conventionally believed. Dalton does not connect her argument to any general methodology, but the fact that in an earlier nonhistorical essay she had defended and applied a explicitly postmodern theory of interpretation[129] suggests that her deliberately subversive reading of *Rylands* is indeed grounded in a variant of Textualism.

In short, a small group of legal historians have begun to deploy arguments that incorporate portions of the textualist style of intellectual history, but no work has yet exploited its full potential.

D. *New Historicist Legal History.*

Thus far, the application of New Historicism to American legal history has been even more limited than the application of other methodologies. Only two essays—both by Hendrik Hartog—conform closely to that methodology.[130] In the most recent, Hartog examines the career and writings of Elizabeth Packard, a nineteenth-century reformer whose husband had her committed to an institution on the ground that her resistance to his authority was evidence of in-

125. Rylands v. Fletcher, 3 Law Rep. 330 (H.L. 1868).

126. *See* Dalton, *supra* note 124, at 19-27.

127. *See id.* at 4.

128. *See id.* at 96-160. Thus, the three judges who sought to justify their votes on the basis of the "activity-based vision" were able to invoke and make sense of a larger portion of the confused body of extant English tort law than the one judge who relied on the negligence principle.

129. *See* Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985).

130. *See* Hendrik Hartog, *Mrs. Packard on Dependency*, 1 YALE J.L. & HUMAN. 79 (1988) [hereinafter Hartog, *Mrs. Packard on Dependency*]; Hendrik Hartog, *Pigs and Positivism*, 1985 WIS. L. REV. 89] [hereinafter Hartog, *Pigs*].

sanity.[131] Following her release, Packard devoted herself to changing the marital property and civil commitment statutes in the United States.[132] Hartog derives from Packard's story the following insights: (1) as late as the third quarter of the nineteenth century, Blackstone's harsh account of the oppressive features of the law of coverture more accurately described the legal position of married women in the United States than has been suggested by many recent revisionist histories of family law; (2) Packard's fidelity to the cult of domesticity and the (loosely) related concept of "manliness" limited the radicalism of her proposals for statutory reform, yet provided powerful, strategic arguments in support of the changes she did demand; and (3) Packard's career exemplifies the "psychologically coercive capacity" of legal rules (i.e., the extent to which Americans during this period constituted themselves through law).[133]

In several respects, the methodology of the article resembles that employed by new historicist literary and cultural critics. First, a small episode, discovered serendipitously,[134] is mined for insights into major themes of American history. Thus, in Hartog's hands, Packard's relatively obscure and sadly ineffectual career becomes "a 'site' through which ran many of the most important highways of American cultural history."[135] Second, the essay is suffused with a sense of the ambiguity of Packard's writings. Plainly lacking the Contextualists' confidence in their ability to discern authors' intentions, Hartog instead eagerly explores the protean potential meanings of the phrases (like "the right to be a married woman") around which Packard's arguments revolve.[136] Third, Hartog situates Packard's texts in a variety of polyphonous discursive contexts—ranging from the "cult of domesticity" to "republican obsession with the misuse of public power."[137] Fourth, in a fashion that has since become traditional, Hartog not only uses each of those contexts to help interpret Packard's texts, he also uses her texts to suggest revisions of the traditional views of those contexts. For example, he contends that "an explication of Mrs. Packard's writings on dependency will help us make sense of the ways persons did and did not view themselves as property in the United States."[138] Finally, while Hartog is intensely interested in the light that Packard's writings cast on the structures of power in the United States, he eschews simple applications of the concepts of cultural hegemony and false consciousness. Thus, he repeatedly ruminates on the extent to which Packard was both the prisoner and the manipulator of the various ideological structures in which she moved.[139]

131. *See* Hartog, *Mrs. Packard on Dependency*, *supra* note 130, at 81. Following a three year commitment, Packard resisted her own release which had been made contingent on her return to her husband's charge. *See id.* at 81-82.

132. *See id.* at 82-83.

133. *See id.* at 87-101.

134. As Hartog recounts: "I came across the trial record of her case while working my way through family law trial records." *Id.* at 83.

135. *Id.*

136. *See id.* at 94.

137. *Id.* at 92.

138. *Id.* at 85.

139. *See id.* at 102-03.

In Hartog's other essay, an obscure 1819 criminal case, heard in the Mayor's Court in New York City, serves as his vehicle.[140] In this historeme, a butcher was convicted of a public nuisance for keeping pigs in the city.[141] As in his handling of Elizabeth Packard's life, Hartog lovingly explores the ambiguities of the case and the ways in which it illuminates and is illuminated by multiple themes in American legal and cultural history. These include the controversy over whether social issues of this sort were properly resolved by legislatures or courts;[142] the gradual but contested emergence during the early nineteenth century of a new vision of the city (clean, healthy, and bureaucratized, thus sharply differentiated from the countryside);[143] the clash between old legal arguments that saw in immemorial custom a source of justiciable rights and a newer (albeit already unraveling) ideology of egalitarian classical republicanism;[144] and the limited credibility and cultural power of judicial edicts.[145]

In neither essay does Hartog acknowledge the extent to which his mode of analysis parallels that of the New Historicists—and thus far, no other legal historian has followed closely his methodological lead.[146] In view of the subtlety and novelty of his arguments, however, it seems likely that similar studies will soon appear.

III. MEASURING THE MARIGOLDS

Most historians who have not themselves been combatants in the methodological wars discussed above, but who have observed the battles from a distance, have come away with two general reactions: (1) that the central lesson

140. Hartog, *Pigs*, *supra* note 130, at 904-05 & 905 n.22 (citing Louis Lashine and Christian Harriot's Cases, 4 New York City Hall Recorder 26 (1819)). Hartog notes that "[t]he best record of the case can be found in the New York Judicial Repository, 258-72 (1819)." *Id.* at 905 n.24.

141. *See id.* at 905-06.

142. *See id.* at 906-08.

143. *See id.* at 908-12.

144. *See id.* at 912-19.

145. *See id.* at 921-35.

146. Some of the features of the new historicist style may be found in Dianne Avery & Alfred S. Konefsky, *The Daughters of Job: Property Rights and Women's Lives in Mid-Nineteenth-Century Massachusetts*, 10 LAW & HIST. REV. 323 (1992). From a single, accidentally discovered document (a letter written in 1839 to Professor Simon Greenleaf of Harvard by Keziah Kendall, a single woman running a dairy farm with the aid of her sisters), Avery and Konefsky extract various insights into the circumstances that prompted some nineteenth-century women to distance themselves from the cult of domesticity and to subscribe instead to an "equalitarian feminism." *Id.* at 349. The authors' careful explication of how Kendall's description of her life and beliefs illuminates and is illuminated by the many discursive contexts available to antebellum New Englanders closely resembles Hartog's inquiries. However, other features of the new historicist methodology—attentiveness to the ambiguity of texts and interest in the dynamics of cultural hegemony—are largely absent from the essay.

Peter Jaszi, in his seminal study of history of copyright law, also relies partially upon New Historicism. *See* Jaszi, *supra* note 67. In particular, the manner in which he traces casual connections between legal and nonlegal phenomena—"draw[ing] out homologous relationships between developments in law and developments in literary culture—without insisting that one is somehow determined by the other"—resembles, as he notes, Stephen Greenblatt's style of literary/cultural analysis. *Id.* at 457 n.5. Jaszi has little interest, however, in either evocative historemes or in multiple discursive contexts, preferring to concentrate most of his interpretive energies on various manifestations of a single theme: the romantic conception of authorship.

of the "linguistic turn"—that full, unmediated, objective access to the past is impossible—is right; but (2) that there is such a thing as the past, and not all historical interpretations are equally true to it.[147]

Some historians have found the tension between those two reactions debilitating and have concluded, consequently, that contemporary methodological theory not only fails to enhance, but actively threatens the practice of history.[148] To avoid paralysis, they insist, we should forget theory and get on with the business of doing history.[149] If we need any guidance in determining how to read and write about the past, we should look not to philosophers, but to the interpretive community of our fellow historians. Craft, convention, and peers, not epistemology and hermeneutics, should be our guides.[150]

That response, though perhaps understandable, is disappointing. Inability to provide some general justification for what we are doing—blind reliance on methods developed through trial and error by previous generations of historians—is surely not a desirable state of affairs. The remainder of this essay proposes an alternative response, a way of coming to grips with the tension between the "linguistic turn" and our persistent sense of the reality of the past. Among its merits is its power to assist legal historians in evaluating and harnessing the four varieties of intellectual history with which they have been experimenting in recent years.

The response begins with the now familiar (even banal) proposition that all history is, to some degree, perspectival; the manner in which the historian approaches and interprets the past is influenced by her own concerns and by the concerns of the community and period in which she lives. At any given moment, a particular historical phenomenon can be examined from more than one perspective. That observation is obvious and unhelpful if taken to mean that historians' political orientations, hopes, and expectations vary. It is less obvious and more fruitful if taken to mean that history (and legal history in particular) is and should be practiced for different purposes. Its intended audiences are various, as are its objectives. Therefore, we should not be surprised if the methodology best suited for one purpose is not ideal for another.

147. *See, e.g.*, Cass R. Sunstein, *The Idea of a Useable Past*, 95 COLUM. L. REV. 601, 601 (1995); Zammito, *supra* note 45, at 798.

148. *See, e.g.*, James Kloppenberg, *Deconstructive and Hermeneutic Strategies for Intellectual History: The Recent Work of Dominick LaCapra and David Hollinger*, 9 Intell. Hist. Newsl. 3, 7, 10 (1987) (contending that "the deconstructive method makes writing history impossible; . . . to insist rigorously on universal undecidability would bring all critical exchange to an end").

149. *See, e.g.*, Stephen Bann, *Towards a Critical Historiography: Recent Work in Philosophy of History*, 56 PHILOSOPHY 365, 370 (1981) (discussing G.R. Elton and Donald Davidson).

150. *See* Lionel Gossman, *Towards a Rational Historiography*, 79 TRANSACTIONS AM. PHIL. SOC'Y 51-67 (1989); Lynn Hunt, *History as Gesture; or, The Scandal of History*, *in* CONSEQUENCES OF THEORY: SELECTED PAPERS FROM THE ENGLISH INSTITUTE, 1987-88, at 91, 100-01 (Jonathan Arac & Barbara Johnson eds., 1991) ("[E]ven the most theoretically sophisticated of historians have to admit to intractable problems with grounding their methods. For the most part, we ignore this issue by writing within the confines of conventional types of interpretation and with the conventional tools of the trade."); Zammito, *supra* note 45, at 812-14.

These reflections point toward what might be described as a pragmatist approach to historical methodology.[151] Central to American pragmatism is the claim that the truth of a proposition cannot be determined in the abstract; a proposition is true if and only if it is useful (i.e., if it facilitates attainment of a particular social end). The claim here is that the value of an historical methodology cannot be determined in the abstract; its value is to be determined by the extent to which it contributes to a particular social or scholarly project.

What, then, are the projects that historians might seek to advance? What, in short, are the possible purposes of history in general and legal history in particular? Reviewed below are nine candidates. Some are familiar, others less so. With respect to each of the nine possible purposes, the essay asks: Which, if any, of the methodologies reviewed above is most promising?

Some disclaimers bear emphasis at the outset. The nine objectives around which the argument is structured plainly do not exhaust the set of possible purposes of history. Readers undoubtedly can imagine additional goals. The analysis is thus meant to be illustrative, not comprehensive. The argument is circumscribed in an additional respect: For the most part, it does not substantively evaluate the nine candidates. The footnotes direct readers to sources that seek to answer the question: What is the best or proper function of history? This article does not attempt to settle that age-old debate. Finally, the overall objective of the analysis is not to limit legal historians interested in intellectual history to four methodological recipes (Structuralism, Contextualism, Textualism, and New Historicism). Rather, its objective is to encourage legal historians, by example, to think critically about what they are trying to achieve and which methodology (or combination or reconfiguration of methodologies) would best advance their ends.

Here, then, are the nine candidates:

(1) Explain why events transpired as they did and why they did not come out differently. Most historians, when asked why they do what they do, will at least include this objective in their answers. It is commonly thought that to understand an event entails identifying its causes and its effects.[152] Legal historians are typical in this regard. Almost all aspire to trace chains of causation, locating the origins and impacts of legal rules and ideas.

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151. By appealing to pragmatism for this basic proposition, I do not mean to invoke the methodology of "pragmatic hermeneutics" originally developed by James and Dewey and recently defended by James Kloppenberg as a viable alternative to the unpromising choice between objectivism and relativism in historical inquiry. *See* James T. Kloppenberg, *Objectivity and Historicism: A Century of American Historical Writing*, 94 AM. HIST. REV. 1011, 1026-30 (1989). The heart of the latter approach is the proposition that a necessary and sufficient criterion for determining the validity of an historical narrative or explanation is whether it can "survive the scrutiny of the community of professional historians." *Id.* at 1029. That attitude has considerable support among professional historians these days, *see* note 150 *supra*, but does not seem an adequate response to the challenges presented by the new styles of intellectual history.

152. *See, e.g.*, COMMITTEE ON HISTORIOGRAPHY, SOCIAL SCI. RES. COUNCIL, BULLETIN 64, THE SOCIAL SCIENCES IN HISTORICAL STUDY 86 (1954) ("The truly scientific function begins where the descriptive function stops. The scientific function involves not only identifying and describing temporal sequences; it also involves explaining them."), *quoted in* Megill, *supra* note 30, at 632. For additional examples of this orientation, see Megill, *supra* note 30, at 632-34.

An important variant of this objective is explaining why the victims of legal developments failed to resist (or, at least, to resist effectively). A persistent puzzle confronts legal historians who study ostensibly democratic societies such as the United States: Why were legal rules that benefited a minority and disadvantaged a majority of the population adopted and obeyed? Roughly speaking, the farther left on the contemporary political spectrum a historian is located, the more pressing and difficult this explanatory challenge will seem to her.

Of the four variants of intellectual/legal history, Structuralism is the least helpful in advancing this explanatory end. Foucault, the most influential of the structuralist intellectual historians, was altogether uninterested in questions of this sort. Efforts to trace chains of causation he regarded as hopelessly naive. In his own intellectual histories (which he called "archeologies"), he scorned "the staple of conventional history of ideas: continuities, traditions, influences, causes, comparisons, typologies, and so on. He is interested, he tells us, only in the 'ruptures,' 'discontinuities,' and 'disjunctions' in the history of consciousness, that is to say, in the *differences* between the various epochs in the history of consciousness, rather than the similarities."[153]

The legal historians influenced by Foucault and his predecessors have been less adamant in eschewing causal explanations, but they too have been concerned primarily with mapping the structures of legal consciousness in discrete periods, rather than in determining why one system of ideas gave way to another. In the lead essay of the genre, for example, Duncan Kennedy cautioned: "[W]hat I have to say is descriptive, and descriptive only of thought. It means ignoring the question of what brings a legal consciousness into being, what causes it to change, and what effect it has on the actions of those who live it."[154] When Kennedy and the legal historians who follow him permit themselves to speculate on the latter question, their explanations usually focus on arguments internal to the legal profession (e.g., on how efforts by one generation of legal theorists to simplify and purify a doctrinal system made its weaknesses more evident to the next generation).[155] To the large majority of other legal historians, explanations of that sort seem, at best, radically incomplete. In sum, for assistance in explanatory projects, legal historians should not look to Structuralism.

Contextualism, by contrast, has great potential for suggesting or refining causal explanations. Central to contextualist inquiries is showing how concepts were developed in some discursive communities and then transmitted to others. As we have seen, legal historians have employed investigations of these sorts to trace the roots of legal doctrines and ideas—to explain, for example, why international legal theory between the world wars or the criminal law of slavery in the American South took the shape they did.[156]

153. White, *supra* note 14, at 27.

154. Kennedy, *supra* note 50, at 220.

155. *See, e.g.*, text accompanying notes 60-63 *supra*.

156. *See* text accompanying notes 81-89 *supra*.

The contextualist approach also holds great promise in explaining why the lower classes in the United States were unable to prevent the promulgation and enforcement of legal rules that hurt them. A fine illustration of the power of the method is provided by William Forbath's recent book on the history of labor law.[157] The central puzzle in American labor history is why American workers, unlike their European counterparts, failed to form an effective class-based political movement capable of forcing the state to promote or protect their economic interests. Most labor historians have sought answers to that question by focusing on two factors: (1) the ability of American capitalists to mobilize force (e.g., strikebreakers and labor injunctions) to discourage collective action by workers and (2) social and ideological conditions that inhibited the formation of class consciousness among workers (e.g., ethnic and racial divisions, the relative affluence of American workers, the availability (or mirage) of social mobility, and the ethos of individualism).[158] Forbath does not contend that these factors were unimportant; indeed, he buttresses the first explanation by showing in great detail how judge-made law strengthened the hands of capitalists. But he argues that they were insufficient. A persuasive explanation must account for the dramatic shift in American workers' ideals and self-images during the two decades surrounding the turn of the century—from a statist and radical outlook grounded in the worldview of classical republicanism to a liberal, laissez-faire outlook centered on the principle that the "best thing the State can do for Labor is to leave Labor alone."[159] To a large extent, Forbath argues, that shift can be attributed to the seductive discourse of the law. Demeaned and demoralized by relentlessly antilabor judicial decisions, American workers at the start of the twentieth century concentrated almost all their energies on the limited goal of securing the freedoms to organize, strike, and boycott.[160] The set of arguments most likely to attain those ends, they sensibly concluded, was not the ambitious, utopian vocabulary of republicanism, but a variant of the liberal "rights" discourse that the courts had been deploying against them. Freedom and formal equality (freedom of contract, freedom of speech, and opportunities to "compete" on an equal footing with employers)—not citizenship, civic virtue, and social and economic equality—became the central concepts both in the requests they made of courts and legislatures and in their conversations among themselves.[161] To be sure, the workers did not merely parrot the arguments of their oppressors; they modified the language of liberalism to suit their own ends, incorporating, for example, a radical interpretation of the Thirteenth Amendment.[162] And they can hardly be

157. *See* WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991).

158. *See, e.g.*, THE AMERICAN LABOR MOVEMENT (David Brody ed., 1971); DAVID MONTGOMERY, THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND AMERICAN LABOR ACTIVISM, 1865-1925 (1987); SELIG PERLMAN, A THEORY OF THE LABOR MOVEMENT (1928).

159. Samuel Gompers, *Judicial Vindication of Labor's Claims*, 7 AM. FEDERATIONIST 283, 284 (1901). For Forbath's description of this shift, see FORBATH, *supra* note 157, at 49-58.

160. *See* FORBATH, *supra* note 157, at 54-56, 168.

161. *See id.* at 129-31.

162. *See id.* at 135-41.

blamed for their abandonment of the republican vision; it undoubtedly would have been less effective in securing essential legal reforms.[163] But the ultimate effect was to deprive American workers of the rhetorical resources they needed to mount a serious challenge to the status quo. The cost of adopting the language of the law was "acceptance of the naturalness of the capitalist marketplace, the inevitability of marketplace conflict, and the legitimacy of the competitive freedom enjoyed by corporations."[164]

In short, in Forbath's hands, the contextualist method produces an unusually subtle account of the process of cultural hegemony. One of the things that makes his argument so powerful is the care with which he traces lines of linguistic influence from lawyers to labor leaders. Too often, contextualist historians content themselves with identifying similarities between the vocabularies employed during the same period in two discursive communities, and then inferring a causal connection between the two.[165] Forbath goes further, showing in detail when and how labor leaders adopted "arguments, analogies, and metaphors inspired by the common law."[166] Similar attention to modes of linguistic transmission would considerably enhance the explanatory power of other contextualist legal histories.

Textualism, heretofore rarely employed by legal historians, is less promising as a source of plausible causal explanations of historical events. The deliberate injection of presentist concerns and the sometimes aggressive interpretations of historical texts for the purpose of making them worthy participants in conversations on contemporary problems weaken the credibility of the causal arguments made in textualist legal histories. In one respect, however, the methodology does have potential: Analyses like Dalton's, designed to corrode conventional interpretations of canonical texts, may be valuable in disrupting misleadingly whiggish orthodox causal accounts.[167] Interpretations that "brush history against the grain" in this fashion may not themselves provide more compelling explanations, but they can identify the need for them.

So little legal history has been written to date in the style of New Historicism that it is difficult to estimate its ability to facilitate projects of causal explanation. However, its potential seems great. New Historicism's sensitivity to the variety of discourses available at any given time to participants in (legal) culture and its attention to the degrees of freedom enjoyed by individual actors in fashioning ideas and arguments from those discursive materials may well enable it, even better than Contextualism, to churn up promising explanations of legal events. The offsetting danger of New Historicism is anecdotalism.

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163. *See id.* at 170.

164. *Id.* at 131.

165. Hovencamp's otherwise powerful study of the relationship between classical economic theory and postbellum legal doctrine, *see* text accompanying notes 69-72 *supra*, is unfortunately weak on this score. For discussions of this problem, see Victoria A. Saker, *Between a Doctrine and a Hard Place*, 21 REVIEWS IN AM. HIST. 279, 282 (1993); Christopher L. Tomlins, *Book Review*, 11 LAW & HIST. REV. 198 (1993) (reviewing HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937 (1991)).

166. FORBATH, *supra* note 157, at 128.

167. *See* text accompanying notes 124-129 *supra*.

How is the historian (or her reader) to have confidence in the representativeness of the historemes she seizes upon? The serendipitous research methods that the New Historicists celebrate may produce eccentric rather than illuminating explanations of legal events.

(2) Formulate general laws of social development. It is necessary but insufficient, Carl Hempel believed, to trace the causal connections that gave rise to particular events. One must strive to extract from such explanations general laws—laws that transcend the particularities of time and place.[168] The ultimate objective of history is thus to produce testable statements of the form: whenever conditions A, B, and C coincide, event D occurs.[169] From this perspective, the purposes of history (and legal history in particular) are the same as those of physics: (1) to provide us a deeper understanding of the laws that govern the universe; and (2) to enable us to predict future events (whether they be eclipses, earthquakes, revolutions, or doctrinal reforms).[170]

Relatively few historians were persuaded by Hempel's argument when it first appeared a half century ago, and the number has diminished over time.[171] But one effect of the continued grip of logical positivism on American law schools is that legal historians are more inclined than other historians to extract from their work broad generalizations about social life.[172]

None of the four variants of intellectual/legal history is likely to provide much service in this cause. In part, this is because all four deliberately neglect a number of factors (such as economic and technological developments) that would likely figure in any general laws of social development. A more fundamental reason is that all four share (albeit to different degrees) an antifoundationalist, perspectival stance that corrodes scientism. The more one acknowledges the inevitable impact of the interpreter on the data she interprets, the less reliable appear general laws derived from a cluster of individual interpretations.[173]

These predictions are reinforced by the manner in which nonlegal intellectual historians have responded to questions that arguably invite responses in the form of general laws. For example, in a recent essay, Stephen Greenblatt (the most prominent of the New Historicists) confronts the relationship between capitalism and art.[174] Frederic Jameson, he observes, blames capitalism for the repressive and pernicious separation of the aesthetic domain from other sectors

168. *See* Carl G. Hempel, *The Function of General Laws in History, in* THEORIES OF HISTORY 344, 348-49 (Patrick Gardiner ed., 1959).

169. *See id.* at 348-52.

170. *See id.* at 345; *cf.* Megill, *supra* note 30, at 633-34.

171. *See* Kloppenberg, *supra* note 151, at 1022.

172. The outlines of a historical analysis that might (with some further elaboration) meet Hempel's expectations may be found in Robert Charles Clark, *The Four Stages of Capitalism: Reflections on Investment Management Treatises,* 94 HARV. L. REV. 561, 562-69 (1981) (identifying four stages of increasing specialization of private economic activity and attributing the progression to a combination of (1) "the efficiency advantages of role specialization"; (2) "a general increase in wealth"; and (3) a process of natural selection of institutional forms).

173. *See* Russell Jacoby, *A New Intellectual History?,* 97 AM. HIST. REV. 405, 423-424 (1992).

174. *See* Greenblatt, *Towards a Poetics of Culture, supra* note 41.

of contemporary Western culture.[175] Jean-François Lyotard, by contrast, blames capitalism for the corrosion of discursive boundaries—for a drive toward monological totalization.[176] Neither generalization, argues Greenblatt, is convincing. If there is any discernible pattern, it is one of "inexhaustible circulation," in which a working distinction between the aesthetic and the real is repeatedly established and then abrogated.[177] In Greenblatt's willingness to entertain *any* general hypotheses concerning "the distinct power of capitalism,"[178] one can perhaps see some hope for universal laws. But more prominent in his essay is the insistence upon the complexity and particularity of relations between art and capital. Transferred to the domain of legal history, this analytical predisposition does not seem likely to produce generalizations of the sort that would satisfy Hempel.

In one respect, however, the strategies employed by the new intellectual historians resonate with Hempel's vision of history. None of the four methodologies may be of much aid in *discovering* general laws of social development, but all four *rest upon* generalizations concerning human behavior sweeping enough to have piqued Hempel's interest.[179] Law functions "to deny the truth of our painfully contradictory feelings about the actual state of relations between persons in our social world"[180] (Structuralism); "[m]en cannot do what they have no means of saying they have done; and what they do must in part be what they can say and conceive that it is"[181] (Contextualism); "unrecognized power is everywhere[;] . . . (at least in all hitherto existing societies) relations of command and obedience have become routinized or 'sedimented' in the institutionalized forms of life within which speaking and acting subjects are formed"[182] (Textualism); "cultures are rarely coherent and unified; groups struggle for discursive power just as they struggle for political dominance"[183] (New Historicism)—these premises sound suspiciously like "general laws." Perhaps (a reader with positivist leanings might suggest) they should be treated, not as premises, but as hypotheses subject to empirical confirmation. The more plausible[184] the historical interpretations generated in accordance with a particular methodology, the more willing we should be to accept the generalizations concerning human action and interaction on which that methodology is based. Such a reconceptualization of the purpose of intellectual history would make the founders of these four approaches recoil, but it would provide a way of reconnecting them with Hempel's project.

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175. *See id.* at 2.

176. *See id.* at 4.

177. *Id.* at 8.

178. *Id.*

179. This argument was inspired by a comment made by Richard Ross when I presented the manuscript of this article at the University of Chicago.

180. Kennedy, *supra* note 50, at 210.

181. Appleby, *supra* note 18, at 15.

182. Keane, *supra* note 24, at 213.

183. Montrose, *supra* note 36, at 22; *see also* text accompanying note 45 *supra.*

184. *Cf.* William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237, 1248-56 (1986) (exploring the related criterion of "credibility").

(3) Reenact past experiences. The philosopher, R.G. Collingwood, firmly rejected as appropriate goals of history both of the objectives just considered.

> [T]he historian need not and cannot (without ceasing to be an historian) emulate the scientist in searching for the causes or laws of events. For science, the event is discovered by perceiving it, and the further search for its cause is conducted by assigning it to its class and determining the relation between that class and others. For history, the object to be discovered is not the mere event, but the thought expressed in it. To discover that thought is already to understand it.[185]

Collingwood's conception of the historian's true purpose is latent in the last two sentences of the foregoing passage. Historical understanding entails reexperiencing—"rethinking"—the thoughts of historical agents. To comprehend an event requires getting "inside" the minds of the people who shaped it. This does not mean that historians should not seek to explain the events they chronicle, but it does mean that historical explanation is radically different from scientific explanation.

> When a scientist asks "Why did that piece of litmus paper turn pink?" he means "On what kinds of occasions do pieces of litmus paper turn pink?" When an historian asks "Why did Brutus stab Caesar?" he means "What did Brutus think, which made him decide to stab Caesar?" The cause of the event, for him, means the thought in the mind of the person by whose agency the event came about: and this is not something other than the event, it is the inside of the event itself.[186]

Collingwood's theory continues to have considerable influence among historians. When pressed, many will acknowledge that one of their objectives is to enable readers to revisit the past—to inhabit the minds of their predecessors.

Of the four variants of contemporary intellectual history, Structuralism is least well suited to Collingwood's project. Structuralist analyses are typically designed, not to recapture the experience of historical actors, but to reveal what they themselves were unable to see: the premises they took for granted; the dichotomies that unconsciously shaped their thoughts; the limits on their imaginations. The particular application of Structuralism popularized by Duncan Kennedy similarly aspires to show how successive systems of legal thought operated to mediate contradictions that American lawyers and legal theorists would have found too painful to confront consciously.[187] Interpretations of these sorts aspire, not to enable readers to recapture the thoughts of their predecessors, but to show them things of which their predecessors were unaware.

Contextualism, by contrast, seems well adapted to Collingwood's vision of history. Like Collingwood, the Contextualists are intensely interested in ascertaining the intent of the authors of great texts. Indeed, Collingwood's discussion of the way a sophisticated historian ascertains the original meaning of a text anticipated in many respects the methodological arguments of Skinner and Pocock:

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185. R. G. COLLINGWOOD, THE IDEA OF HISTORY 214 (1946).
186. *Id.* at 214-15.
187. *See* text accompanying notes 49-59 *supra*.

> Suppose [an historian] is reading the Theodosian Code, and has before him a certain edict of an emperor. Merely reading the words and being able to translate them does not amount to knowing their historical significance. In order to do that he must envisage the situation with which the emperor was trying to deal, and he must envisage it as that emperor envisaged it. Then he must see for himself, just as if the emperor's situation were his own, how such a situation might be dealt with; he must see the possible alternatives, and the reasons for choosing one rather than an other; and thus he must go through the process which the emperor went through in deciding on this particular course. Thus he is re-enacting in his own mind the experience of the emperor; and only in so far as he does this has he any historical knowledge, as distinct from a merely philological knowledge, of the meaning of the edict.[188]

Immersion in the world of one's subject, mastery of his vocabulary, sensitivity to the problems he was trying to solve—these are standard contextualist techniques, and Collingwood is convincing that they are well designed to place modern readers inside the heads of past authors.

In two respects, however, Collingwood's sense of the purpose of history diverges from that of the Contextualists. First, Collingwood argued that one of the circumstances that enables an historian to gain access to the minds of persons long dead is that "[t]he past, or some part of it, continues to live in the present and may be retrieved by the traces it leaves behind."[189] In his autobiography, he elaborated this argument as follows:

> If P(1) has left traces of itself in P(2) so that an historian living in P(2) can discover by the interpretation of evidence that what is now P(2) was once P(1), it follows that the traces of P(1) in the present are not, so to speak, the corpse of a dead P(1) but rather the real P(1) itself, living and active though incapsulated within the other form of itself P(2). And P(2) is not opaque, it is transparent, so that P(1) shines through it and their colors combine into one.[190]

An apparent corollary of this perspective is that only a historian who is so situated in the present as to have access to the "traces" of particular aspects of the past is qualified to undertake the project of historical reproduction. This implies, in turn, that a historian ought not pick topics or texts too foreign to his own experiences or that require him to work "against the grain of his own mind."[191] More subtly, it seems to suggest that a sensitivity to the ways issues contested in the past remain pertinent in the present would be, not a distraction (as committed Contextualists would claim), but an aid to the historical enterprise.

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188. COLLINGWOOD, *supra* note 185, at 283.

189. Joseph M. Levine, *Objectivity in History: Peter Novick and R.G. Collingwood,* 21 CLIO 109, 124 (1992).

190. R.G. COLLINGWOOD, AN AUTOBIOGRAPHY 97-98 (1939). Some reasons to hesitate before accepting this conception of the way historians gain access to the past are reviewed in William W. Fisher III, *Making Sense of Madison: Nedelsky on Private Property,* 18 L. & SOC. INQUIRY 547, 571-72 (1993).

191. COLLINGWOOD, *supra* note 185, at 305.

Second, Collingwood argued that a historian must do more than excavate the intentions of past authors; "reexperiencing" their thoughts also entails critique.

> [R]e-enactment is only accomplished . . . so far as the historian brings to bear on the problem all the powers of his own mind and all his knowledge of philosophy and politics. It is not a passive surrender to the spell of another's mind; it is a labor of active and therefore critical thinking. The historian not only re-enacts past thought, he re-enacts it in the context of his own knowledge and therefore, in re-enacting it, criticizes it, forms his own judgment of its value, corrects whatever errors he can discern in it. This criticism of the thought whose history he traces is not something secondary to tracing the history of it. It is an indispensable condition of the historical knowledge itself. Nothing could be a completer error concerning the history of thought than to suppose that the historian as such merely ascertains "what so-and-so thought," leaving it to some one else to decide "whether it was true." All thinking is critical thinking; the thought which re-enacts past thoughts, therefore, criticizes them in re-enacting them.[192]

Both of these refinements in Collingwood's argument suggest that Textualism and New Historicism would be better adapted to the project of "reenacting the past" than they first might have appeared. Constant awareness of the extent to which one's own cultural position affects one's access to the past, plus an eagerness to argue with one's subjects—these characteristics shared by the Textualism and New Historicism would seem well suited to the kind of re-creation that Collingwood had in mind.

(4) Contribute to contemporary policy debates by enabling readers to assess the merits and preconditions of policies pursued in other societies. Viewed from this standpoint, the past consists of a set of (uncontrolled) experiments. The notion is that historically knowledgeable leaders will be able to capitalize on the successes and avoid the failures of their predecessors. Like the second objective, this goal is unpopular among historians in general, but somewhat more popular among legal historians.[193]

None of the four variants of the new intellectual history will be of much use in advancing this goal—for much the same reasons none was helpful in ad-

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192. *Id.* at 215-16.

193. A good recent example of legal history written in this spirit is DAVID J. LANGUM, CROSSING OVER THE LINE: LEGISLATING MORALITY AND THE MANN ACT (1994). As Langum presents it, the history of the White Slave Traffic Act of 1910 is a cautionary tale, revealing the futility and misguidedness of governmental regulation of consensual adult sexual relations and, more broadly, of all efforts to use the law to force a minority of the population to accept the moral code of the majority. *See id.* at 242-49. In his concluding paragraph, Langum crisply summarizes the lesson of the book:

> In legislative reaction to panic, rigidity of judicial interpretation, and oppressive moralism of enforcement, the Mann Act serves as a model of the sort of statute that ill-serves the country. In future incarnations, not necessarily concerning only interstate sexual activity, any such statute laden with presumptuous moralism will once again ill-serve the nation.

Id. at 259.

For another example of legal history in this vein, see PAUL CHEVIGNY, GIGS: JAZZ AND THE CABARET LAWS IN NEW YORK CITY 2 (1991) (seeking to extract from the history of the establishment and the dismantling of restrictions on the performance of jazz some insights into "a classic problem in the politics of law: under what circumstances are assertions of rights through litigation successful?").

vancing the second goal. Their shared indifference to economic and technological developments undermines their ability to provide appropriately comprehensive accounts of the conditions under which the "experiments" of the past were conducted. Further, their antifoundationalist, perspectival orientation is ill suited for rigorous testing of hypotheses concerning the merits of alternative public policies.

It is not surprising, consequently, that very few intellectual legal histories offer "lessons" to contemporary lawmakers. There are exceptions, however, and some may be found in the work of Guyora Binder and Robert Weisberg (although not in the work they submitted to this Symposium).[194] For example, from their recapitulation of Jack Katz's cultural analysis of criminal violence (itself well within the tradition of New Historicism), Binder and Weisberg extract a skepticism concerning the "causal chain linking incentives to crimes" and an associated critique of utilitarian theories of punishment.

> If violence is an aesthetic project of defining one's self by contrast to officially enforced norms of civility, it will not easily be commodified and reduced to the logic of price, and so will not likely yield to the brute force of heavier punishments and higher incarceration rates. An effective crime policy may not be a law enforcement strategy at all, but a cultural strategy.[195]

The earnest, programmatic tone of this argument differs strikingly from the ironic, teasing style of the bulk of their book; it is not clear that they reside comfortably together. But the argument at least suggests the possibility of hitching one of the new interpretive methodologies to the wagon of law reform.

(5) "[L]iberate the political imagination by revealing suppressed alternatives."[196] A common aspiration among politically progressive or radical historians is to write about the past in a fashion that undermines the naturalness of contemporary institutions and thereby encourages people today to imagine and to strive to achieve dramatically different social arrangements. History can have this effect in two ways—which are usually thought to be connected but are in fact separable. First, it can expand readers' awareness of alternatives simply by revealing that people in the past lived and thought in fundamentally different ways.[197] For example, the careful demonstration by recent family-law historians that, in the early nineteenth century, Americans did not conceive of a fetus as a person (at least before "quickening," which occurs near the midpoint

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194. *See* GUYORA BINDER & ROBERT WEISBERG, LITERARY CRITICISMS OF LAW (forthcoming 1998).

195. *Id.*

196. Robert W. Gordon, *Exchange with William Nelson on Critical Legal Studies*, 6 LAW & HIST. REV. 139, 178 (1988).

197. Marianne Constable's recent book on the history of the mixed jury is written partly in this spirit. The aim of the book, she tells us,

> is paradoxically twofold: on the one hand, indeed, to point to the ascendance of positivism—in which law appears as propositional knowledge of official acts of social policy that are validated by a sociological understanding of facts which, ignoring justice, confirms the coerciveness of the legal system; and, on the other, by showing the extensiveness and the limitations of that positivism, to hold open the possibility of another law.

MARIANNE CONSTABLE, THE LAW OF THE OTHER: THE MIXED JURY AND CHANGING CONCEPTIONS OF CITIZENSHIP, LAW, AND KNOWLEDGE 6 (1994).

of gestation) and consequently did not criminalize abortion in the early stages of a pregnancy[198] corrodes the contention of the contemporary "right-to-life" movement that abortion is self-evidently immoral. That corrosion, in turn, might facilitate reconfiguration of the debate, currently in stalemate in the United States, concerning the morality of abortion and the constitutionality of laws prohibiting it. Second, by revealing the contingency of events in the past, history can encourage readers to think more freely about their current options. In other words, it can leave readers with the impression that things easily could have come out differently—and they still can.[199] This is what Roland Barthes refers to as "strategic history," suggesting that we can draw wisdom from the past by reexperiencing the openness of the existential choices that confronted earlier actors.[200]

Both Structuralism and Contextualism are potentially effective in opening the readers' eyes in the first of the two ways just discussed. Indeed, denaturalization of current ways of thinking and acting through demonstration of how different things used to be was one of Foucault's central ambitions in deploying his variant of Structuralism.[201] Mark Poster explains:

> [Foucault] strives to alter the position of the historian from one who gives support to the present by collecting all the meanings of the past and tracing the line of inevitability through which they are resolved in the present, to one who breaks off the past from the present and, by demonstrating the foreignness of the past, relativizes and undercuts the legitimacy of the present. . . .
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> . . . .
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> [The] alien discourses/practices [of earlier epochs] are . . . explored in such a way that their negativity in relation to the present explodes the 'rationality' of phenomena that are taken for granted. When the technology of power of the past is elaborated in detail, present-day assumptions which posit the past as 'irrational,' are undermined.[202]

Contextualist legal histories often share this objective. For example, William Treanor and Morton Horwitz have argued that, until the late 1780s, many Americans believed that a government should have substantial latitude in expropriating the property of its citizens, and that this belief grew naturally out of

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198. *See* MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 155-95 (1985); JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900, at 3-6 (1978); Siegel, *supra* note 80, at 281-87.

199. Robert Gordon provides an example that combines (or blurs the difference between) these two effects:

> [I]t is exceedingly useful to be reminded that the present consensus, if it is one, that fundamental decisions about investment, production technologies, and the organization of work are for management to make is a very recent artifact of the post-World War II period, that it can hardly be explained simply as what American workers "want," because it was disputed for most of our history and has only (unstably) come to prevail after long and violent struggle.

Gordon, *supra* note 196, at 178. A fuller version of the argument appears in Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 81-87 (1984).

200. Bann, *supra* note 149, at 378.

201. *See* POSTER, *supra* note 16, at 74-78.

202. *Id.* at 74, 89-90; *see also* Gerard Raulet, *Structuralism and Poststructuralism: An Interview with Michel Foucault*, 55 TELOS 195, 210 (1983).

their immersion in the discourse and ideology of classical republicanism.[203] The goal—and, to some degree, the effect—of this argument was to reveal the contingency of Americans' current commitment (grounded in a classical liberal worldview) to the principle that property may not be "taken" for public use without just compensation.[204]

Structuralism and Contextualism hold little promise, however, for historians interested in enhancing in the second way readers' sense of the options available to them. Indeed, each one is worse in this respect than methodologies in vogue before the "linguistic turn." The reason is that, by emphasizing the power of conceptual systems to limit people's imaginations, they often leave the impression that historical actors had no real choices; they could not have thought—and thus they could not have acted—any differently. In his early work, for example, Foucault casts people as captives of the "epistemes" of their times.[205] Legal histories constructed on structuralist premises often leave a similar impression. Consider the following passage by Duncan Kennedy:

> The notion behind the concept of legal consciousness is that people can have in common something more influential than a checklist of facts, techniques, and opinions. They can share premises about the salient aspects of the legal order that are so basic that actors rarely if ever bring them consciously to mind. Yet everyone, including actors who think they disagree profoundly about the substantive issues that matter, would dismiss without a second thought (perhaps as "not a legal argument" or as "simply missing the point") an approach appearing to deny them.[206]

Kennedy's formulation seems to imply that, during periods in which a stable "legal consciousness" is in place, the intellectual freedom of individual lawyers is dramatically limited. Kennedy goes on to acknowledge that both the imperfections in a legal consciousness and the continued availability of residues of older paradigms accord individuals more liberty than his initial definition might suggest.[207] But the structuralist portion of his analysis plainly tilts in the direction of determinism.

Much the same must be said of the contextualist method. Indeed, in the late 1970s, when Contextualism was just beginning to take root in the field of intel-

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203. *See* Treanor, *supra* note 88, at 695 (noting that the "absence of a just compensation clause in [many of] the first state constitutions accorded with . . . the position held by many republicans that the property right could be compromised in order to advance the common good"); *see also* Morton J. Horwitz, *History and Theory*, 96 YALE L.J. 1825, 1833 (1987) (citing Treanor); Stephen A. Siegel, *Understanding the Nineteenth-Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence*, 60 S. CAL. L. REV. 1, 8 (1986). For a skeptical assessment (unrelated to the methodological point made in the text) of this account of the origins of the just-compensation principle, see Fisher, *Ideology, Religion, and the Constitutional Protection of Private Property: 1760-1860*, *supra* note 89, at 95-107.

204. For indications that the argument had some impact, albeit not enough to sway a majority of the United States Supreme Court, see *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1036 (1992) (Blackmun, J., dissenting).

205. *See* White, *supra* note 14, at 27.

206. Kennedy, *Toward an Historical Understanding of Legal Consciousness*, *supra* note 49, at 6.

207. *See id.* at 19-21.

lectual history, Thomas Haskell warned of this danger.[208] The central tenets of the (then) new method—that ideas have no meaning out of a particular interpretive context and that basic presuppositions control the way we view reality, not vice versa—reinforce, he contended, "the 'despairingly deterministic view of the past and the present' that too many students now hold."[209] Contextualism may not lead to determinism in any strict philosophic sense, he acknowledged, but does tend to produce accounts of events that have "an air of inevitability"; actions are not seen as flowing "from the conscious choices of thinking individuals who might have chosen other than they did."[210] Haskell did not view this tendency as sufficiently pernicious to require abandonment of the methodology, but he was plainly troubled by its erosion of readers' senses of freedom.[211] To the extent legal historians hope their work conduces to a fuller appreciation of contingency, they too should pause before pursuing the contextualist line.

From this standpoint, the textualist and new historicist approaches fare better. They are equally sensitive to the foreignness of the past, and they are both much more sensitive to gaps and ambiguities in discursive and conceptual systems—the opportunities for authors and actors to rework, and even transform, the discursive materials they inherit.

Their comparative advantage in this respect is exemplified by the contrast between two studies of the fate of the Legal Realist movement in the United States. In a rich book that anticipated many features of the contextualist revolution in intellectual history, Edward Purcell argued that Legal Realism is best understood and explained as one aspect or manifestation of a set of "conceptual assumptions that came to pervade American thought in general and the social sciences in particular during the twenty-year period after the [First World] war."[212] Those assumptions, he contended, provided Legal Realism much of its novelty and power, but also led it into a trap. Specifically, the Realists' commitment to the principle of the relativity of value rendered them vulnerable in the late 1930s to the charge that their ideas were weakening America's intellectual defenses against Fascism. Their understandable inability to imagine any way out of this bind contributed importantly, Purcell argued, to the deterioration of the movement.[213]

Through textualist lenses, Gary Peller sees the same period differently. American intellectuals in many fields who had been influenced by modernism

208. *See* Thomas L. Haskell, *Determinist Implications of Intellectual History, in* NEW DIRECTIONS IN AMERICAN INTELLECTUAL THEORY *supra* note 5, at 133 (citing Richard M. Hunt, *No-Fault Guilt-Free History*, N.Y. TIMES, Feb. 16, 1976, at A19).

209. *Id.* at 134.

210. *Id.* The tendency of contextualist history to depict historical agents as prisoners of their ideologies is also suggested by the following passage from BERNARD BAILYN, THE ORDEAL OF THOMAS HUTCHINSON ix (1974): "What impresses [the historian] most are the latent limitations within which everyone involved was obliged to act; the inescapable boundaries of action; the blindness of the actors—in a word, the tragedy of the event."

211. *See* Haskell, *supra* note 208, at 134-35.

212. EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE xi (1973).

213. *See id.* at 159-78.

were confronted with essentially the same accusation—that they were opening the way to Hitler. But (with a sizable dose of hindsight and deliberate anachronism), Peller is able to identify, not just one, but three effective possible responses to that accusation.

> One route would have been to continue carrying out the most radical implications of the modernist attack on the legitimacy of the old order by reflexively extending the premises of the social sciences, say of sociology or anthropology, to the social sciences themselves. . . .
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> . . . .
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> A second possible response to the charge of moral relativism would have been to take the modernist positions as representing a new, objective vision of truth and society, an actual correction of the "mistakes" of the traditionalists. . . .
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> The third alternative, the one chosen by the American intellectual mainstream, rejected both of these options. Instead of either continuing to contextualize claims of knowledge to social ideology, or offering the process of contextualization itself as the foundation for a substantive social theory based on the group and the social structure rather than the individual, the mainstream fifties thinkers answered the criticism of relativism by making the fact/value distinction a foundational organizing principle for post-War intellectual discourse.[214]

Peller goes on to contend that Dewey's recognition and pursuit of the third route in the field of philosophy not only blunted the attacks of his critics, but, after the war, provided "the cultural framework that defined for mainstream American intellectuals their roles as intellectuals and, more generally, their conception of the difference between freedom and domination."[215] Whatever one thinks of the accuracy of Peller's account, it plainly depicts its protagonists as far less the prisoners of their discourse than does Purcell's.

(6) Expose injustice and inspire indignation and commitment. The purpose of history, on this view, is to inspire contemporary readers to act to change their world, rather than merely identify the strategies they should pursue. For legal historians, this objective entails demonstrating how law in the past has contributed to oppression, in the hopes of thereby cultivating in readers an attitude of: "Never again."

None of the four variants of intellectual history is especially well suited to the pursuit of this goal. The aloof, diagnostic stance of both Structuralism and Textualism (as well as their off-putting technical vocabulary) hampers their ability to stimulate indignation, while the exculpatory, determinist tilt of Contextualism (explored in the preceding section) also inhibits anger. The New Historicists' empathetic explorations of historemes and the careers of individual people creates more opportunities to inspire fury in like-minded readers, but the involuted, polyphonic character of their arguments prevents them from capitalizing on many of those opportunities. So, for example, one comes away from Hartog's exploration of the career and writings of Elizabeth Packard with

214. Peller, *supra* note 108, at 581-83.
215. *Id.* at 585.

a somewhat enhanced appreciation of the unfairness of the legally constituted system of gender relations in the nineteenth-century United States,[216] but nowhere near as strong a reaction as one gets from reading traditional narratives recounting the lives of women who bore the yoke of coverture.[217]

(7) Increase (or decrease) readers' commitment to their cultural traditions. Some American historians believe that, by identifying and celebrating the unique and enduring features of American culture, they can help defend the achievements of liberalism ("Great Society"-style liberalism, not classical liberalism) against the intensifying skepticism and hostility of the increasingly selfish middle class. Among legal historians, the most forthright exponent of this view is William Nelson.[218] In a survey of recent work in legal history, he argues: "Historians may . . . be able to help by identifying those legal traditions which are an essential part of our legal culture. For if those traditions can be identified, judges and other decisionmakers . . . will feel constrained to follow them in order to avoid initiating revolutionary changes in that culture."[219] In a subsequent exchange with Robert Gordon, he elaborates:

> I think the government we have now [during the mid-1980s, the height of the "Reagan Revolution"] is precisely the government that the majority of Americans want and the government that best promotes the majority's interests and well-being. The communities of Middle America that periodically coalesce into a majority are the ultimate source of political power in the nation as we know it, and I fear government in accordance with the naked political preferences of this majority. I can think of no way to restrain this majority other than by appeals to law.[220]

The job of the politically responsible historian, he argues, should be to provide Americans with an understanding of the character and development of the legal system that will discourage them from indulging their more selfish or short-term desires.[221]

This objective has the worrisome characteristic that, to be most effective, it must be pursued covertly. To acknowledge an intent to inhibit your readers' ability to get what they "want"—to prevent them from electing representatives and adopting statutes that "best promote the majority's interests and well-being"—will presumably provoke skepticism. In any event, none of the four methodologies considered in this essay is likely to have much value for historians who take Nelson's position, because all four—for different reasons and in different ways—are disrespectful of the cultural canon. To take just one of Nelson's examples, the likelihood is small that an intellectual historian following any of the four methodologies would identify and celebrate as an enduring

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216. *See* text accompanying notes 130-139 *supra*.

217. For an inspiring collection of such narratives, see Carol Weisbrod, *Divorce Stories: Readings, Comments, and Questions on Law and Narrative*, 1991 BYU L. REV. 143.

218. *See* WILLIAM NELSON & JOHN PHILLIP REID, THE LITERATURE OF AMERICAN LEGAL HISTORY (1985).

219. *Id.* at 197.

220. William Nelson, *An Exchange on Critical Legal Studies between Robert W. Gordon and William Nelson*, 6 LAW & HIST. REV. 139, 167 (1988).

221. *See id.* at 167-68.

cultural tradition Americans' commitment to the "'hegemony of the individual' over nature, government, and the community."[222]

Nelson's suggestion may be more germane, however, if flipped.[223] Perhaps the best way to preserve or inculcate liberal values (tolerance, empathy, freedom of speech, etc.) is *not* to remind Americans of the traditions that have supposedly unified our culture, but to highlight, first, the rich array of groups and cultures that together have comprised the nation and, second, the ways in which contact among those groups has transformed each of them. In other words, the objective of historians in general and legal historians in particular should be to destabilize rather than reinforce Americans' nationalism and exceptionalism.

The four variants of contemporary intellectual history have a good deal more to contribute to such a project. To varying degrees, all are sensitive to the relationships between legal artifacts and class or cultural conflict. Of the four, the most promising would seem to be New Historicism.[224] Careful delineation of the imprint left on particular legal texts by struggles among groups; attentiveness to the "heterogeneous and unstable, permeable and processual" character of the ideological contexts against which legal texts must be read;[225] sensitivity to the ways texts have reflected or contributed to ideological change—each of these penchants bodes well for the multiculturalist agenda.

(8) Assist contemporary judges in construing constitutional texts. An important group of constitutional theorists have long argued that constitutional provisions should be construed in ways consistent with the "original intent" of their drafters or ratifiers,[226] and an important group of judges have agreed.[227] Assuming, for the sake of argument, that some form of "originalism" is both practicable and desirable as a way of applying the Constitution to contemporary problems,[228] can any of the new forms of legal history assist in the enterprise?

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222. *Id.* at 140 (citation omitted).

223. Robert Weisberg suggested this possibility in his comments at the *Stanford Law Review* Symposium at which the manuscript of this article was presented.

224. *See* text accompanying notes 36-46 *supra*.

225. *See* note 45 *supra* and accompanying text.

226. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 363-72 (1977); CHOPER, supra note 113, at 241-43; Edwin Meese III, *Construing the Constitution*, 19 U.C. DAVIS L. REV. 22, 23-26 (1985). For a careful study of the recent resurgence of originalism as a constitutional theory, see Morton J. Horwitz, *The Supreme Court, 1992 Term—Foreword: The Constitution of Change: Legal Fundamentality without Fundamentalism*, 107 HARV. L. REV. 30, 65-70 (1993).

227. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 123-27 (1989) (discussing the historical origins of parental rights); Payton v. New York, 445 U.S. 573, 583-85 (1980) (examining the origins of the Fourth Amendment); Katzenbach v. Morgan, 384 U.S. 641, 650-51 (1966) (reviewing the history of section five of the Fourteenth Amendment); Adamson v. California, 332 U.S. 46, 68-92 (1947) (Black, J., dissenting) (reviewing the legislative history of the Fourteenth Amendment); William W. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 706 (1976) (rejecting the notion of a "living constitution" as an "end run around popular government"); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852-53 (1989) (arguing in favor of interpreting the constitution "on the basis of what the constitution originally meant").

228. Skepticism on this score is expressed in Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 205-17 (1980); Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 471-500 (1981); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983). For a general survey of the com-

To date no historian's effort to ascertain the original understandings of constitutional provisions has employed, explicitly or implicitly, the methodologies of Structuralism, Textualism, or New Historicism—and for good reason. The insistence, shared by all three of those styles of historical inquiry, upon the slipperiness of language and the impossibility of locating the intent of the author of a text plainly makes them ill suited for an originalist project. The same is not true, however, of Contextualism. The contextualist method—Quentin Skinner's version, in particular—asserts that, by attending carefully to the discourse out of which a text grows (the vocabularies available to its author, the concepts and assumptions he took for granted, and the issues he considered contested), one can (and should) ascertain the author's intent.[229] If one can determine the original meaning of *The Prince* or *The Second Treatise* using this approach, why not the Contract Clause?

A few of the many originalist efforts at constitutional interpretation have adopted precisely this tactic. Justice Scalia, for example, has argued that to determine the original understanding of a constitutional provision one must do much more than merely read the text.

> Properly done, the task requires the consideration of an enormous mass of material—in the case of the Constitution and its Amendments, for example, to mention only one element, the records of the ratifying debates in all the states. Even beyond that, it requires an evaluation of the reliability of that material. . . . And further still, it requires immersing oneself in the political and intellectual atmosphere of the time—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day.[230]

Scalia's last sentence could easily have come from an essay by Skinner. A similar strategy is employed by Robert Kaczorowski in his originalist analysis of the Fourteenth Amendment.[231] Kaczorowski contends that we should not ask how the drafters (or ratifiers) of the Fourteenth Amendment would have responded to problems that have confronted courts in the middle and late twentieth century—such as whether public schools should be desegregated,[232] whether the Bill of Rights should be applied against the states,[233] or whether Congress should be permitted to proscribe private discrimination in places of public accommodation.[234] Instead, we should first identify the issue with which the framers of the amendment were most concerned and then try to de-

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peting arguments, see Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989).

229. *See* text accompanying note 19 *supra*.

230. Scalia, *supra* note 227, at 856-57.

231. *See* Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863 (1986).

232. *See, e.g.*, Alfred W. Kelly, *The Fourteenth Amendment Reconsidered: The Segregation Question*, 54 MICH. L. REV. 1049 (1956).

233. *See, e.g.*, William Winslow Crosskey, *Charles Fairman, "Legislative History" and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949).

234. *See, e.g.*, Alfred Avins, *Fourteenth Amendment Limitations on Banning Racial Discrimination: The Original Understanding*, 8 ARIZ. L. REV. 236 (1967).

termine their views on that issue.[235] Applying this method to the Fourteenth Amendment, Kaczorowski argues that the framers were preoccupied with the following question: "whether the national or the state governments possessed primary authority to determine and secure the status and rights of American citizens."[236] Their response was that, because "national citizenship was primary and state citizenship derivative, . . . Congress possessed primary authority to secure the civil rights of United States citizens."[237] Similarly, Martin Flaherty, in the course of a scathing attack on the ways history typically is invoked in constitutional scholarship and argument, has called for more general use of the contextualist method in determining the meanings of constitutional texts.[238]

On reflection, however, this strategy seems problematic, even self-defeating, as an adjunct to originalist constitutional interpretation. The central premise of the contextualist style of intellectual history is that the meaning of a text depends on its context. As Lawrence Lessig has pointed out, thorough-going acceptance of that principle is incompatible with a strong form of originalism.[239] Because the "context of writing" (the "range of facts, or values, or assumptions, or structures, or patterns of thought" that gave significance to the words employed by the draftsmen of a constitutional provision) often sharply differs from the "context of reading" (the analogous circumstances surrounding the efforts of contemporary judges to interpret those words), it is senseless to attempt mechanically to apply the drafters' intentions to contemporary problems.[240] For example, Lessig notes that a conscientious originalist analysis of the Establishment Clause would show that its drafters intended to proscribe all expenditures of public funds to support churches or ministers. A crucial presupposition of that intention, however, was that governments "did not generally provide benefits for social services to the nonprofit sector. In that context, aiding religious organizations meant aiding religion since the government aided no one else."[241] The situation in the late twentieth century is plainly different; public support for nonprofit organizations is now routine. In this altered climate, adherence to the proposition that all government spending that benefits religious institutions is unconstitutional would flout rather than respect the intention of the draftsmen of the clause.[242] Difficulties of this sort may explain why even the most adamant originalists are sometimes unwilling

235. *See* Kaczorowski, *supra* note 231, at 864-66.

236. *Id.* at 866-67 (citation omitted).

237. *Id.* at 867 (citation omitted).

238. *See* Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 554 (1995).

239. *See* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1182-88 (1993).

240. *Id.* at 1178.

241. *Id.* at 1240-41.

242. *See id.* at 1241-42 ("If the meaning of the original proscription hung upon the fact that aid to religion would have been discriminatory (since the government aided no one else), then continuing that proscription when government aid is no longer discriminatory would change the meaning of the original proscription."). For this argument, Lessig is relying upon Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992).

or unable to adhere to the method.[243] Increased reliance by originalists on contextualist intellectual history, by highlighting the differences between the contexts in which provisions were drafted and the contexts in which they are to be interpreted, would exacerbate rather than mitigate such difficulties.

Lessig's response to this insight is not to abandon Contextualism, but to propose a method (which he describes as "translation") for "neutralizing" the effect of changing contexts.[244] The objective of a judge called upon to construe an old constitutional provision, he argues, should be to select an interpretation of the text that renders its contemporary application "equivalent" to its application when first drafted. For the judge,

> A problem of translation is presented when, between the authoring and application context, there is a change in context of a certain kind. That change I have described as a change in presuppositions, a change which, had it occurred in the authoring context, would have required a change in the text in that context for the meaning in that context to be preserved. If a presupposition changes, then the translator must accommodate that change in the current context if fidelity is to be achieved. In accommodating that change, the translator will strive to make the smallest possible change necessary to preserve as much from the original context as is possible.[245]

Contextualist history, Lessig suggests, could facilitate this task, by enabling the judge to develop "familiarity" with—to feel "at home" in—"both the culture from which the source text derives and the culture to which the target text will apply."[246]

While Lessig's strategy is surely more plausible than unreformed originalism, it has difficulties of its own—difficulties that contextualist historical inquiries again are likely to worsen rather than alleviate. When the change in context between the drafting of a constitutional provision and its interpretation involves not a technological advance (e.g., the invention of better devices for eavesdropping, thus creating new threats to privacy)[247] or a new institution (e.g., the advent of professional police forces, creating new dangers of self-incrimination),[248] but a shift in ideology or worldview, then "equivalence" of the sort Lessig celebrates seems chimerical. Consider, for example, the constitutional requirement that "The United States . . . guarantee to every State in this Union a Republican Form of Government."[249] A contextualist reading of that

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243. Justice Scalia, for example, admits that, although the draftsmen of the Eighth Amendment surely would not have regarded flogging as "cruel and unusual punishment," he might well find constitutionally problematic a twentieth-century statute that authorized use of the sanction. *See* Scalia, *supra* note 227, at 861-64. Sensitivity to the perverse implications of unflinching originalism may also help explain Scalia's reluctance to employ the method when analyzing claims that governmental regulations of private property constitute unconstitutional "takings." *See* William W. Fisher III, *The Trouble with* Lucas, 45 STAN. L. REV. 1393, 1394-95 (1993).

244. Lessig, *supra* note 239, at 1241-42. For an application of this method, see Treanor, *supra* note 88.

245. Lessig, *supra* note 239, at 1214.

246. *Id.* at 1194-95 (citation omitted).

247. *See id.* at 1237-40.

248. *See id.* at 1233-37.

249. U.S. CONST., art. IV, § 4.

provision would begin by observing that it was originally proposed by James Madison,[250] who undoubtedly drew upon the enormously complex meaning in late eighteenth-century British North America of the term "republican." Assuming that, through immersion in the enormous body of relevant historical work,[251] we could ascertain what Madison and his colleagues meant by requiring the Federal Government to ensure that each state have a "republican" system of government (not an easy task in itself), what would it entail to "translate" that requirement into the context of contemporary American politics—a system in which most of the components of the republican ideology are largely absent?[252] Strict enforcement of (state) statutes whose enactment represents compromises among rival interest groups—on the theory that pluralistic democracy is the contemporary "equivalent" of the participatory democracy that the republicans celebrated? Alternately, perhaps a greater willingness to uphold (state) statutes that issue from a process of empathetic deliberation concerning the common good, rather than crass log-rolling,[253] on the theory that we should at least try to cultivate civic virtue within our (state) legislatures, even if we no longer consider it an obligation of ordinary citizenship? The answer seems wildly indeterminate—and the more serious the contextualist inquiry on which the analysis is based, the more glaring the indeterminacy becomes.

In sum, contextualist intellectual history at first seems a potentially powerful tool in the hands either of an originalist judge or a judge committed to the sort of "fidelity through translation" advocated by Lessig. In both instances, however, its utility in the end proves doubtful.

A radically different way in which constitutional lawyers might look to history has recently been sketched by Cass Sunstein. Fidelity to the past, Sunstein suggests, need not be a judge's or scholar's central concern. Instead, her ultimate goal should be the construction of the best possible contemporary interpretation of a constitutional provision. This does not imply that she can ignore altogether the history of the provision, but it alters the kind and degree of constraint exerted on her interpretation by the past.

> On this view, constitutional lawyers, unlike ordinary historians, should attempt to *make the best constructive sense out of historical events associated with the Constitution.* They do owe a duty of "fit" to the materials; they cannot disregard the actual events, which therefore discipline their accounts. But they also try to conceive of the materials in a way that makes political or moral sense, rather than nonsense, out of them to current generations.[254]

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250. *See* WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 41-42 (1972).

251. *See, e.g.*, GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 3-45 (1969); Rodgers, *supra* note 7, at 12-24.

252. Put to one side, for the purpose of this exercise, the troubling question of whether responsibility for enforcement of the clause should be allocated to Congress or the federal courts. *See* Luther v. Borden, 48 U.S. (7 How.) 1 (1849).

253. *Cf.* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

254. *See* Sunstein, *supra* note 147, at 602.

The stance that Sunstein commends—a mixture of respect for events as they happened and a forthright effort to interpret and arrange those events in a pattern that points toward doctrinal reform that the interpreter independently deems desirable—seems to resemble the deliberately compromised stance advocated by textualist historians.[255] While this parallelism suggests that Sunstein (and other like-minded constitutional theorists) could derive inspiration and support from LaCapra, Harlan, and their compatriots, such reliance might draw them in two discomfiting directions. First, the textualist intellectual historians typically adopt and celebrate a forthrightly perspectival tone in which the author acknowledges, even flaunts, the partiality of his view of the past. To date, very few constitutional lawyers (even those Sunstein commends) have adopted such a tone. For example, Bruce Ackerman, whose massive work in progress, *We the People*, could (Sunstein suggests) be defended as an effort to construct the sort of narrative Sunstein champions,[256] delivers his story of the successive informal amendments of the Constitution in a stubbornly Rankean tone—and invites criticism, consequently, for the liberties he takes with "the facts."[257] Sunstein, apparently, wishes Ackerman were more candid in this respect. But candor has a price. Confessing to readers that one's account of the past "need not entirely track that of the historian"[258] may cost the constitutional lawyer more credibility than he can afford.

The second respect in which Textualism may be an intriguing but risky methodological resource for Sunstein concerns its penchant for subversive, noncanonical interpretations. Sunstein plainly prefers accounts of our constitutional past that "put things in a favorable or appealing light without, however, distorting what actually can be found."[259] It is not altogether clear why. Why, for instance, is Thurgood Marshall's searing reading of the racism of the pre-Civil War federal Constitution[260] less helpful in constructing sound contemporary doctrine than more cheery readings of the same document? In view of the instability of Sunstein's preference for benign rather than harsh constitutional narratives, he might find the irreverence of the Textualists dangerously contagious.

(9) Play. From this standpoint, history—like all interpretive enterprises—is a source of amusement and sensual pleasure. It can and should resemble (as Roland Barthes says of literary criticism) erotic play.[261] It can, in other words, stimulate and enliven both writer and reader.

You might think that the extent to which a piece of history advances this end would depend more upon the personality and skills of the historian than on the methodology she employs. A great historian should be able to entertain, tease, or seduce her readers or herself, using any language or style. But that

255. *See* text accompanying note 31 *supra*.
256. *See* Sunstein, *supra* note 147, at 603 (discussing Bruce Ackerman).
257. *See, e.g.*, Fisher, *supra* note 8, at 964-74.
258. Sunstein, *supra* note 147, at 607.
259. *Id.* at 603.
260. *See* Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987).
261. *See* ROLAND BARTHES, THE PLEASURE OF THE TEXT (1975).

prediction is undercut by a survey of the field. At least within the world of *legal* history, there are very few examples of structuralist or contextualist essays that make you sit up and smile.[262] On reflection, that is not surprising. Playful historians are more likely to be drawn to, or to have been shaped by, the postmodern aesthetic shared by the textualist and new historicist approaches. Those are the methodologies most attuned to irony, most sensitive to the subtle interaction of arguments, most prone to punning and unexpected juxtaposition—in short, most playful. By contrast, the more ponderous and dour styles characteristic of Contextualism and Structuralism, hamper the ability of their adherents to participate in the analytic dance.

The compatibility of Textualism and play—as well as the risks associated with history in this style—are suggested by an analogy recently drawn by LaCapra between deconstructionist interpretation and jazz:

> In literary criticism that emulates creative writing, a reading [of a text] may be praised to the extent that it is a strong misreading and engages its object in an unpredictable, even strangely disconcerting or uncanny, performative manner. Indeed, the stronger the misreading the better insofar as the strength of a misreading is indicative of the extent to which it appears performative, creative, or even original and brings out what is not evident in the text that becomes its pretext. . . . Disseminatory writing as well as strong misreading is somewhat comparable to the "riff" in jazz wherein one musician improvises on a tune or on the style of an earlier musician. As in jazz, the more traumatic or disjunctive variations (or changes within repetition) may from a certain point of view be the most impressive. In this respect, Derrida may perhaps be seen as the John Coltrane of philosophy or of some hybridized genre it remains difficult to name.[263]

LaCapra goes on to suggest that this style of reading and writing is problematic as a way of doing history (in contrast to literary criticism); it accords too little respect to the texts being interpreted and increases the danger that the analyst will fall into the moral trap exemplified by Derrida's "unfortunate" effort to reaccredit Paul de Man's anti-Semitic World War Two journalism.[264] But LaCapra's analogy remains evocative in two respects. First, it reminds historians of the extent to which we take pleasure in—and hope our readers take pleasure in—provocative, eye-opening, strenuous readings of documents. Textual interpretations (even of judicial opinions) can be—and can be appreciated as—performances. Second, it suggests that the postmodern paradigm may hold the greatest promise for producing readings of this sort.

CONCLUSION

The methodological debates among intellectual historians who think of themselves as having taken the "linguistic turn" have both excited and riven the

262. One of the few may be Duncan Kennedy's watch-my-dust structuralist analysis of Blackstone's Commentaries. *See* Kennedy, *supra* note 50.

263. Dominick LaCapra, *History, Language, and Reading: Waiting for Crillon*, 100 AM. HIST. REV. 799, 815 (1995).

264. *Id.* at 815-17.

field. Most intellectual historians feel today that they are participating in a vital but unstable enterprise, in which the stakes are high and in which the ultimate value of their work is regularly questioned and must as often be reconsidered or defended. In recent years, legal historians' invocation of the new methods of intellectual history have become more common and conscious. At the same time (and partly as a result), disagreement among legal historians concerning methodological issues has been increasing. This essay has sought to accomplish two things. First, it has attempted to enhance legal historians' awareness of the methodological options available to them. Second, it has encouraged legal historians to evaluate, choose among, or transcend those options, not by deciding which (if any) is convincing in the abstract, but by deciding why they are writing about the history of law and selecting (or inventing) a method likely to facilitate their goals.