Note

History as Precedent: The Post-Originalist Problem in Constitutional Law

Emil A. Kleinhaus

I. INTRODUCTION

"[T]he 'historical' past . . . is a complicated world,"[1] the political philosopher Michael Oakeshott wrote. "[I]n it events have no over-all pattern or purpose, lead nowhere, point to no favoured condition of the world and support no practical conclusions."[2] The U.S. Supreme Court does not share Oakeshott's skepticism about the practical application of historical knowledge. As the constitutional historian William Wiecek has noted, the Supreme Court "is the only institution in human experience that has the power to *declare* history,"[3] and the Court exerts that power frequently. The Court, however, does not derive clear lessons from forgotten events in the crude manner disfavored by Oakeshott. Instead, the Court invokes history in order to ground its decisions in the original Framing and ratification of the Constitution and its amendments.[4] Even Justice Brennan, who decried excessive reliance on history in constitutional interpretation,[5] commented in one decision that "the line we must draw

1. MICHAEL OAKESHOTT, *The Activity of Being an Historian*, *in* RATIONALISM IN POLITICS AND OTHER ESSAYS 151, 182 (1991).
2. *Id.*
3. William M. Wiecek, *Clio as Hostage: The United States Supreme Court and the Uses of History*, 24 CAL. W. L. REV. 227, 227 (1988).
4. *E.g.*, Robert Post, *Theories of Constitutional Interpretation*, *in* LAW AND THE ORDER OF CULTURE 13, 21 (Robert Post ed., 1991) (describing the "historical" strand of constitutional interpretation).
5. William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433 (1986).

between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers."[6]

The rise and impact of originalism has turned the Supreme Court's use of history into a controversial subject. For most originalists, when the plain meaning of a constitutional provision is unclear, the original understanding of that provision should be privileged above all other possible understandings and applied to the specific case at hand. Otherwise, as Robert Bork has argued, the Court merely "imposes its own value choices" and "violates the postulates of the Madisonian model that alone justifies its power."[7] Some originalists go further and claim that the original intent of the Framers regarding the meaning of the Constitution, above and beyond even the plain meaning of its text, should be dispositive.[8] Reacting to the Warren Court's activist stance, proponents of originalism have demanded that the Court's jurisprudence be synchronized with the text and original understanding of the Constitution.[9]

The originalist project, by all accounts, relies heavily on historical analysis. In order to elucidate the original meaning of the vague terms that pervade the Constitution, Justices often either delve into primary sources or rely on historians to explain those sources. Referring to the process of historical inquiry in constitutional law, Justice Scalia admitted, "It is, in short, a task sometimes better suited to the historian than the lawyer."[10] Yet originalists minimize the difficulty of gaining a clear understanding of the Constitution and its amendments through historical research.[11] Edwin Meese, for example, declared that "the Constitution is not buried in the mists of time."[12] If Meese was right, the originalist project is relatively simple.[13] Given the opportunity to interpret a vague constitutional provision

6. Sch. Dist. v. Schempp, 374 U.S. 203, 294 (1963) (Brennan, J., concurring).

7. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3 (1971).

8. *See* Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court's Uses of History*, 13 J.L. & POL. 809, 884-85 (1997) (distinguishing Justice Thomas's emphasis on original intent from Justice Scalia's emphasis on original meaning).

9. *E.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 69-100 (1990) (tracing the Warren Court's abandonment of the original understanding of the Constitution in a variety of areas); Edwin Meese, *Interpreting the Constitution*, *in* INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 6 (Jack N. Rakove ed., 1990) (offering historical examples of cases in which Justices rightly resorted to "a jurisprudence of original intention").

10. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 857 (1989).

11. *See, e.g.*, Bruce Ackerman, *Robert Bork's Grand Inquisition*, 99 YALE L.J. 1419, 1422 (1990) (reviewing BORK, *supra* note 9) (noting the conspicuous absence of primary or secondary historical citations in Bork's book on originalism).

12. Meese, *supra* note 9, at 14.

13. This Note does not discuss the merits of originalism as an approach to constitutional interpretation. For critiques of originalism on a variety of grounds, see, for example, RONALD DWORKIN, LAW'S EMPIRE 359-69 (1986); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); H. Jefferson Powell, *The Original Understanding of*

in the appropriate case, an originalist judge will consult the text and relevant historical sources and bring the law into line with the original understanding. The originalist thus ascribes excessive doctrinal change to nonoriginalist adventurism and defends further short-term change on the grounds that it will bring the Court's jurisprudence permanently back to its historical foundations.[14] As one scholar put it, originalism "seeks to freeze meanings against erosion by time."[15]

The postulate that originalism, because it seeks to ground constitutional law in a particular moment, must lead to a set of "frozen" results is widely affirmed,[16] but it is not always accurate. Despite the best efforts of historians to reach decisive historical conclusions, the most plausible interpretation of a historical text changes over time. Historians' understanding of the Constitution and its amendments develops as they interpret and synthesize documentary evidence. Further, since research about particular historical questions intensifies after Justices "declare" history, historical conclusions that are incorporated into the law can be particularly vulnerable.[17] To the extent that Justices rely on historians when they declare history, Justices' conception of the document's original meaning must change along with historians'. Moreover, to the extent that Justices engage in independent historical inquiries, their conception of the document's original meaning can change even more dramatically as they encounter previously overlooked documents or compelling secondary interpretations of those documents. Therefore, even if the Supreme Court's jurisprudence were to coincide exactly at a particular point in time with the Justices' conception of the original understanding, that coincidence would not spell the end of non-amendment-based constitutional development, unless Justices simply ignored new information after that point. Ultimately, the more Justices use historical research as a decisive interpretative tool, the more substantial the body of law that one scholar has called the "common

Original Intent, 98 HARV. L. REV. 885 (1985); and Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

14. BORK, *supra* note 9, at 155-56; *see also* Robert Burt, *Precedent and Authority in Antonin Scalia's Jurisprudence*, 12 CARDOZO L. REV. 1685, 1688 (1991) ("Scalia thus seems to speak of precedent with a forked tongue: he must overrule a raft of past judicial decisions in order to establish a regime in which past precedents will be faithfully and rigidly followed.").

15. Robert Gordon, *The Struggle over the Past*, 44 CLEV. ST. L. REV. 123, 132 (1996); *see also* H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 698 (1987) ("The very point of [originalists'] turn to history is to escape from interpretative freedom.").

16. *See, e.g.*, John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 98 (1999) (telling originalists to stop reading his essay because they do not believe in "both the inevitability and the desirability of constitutional evolution").

17. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 99-102 (1962) (showing that the historical conclusions in a variety of well-known opinions, such as Justice Brandeis's dissent in *Whitney v. California*, 274 U.S. 357, 372 (1927), and Justice Black's dissent in *Adamson v. California*, 332 U.S. 46, 68 (1947), were soon abandoned by historians in favor of opposite or substantially modified conclusions).

law of history"[18] becomes, and the more vulnerable the Court itself becomes to extralegal historical criticism.[19]

This Note poses the post-originalist problem, or the problem of how Justices committed to an originalist approach deal with historical analysis that challenges the historical narrative created in earlier decisions. This precise question has continually presented itself to the Rehnquist Court,[20] and because so many Rehnquist Court opinions contain extended historical argumentation, it will undoubtedly present itself more in the future. But as this Note illustrates, Justices have adopted conflicting approaches to innovative historical inquiry, which has led to unpredictable results when "official" history has been challenged. Despite the practical impact of originalism, however, few scholars have directly addressed the Court's treatment of its own codified historical narrative.[21]

Part II shows that originalists' attitudes toward precedent, as well as the emergence of credible historical studies that challenge longstanding assumptions about the Founding period and Reconstruction, heighten the need for a systematic approach to relevant new historical evidence. Part III briefly outlines the different types of "new" historical evidence that are presented to the Court, concluding that the evidence used by the Court cannot be divided into the two rigid categories—"primary" and "secondary" evidence—often used by historians. Part IV, borrowing terms from Sanford Levinson's *Constitutional Faith*,[22] isolates two opposing strands of historical analysis employed and defended by Justices, and concludes that the strands lead to divergent postures toward persuasive historical argument that challenges the Court's official history. While one strand of historical analysis, which is analogous to Levinson's "protestant" strand of constitutional interpretation, leads to the conclusion that innovative historical argumentation can have a profound effect on constitutional doctrine, the other strand, or the "catholic" strand, leads to the conclusion that it usually should be ignored.[23] Both strands, however, have notable shortcomings when employed on their own, and neither strand

18. Richards, *supra* note 8, at 889.

19. BICKEL, *supra* note 17, at 102-03 (demonstrating that Justices' assertions regarding an "exact original intention" are vulnerable to scholarly criticism); *see also* William N. Eskridge, Jr., Hardwick *and Historiography*, 1999 U. ILL. L. REV. 631, 682 (noting that the Supreme Court's historiographical errors in *Bowers v. Hardwick*, 478 U.S. 186 (1986), illustrate "the slipperiness of originalism").

20. *See, e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997); Seminole Tribe v. Florida, 517 U.S. 44 (1996). These cases and others will be discussed in detail below. *Infra* text accompanying notes 76-102.

21. One scholar who does mention the Court's relationship with its own previous historical conclusions is Neil Richards. Richards, *supra* note 8, at 856 (noting that the Court often presents its own previous historical conclusions as "precedent standing for a principle").

22. SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988).

23. *See id.* at 27-30.

accurately captures the Court's practice, which often involves using the two strands together.

While Parts II through IV lay out the post-originalist problem, the remainder of the Note offers a preliminary response to the problem by drawing a comparison between originalism in American constitutional law and Jewish law. Like judicially generated post-originalist constitutional change, legal development within the Jewish tradition often results from a complex process of historical rediscovery. Part V looks at some of the ways in which rabbis, who have integrated various forms of historical analysis into the law throughout Jewish history, have engaged in that process of rediscovery. While acknowledging the limitations of the analogy between constitutional and religious law, Part V argues that an interpretative framework derived from certain modern rabbinic decisions—or a multitextual approach—combines some of the advantages of the two historical approaches described in Part IV. The multitextual approach leads judges to inquire into the original understanding of a foundational text, but grounds that inquiry in the traditional understandings of the text. In doing so, the approach minimizes the doctrinal instability that might result from constant historical reinterpretation without compromising the originalist's commitment to genuine historical inquiry. Finally, Part VI synthesizes Parts IV and V by measuring the substantive contributions that a multitextual approach could make to an originalist's treatment of history. Drawing on cases from the sovereign immunity context, Part VI shows that the multitextual approach defines boundaries for the treatment of innovative historical analysis, but does not compel specific results in most cases. Therefore, while the analogy to Jewish law yields no complete response to the post-originalist problem, it points toward a genre of judicially generated history, as well as criticism of that history, that can be reconciled with the multiple goals of the originalist project.

II. STARE DECISIS AND THE REPUBLICAN REVIVAL

This Part makes two related claims. First, it argues that the originalist critique of stare decisis renders originalists' own historically grounded opinions vulnerable to criticism on historical grounds. Second, it argues that the republican revival in constitutional history, which has seeped into judicial opinions, endangers the body of official history that rests on longstanding historical assumptions. The Part concludes that the originalists' posture toward precedent and the "turn to history"[24] in

24. The phrase "turn to history" comes from LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 132 (1996).

constitutional scholarship make originalists' approaches to new historical evidence especially worthy of examination.

A. *Stare Decisis*

New historical evidence matters to originalist judges only to the extent that they are willing to overturn precedent. If they are not willing to do so, no matter how much historians might criticize the Court's history, their first answer to a historical question will generally be their last. Likewise, they will defer to rulings that are not grounded in the original understanding. To that end, Justice Scalia has responded to the claim that originalism is "medicine that seems too strong to swallow" by insisting that "almost every originalist would adulterate it with the doctrine of stare decisis—so that *Marbury v. Madison* would stand even if Professor Raoul Berger should demonstrate unassailably that it got the meaning of the Constitution wrong."[25] Justice Scalia's outlying example is revealing, however, because in a variety of areas, Justice Scalia himself has been willing to disregard established precedent.[26] Moreover, even when he has decided to uphold a precedent, he has often found independent textual or historical reasons for doing so.[27] Chief Justice Rehnquist and Justice Thomas have also been willing to overturn precedent, especially in constitutional cases,[28] and Justice Thomas has even considered overturning *Calder v. Bull*,[29] a 1798 decision holding that the Ex Post Facto Clause applies only in the criminal context.[30]

Originalists defend their attitude toward stare decisis based on history and principle. Bork, for example, points out that some of the Court's most

25. Scalia, *supra* note 10, at 861.

26. *E.g.*, Walton v. Arizona, 497 U.S. 639, 671-73 (1990) (Scalia, J., concurring) (declining to follow *Lockett v. Ohio*, 438 U.S. 586 (1978)); Webster v. Reprod. Health Servs., 492 U.S. 490, 535-37 (1989) (Scalia, J., concurring) (declining to follow *Roe v. Wade*, 410 U.S. 113 (1973)).

27. Burt, *supra* note 14, at 1686 ("Prior rulings command Scalia's respect primarily when he sees independent reasons that would lead him to decide the case the same way if it first appeared before him today.").

28. *E.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 954-55 (1992) (Rehnquist, C.J., joined by White, Scalia, & Thomas, JJ., concurring in part and dissenting in part) ("Erroneous decisions in such constitutional cases are uniquely durable, because correction through legislative action, save for constitutional amendment, is impossible.").

29. 3 U.S. (3 Dall.) 386 (1798).

30. E. Enters. v. Apfel, 524 U.S. 498, 538-39 (1998) (Thomas, J., concurring) ("Since *Calder v. Bull* . . . , this Court has considered the *Ex Post Facto* Clause to apply only in the criminal context. I have never been convinced of the soundness of this limitation . . . . In an appropriate case, therefore, I would be willing to reconsider *Calder* and its progeny . . . ."). In other cases, however, Justice Thomas, while advocating a return to the original understanding, *has* given weight to the early decisions of the Court. *E.g.*, United States v. Morrison, 120 S. Ct. 1740, 1759 (2000) (Thomas, J., concurring) ("[T]he very notion of a 'substantial effects' test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases.").

celebrated opinions overturned longstanding precedent.[31] With the exception of the earliest decisions of the Court, which were made by Justices whose superior knowledge of the original understanding must be presumed, Bork insists that precedent should not bind sitting Justices who are devoted to the original understanding.[32] Gary Lawson, meanwhile, argues not only that precedents can be overruled, but that refusing to overrule a precedent at odds with a Justice's conception of the objective meaning of the Constitution is itself unconstitutional.[33] The originalists' attitude toward precedent leads to the conclusion that just as historically minded Justices are willing to overturn precedents that depart from the original understanding, they should also be willing to overturn precedents that misconstrue the original understanding. The question of how Justices should deal with new historical evidence is thus highly relevant in an era in which the Court constantly issues official versions of history that can be challenged in later cases.

B. *The Republican Revival*

The rise of originalism has gone hand in hand with a reaction against the Warren Court's "responsive" jurisprudence.[34] But constitutional lawyers have not simply surrendered historical analysis to conservative jurists; rather, they have produced an influx of historical scholarship that challenges the fundamental assumptions of the conservative originalist world view.[35] Drawing on the work of prominent historians such as Bernard Bailyn, Gordon Wood, and J.G.A. Pocock, whose work has been characterized as the "republican revival,"[36] legal scholars have contributed to an interpretation of the Founding in which republican concepts such as popular sovereignty played a critical role. While some scholars have drawn lessons from the tradition of deliberative democracy in the Founding

31. BORK, *supra* note 9, at 155-56.

32. *Id.* at 157. Bork, however, excepts those decisions that are "fundamental to the private and public expectations of individuals and institutions" from his general analysis. *Id.* at 158.

33. Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994).

34. *See generally* PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION 155-84 (1999) (showing that it has generally been assumed that historical analysis undermines Warren Court decisions).

35. Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 FORDHAM L. REV. 87, 96-104 (1997).

36. These historians have been associated with the republican revival because they challenged the dominant classical liberal conception of the Founding period promulgated by earlier historians such as Louis Hartz, and offered an alternative interpretation of the period according to which republican values such as civic virtue and egalitarianism, in addition to class interest, made a decisive difference. For a complete discussion of the republican revival and its impact on legal scholarship, see KALMAN, *supra* note 24, at 147-63; and 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 24-33 (1991).

period, others have focused on later moments in American history, arguing that the Founding should not be the exclusive guidepost for historically minded interpreters of the Constitution.[37] Meanwhile, scholars have also questioned the classic account of Reconstruction articulated by historians such as Charles Fairman and Raoul Berger, according to which the Fourteenth Amendment was not intended to incorporate the Bill of Rights.[38] In short, a new form of originalism, or "an originalism of the communitarian left,"[39] has arisen in reaction to its conservative counterpart.

Of course, much of the literature associated with the republican revival has little or no direct application to real cases. Nevertheless, in some areas, the republican revival in legal scholarship, and the attention it has brought to particular historians, has armed judges and lawyers to take on conservative originalists on their own terms.[40] Justice Souter's dissent in *Seminole Tribe v. Florida*,[41] which is discussed in detail below,[42] provides a remarkable example of how the new scholarship has infiltrated judicial opinions. As one scholar wrote, Justice Souter's opinion, which challenges the conclusion that the Eleventh Amendment prevents Congress from abrogating state sovereign immunity pursuant to the Indian Commerce Clause, "reads . . . like a law review article from one of the republican revivalists."[43] The direct line of influence from historians to legal scholars to judges, like the originalist attitude toward stare decisis, further reinforces the post-originalist problem, for it indicates that the prevailing official history can be challenged further.

III. CATEGORIES OF HISTORICAL EVIDENCE

At first glance, the post-originalist problem seems to be two separate problems, given that new primary evidence such as a previously inaccessible ratification debate cannot be equated with secondary evidence

37. The literature on republicanism and constitutional law is vast and diverse. *See, e.g.*, ACKERMAN, *supra* note 36 (arguing that Reconstruction Republicans and New Deal Democrats fundamentally changed the Constitution outside of Article V); Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988) (arguing that republican constitutional thought leads to a theory of judicial review that demands judicial action in cases such as *Bowers v. Hardwick*, 478 U.S. 186 (1986)); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985) (arguing that the deliberative concept of democracy central to the republican political tradition provides a foundation from which judges can evaluate political processes and outcomes).

38. *E.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS 181-215, 303 (1998) (attacking the traditional account of Reconstruction and noting the traditional account's continued prominence among judges and lawyers).

39. JACK N. RAKOVE, ORIGINAL MEANINGS 22 (1996).

40. AMAR, *supra* note 38, at 302 ("[L]awyers' accounts of the Creation cannot ignore the lessons of the 'republican revival,' and our narrations of Reconstruction must be informed by generations of revisionist historians.").

41. 517 U.S. 44 (1996).

42. *Infra* text accompanying notes 76-98.

43. Richards, *supra* note 8, at 862.

such as an article that reinterprets the tenth *Federalist* paper. Yet this binary conception of historical evidence does not accurately capture the types of historical evidence that actually make a difference in constitutional cases. In practice, judges probably never deal with totally new primary evidence, because they simply do not spend their time searching for new sources. By the time judges encounter it, even new documentary evidence is intertwined with the secondary analysis of historians. The historical analysis that presents itself in constitutional cases should therefore be viewed on a continuum rather than in neat categories. That continuum stretches from recently discovered documents and the initial historical conclusions they have spawned at one end to new readings of intensely analyzed constitutional provisions at the other.

Newly discovered documents, and historians' interpretations of those documents, can have a profound effect on historically minded judges. Since 1900, historians have collected and then compiled an array of crucial sources, including the ratification debates, influential pamphlets from the revolutionary period, and Anti-Federalist literature.[44] These collections, and the resulting scholarship, have at times changed the way in which lawyers and judges conceive of the Constitution and its amendments, and, in a few cases, led the Supreme Court to revise its official historical narrative.[45]

Erie Railroad v. Tompkins[46] represents one well-known example of a case in which documentary evidence discovered and interpreted by a legal scholar had a tangible effect on a decision before the rise of originalism. In that case, the Supreme Court overruled *Swift v. Tyson*,[47] the longstanding precedent allowing federal judges to resort to a federal common law. To reach its result, the *Erie* Court relied directly on a law review article by Charles Warren in which he introduced and deciphered a previously unknown draft of the Judiciary Act of 1789, a draft that showed that federal courts should apply the laws of states while exercising diversity jurisdiction.[48] In the rare cases in which new primary evidence can have an impact, the Justices, and litigants who have appeared before them, have relied on articles like Warren's to draw historical conclusions.[49]

Yet the historical evidence incorporated by Justices into their opinions almost always falls somewhere in the middle of the continuum described

44. AMAR, *supra* note 38, at 303-04.

45. For a thorough summary of the collections of relevant documents that have been compiled in the twentieth century, see James Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1 (1986).

46. 304 U.S. 64 (1938).

47. 41 U.S. (16 Pet.) 1 (1842).

48. *Erie*, 304 U.S. at 72-73 & n.5 (invoking Warren's article); *see also* Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923).

49. For a detailed discussion of historical evidence in *Erie*, *Brown v. Board of Education*, 347 U.S. 483 (1953), and other cases, see Buckner F. Melton, Jr., *Clio at the Bar: A Guide to Historical Method for Legists and Jurists*, 83 MINN. L. REV. 377, 388-91 (1998).

above. While originalist Justices will probably be willing to uproot an entrenched historical narrative in the rare case in which new and decisive documentary evidence has emerged, their approach toward innovative and persuasive historical analysis based on previously available sources is far more complex. Before declaring history, Justices often interpret primary sources independently, but because of the massive institutional barriers that prevent them from producing thorough historical research, they use historians and legal scholars as guides. These scholars are cited because they draw attention to particular documents and synthesize those documents with the historical record as a whole, thus drawing specific conclusions that can be imported into opinions. But such importation is highly controversial. Justices committed to historical inquiry have disagreed about the precise role of historiography in the interpretative process, and that disagreement has significant implications for the Court's treatment of innovative historical analysis.

IV. TWO ORIGINALIST APPROACHES

Through a close reading of two cases in which Justices conducted extensive historical inquiries in the face of preexisting official history, this Part explicates two divergent approaches toward using history in constitutional interpretation and then examines their implications for dealing with innovative historical analysis. The Part demonstrates that while both originalist approaches are at least somewhat open to incorporating rare new documentary evidence into the "common law of history," they lead to contradictory attitudes toward persuasive new interpretations based on existing evidence. Finally, this Part argues that each approach has distinct advantages, and Justices' employment of both approaches together confirms that neither approach is sufficient on its own.

A. *The "Catholic" and "Protestant" Approaches*

In *Constitutional Faith*, Sanford Levinson, drawing a broad comparison between constitutional and religious law, distinguished between "catholic" and "protestant" strains in constitutional interpretation.[50] Catholic interpreters of the Constitution, according to Levinson's model, emphasize the exclusive authority of the Supreme Court to give binding and final interpretations of the Constitution. They also respect and adopt the traditional interpretations of the Constitution articulated by earlier Justices

50. LEVINSON, *supra* note 22, at 27-30. For an earlier comparison between constitutional law and these two religious traditions, see Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 4 (1984).

regardless of the textual grounds for those interpretations. Protestant interpreters, conversely, insist that the text of the Constitution is the sole legitimate basis for judicial decisionmaking, and that individuals in each generation have equal authority to reinterpret that text. Moreover, for the protestant interpreter, just as no generation has a monopoly on interpretative legitimacy, no one institution does either.[51]

Levinson categorizes originalists as strict "Protestants" because of their emphasis on text, their generally minimalist concept of judicial review, and their willingness to overturn previous decisions.[52] But Levinson's overarching analogy is also quite useful in classifying strains within the developing originalist tradition itself. Justices searching for the original understanding in particular cases seem to draw from two distinct historiographical approaches. According to one approach, which is analogous to Levinson's catholic strain of constitutional interpretation, the judge committed to uncovering the original understanding is primarily interested in finding previous cases in which the available evidence has been analyzed and the original understanding has been isolated and articulated. Rather than attempting to engage in wide-ranging historical research or relying heavily on outside scholarship, a catholic originalist judge focuses his inquiry on the Court's preexisting institutional wisdom concerning the original meaning of a constitutional provision. Such a judge respects precedents, but primarily those precedents that contain relevant official history.[53] For the catholic originalist, therefore, the process of rediscovery does not entail a return to the Founding, but a return to the moment in the jurisprudential narrative when the original understanding was lost.[54] Comparing constitutional decisionmaking to a very long version of the party game "telephone," as Jack Balkin does,[55] the catholic originalist is the person who doubts the players' capacity to recover the exact original word, but is still intent on finding out what the last person who did not purposely distort that word actually said.

The alternative approach, which is analogous to Levinson's protestant strain of constitutional interpretation, calls for an independent inquiry into the available historical evidence in each case. While the catholic originalist looks for the traditional understanding of the original meaning of the

51. For a full discussion of the analogy to religious traditions and its implications, see LEVINSON, *supra* note 22, at 27-53.

52. *Id.* at 33 ("The most recent restatement of such 'protestantism' has come from President Reagan's attorney general, Edwin Meese."); *id.* at 87 (characterizing Judge Bork as "hyperprotestant").

53. *See* Richards, *supra* note 8, at 856 (showing that in various recent cases, "the majority first presented the historical essay of an earlier decision as precedent standing for a principle").

54. *See* BORK, *supra* note 9, at 157-58 ("[P]recedents that reflect a good-faith attempt to discern the original understanding deserve far more respect than those that do not.").

55. J.M. Balkin, *Constitutional Interpretation and the Problem of History*, 63 N.Y.U. L. REV. 911, 934 (1988) (reviewing RAOUL BERGER, THE FOUNDERS' DESIGN (1987)).

Constitution, a protestant originalist adopts the traditional understanding only insofar as it is consistent with her independent assessment of the available historical evidence. As such, when a protestant originalist seeks to discover the original meaning of a clause, she looks beyond the pre-"evolutionary" case law to the documentary evidence surrounding the Framing of the Constitution and its amendments. Moreover, while the catholic originalist cites primary sources or historians mainly in order to lend support to a settled historical conclusion, the protestant cites them to back up his main argument, and often relies on historical scholarship as a key part of that argument.[56]

B. *The Approaches in Action*

In order to tease out the two methodologies outlined above, this Section discusses two cases in which Justices engaged in extensive inquiries into the original understandings of constitutional provisions. In both cases, Justices had the option of relying on official history or engaging in independent analyses, and they chose different routes. In *U.S. Term Limits v. Thornton*,[57] both the majority and the dissent employed protestant originalist analysis, along with catholic analysis, to reach their historical results. In *Seminole Tribe v. Florida*,[58] however, both the majority and the dissent relied mainly on one approach toward historical analysis and sharply criticized the opposing approach.

56. *City of Boerne v. Flores*, 521 U.S. 507 (1997), is an example of a case with extensive protestant historical analysis. The *Boerne* Court struck down a federal statute prohibiting a state actor from substantially burdening a person's exercise of religion without a compelling interest on the grounds that the statute exceeded Congress's enforcement power under Section 5 of the Fourteenth Amendment. Justice O'Connor's dissent, however, did not take issue with the majority's interpretation of the Fourteenth Amendment. Rather, Justice O'Connor argued vehemently that *Employment Division v. Smith*, 485 U.S. 660 (1988), which led Congress to pass the statute at issue in *Boerne*, should be overturned in light of strong historical evidence concerning the original understanding of the Free Exercise Clause. 521 U.S. at 549 ("The historical evidence casts doubt on the Court's current interpretation of the Free Exercise Clause."). Relying heavily on Michael McConnell's work, for example, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990), as well as the primary sources he uses, Justice O'Connor traced the history of the term "free exercise" in the American colonies. She concluded that "free exercise" during the Framing period was tantamount to government accommodation of religious practice whenever possible. 521 U.S. at 549-64. Justice O'Connor therefore assumed that she and other Justices are equipped to reexamine the historical record, produce a new historical conclusion, and finally overturn a case based on "bad" history. Justice Scalia, meanwhile, by concurring solely in order to respond to Justice O'Connor's assault on *Smith*, *id.* at 537, demonstrated that he shared Justice O'Connor's assumption.

57. 514 U.S. 779 (1995).

58. 517 U.S. 44 (1996).

1. U.S. Term Limits v. Thornton

In *U.S. Term Limits v. Thornton*, which held that state-imposed term limits on national representatives are unconstitutional, both the majority and the dissent based their arguments on the original understanding of the Qualifications Clauses, and they employed both catholic and protestant modes of historical reasoning to reach their conclusions. The Court, after stating the facts of the case, reviewed its earlier opinion in *Powell v. McCormack*[59] in great detail. The *Powell* Court blocked an attempt by the House of Representatives to impose qualifications on its members beyond those explicitly stated in the text of the Constitution. The *Thornton* Court, however, did not look back to *Powell* as it would look to any precedent. Rather, the Court specifically adopted the *Powell* Court's substantial inquiry into the history and text of the Qualifications Clauses.[60] In a full section entitled "*Powell*'s Reliance on History," the Court resuscitated the *Powell* Court's detailed historical argument, treating the argument with the deference usually reserved for previous holdings.[61] In the Court's judgment, *Powell*, through a thorough review of the Convention and ratification debates as well as *The Federalist Papers*, already proved that the Framers intended to adopt the English precedent fixing the qualifications of legislators.[62] The Court's preliminary position, in short, was that rather than engaging in a de novo review of the available historical evidence, it should treat a pre-existing declared historical narrative as precedent worthy of deference.

Justice Thomas, in his lengthy dissent, disputed the Court's interpretation of *Powell*'s historiography and claimed that *Powell* actually supported *his* historical position in *Thornton* if it supported any position at all. For Justice Thomas, the *Powell* Court's historical inquiry established only that the House of Representatives itself could not regulate the qualifications of its members.[63] Since the debates and *The Federalist Papers* quoted by *Powell* and then the *Thornton* majority dealt specifically with *federal* power,[64] according to Justice Thomas, the inference that the states cannot impose qualifications on legislators was unwarranted. In Justice Thomas's view, *Powell*'s official history stood for the

59. 395 U.S. 486 (1969).

60. *Thornton*, 514 U.S. at 787.

61. *Id.* at 789-93.

62. *See Powell*, 395 U.S. at 532-47.

63. *Thornton*, 514 U.S. at 885 (Thomas, J., dissenting) ("In particular, the detail with which the majority recites the historical evidence set forth in *Powell v. McCormack* should not obscure the fact that this evidence has no bearing on the question now before the Court. As the majority ultimately concedes[,] . . . it shows only that the Framers did not intend *Congress* to be able to enact qualifications laws." (citations omitted) (emphasis added)).

64. *Id.* at 885 n.18.

straightforward proposition that "the Federal Government enjoy[s] only the powers that are granted."[65] Since the state governments maintain all powers that are not expressly withdrawn from them, they may do what the federal government cannot. Justice Thomas, therefore, like the Justices in the majority, relied on declared history to reach his result.

Recognizing the key difference between *Powell* and *Thornton*, namely that *Powell* struck down a congressional rather than a state qualification, the *Thornton* Court did not base its historical case solely on *Powell*.[66] Instead, the Court engaged in an independent review of the evidence to answer the specific question at hand: Can *states* impose term limits on national representatives? The Court quoted several *Federalist* papers to prove that the Founders, and Madison in particular, believed that the Qualifications Clauses precluded extra terms or conditions added by any party.[67] Next, the Court put the Qualifications Clauses in the context of the federal election provisions and the ratification history of those provisions. In the Court's judgment, the Framers' insistence that the federal government regulate the "time, place, and manner" of elections, and also that the state-sanctioned qualifications for federal electors be the same as the qualifications of state electors, indicated that they meant to curb potential *state* abuse of the election process.[68] Turning to the Qualifications Clauses themselves, the Court scoured the ratification debates as well as the letters of several Framers. It concluded that had the Framers believed that states could impose qualifications on national representatives, "it is inconceivable that the Federalists would not have made this obvious response to the arguments of the pro-rotation forces."[69] Finally, the Court looked at state practice after ratification, and concluded that despite the prevalence of term limits in all levels of government, "no State sought to impose any term limits on its own federal representatives."[70]

Justice Thomas also conducted an independent historical inquiry. Citing various originalist legal scholars, Justice Thomas addressed each of the Court's historical arguments.[71] In Justice Thomas's view, the ratification debates and the *Federalist* papers presented by the majority showed only

65. *Id.* at 876.

66. *Id.* at 806 ("Much of the historical analysis was undertaken by the Court in *Powell*. There is, however, additional historical evidence that pertains directly to the power of the States." (citations omitted)).

67. *Id.* at 806-08; *see also* THE FEDERALIST NOS. 52, 57 (James Madison).

68. *Thornton*, 514 U.S. at 808-11.

69. *Id.* at 814. *See generally id.* at 812-15. The "pro-rotation forces" were those representatives at the ratifying conventions who wanted a clause in the Constitution mandating rotation in office.

70. *Id.* at 826.

71. Richards points out that "[t]his use of secondary sources may represent a reflection of the debate among legal academics in the turn to history: the use by conservative justices of originalist literature and the use by the liberals of the ideological historians." Richards, *supra* note 8, at 859.

that the Framers had deep-seated federalism concerns in the election context, and they resolved those concerns by limiting the national government's ability to set qualifications on representatives.[72] Justice Thomas, following the Court's lead, argued for his position textually. According to Justice Thomas, the presence of specific limitations on the states regarding qualifications for office in the text of the Constitution, rather than supporting the conclusion that the states cannot impose term limits, only proved that the states can.[73] Since the Framers did not hesitate to preempt state legislatures when they saw fit, the absence of explicit rules about term limits, for Justice Thomas, meant that the states were not bound. Finally, by pointing to a Virginia law establishing property requirements for national representatives as well as several other state laws setting qualifications along religious lines, Justice Thomas rejected the Court's claim that early state practice supported its conclusion.[74] Because no credible historical evidence could be found to justify reading nontextual prohibitions into the Qualifications Clauses, the dissent thus concluded that the clauses "do no more than what they say."[75] Like the Court, the dissent presented an impressive piece of historical scholarship and showed that the two genres of historical argument outlined above are not mutually exclusive. Indeed, both the Court and Justice Thomas used both historical approaches to support their positions.

2. Seminole Tribe v. Florida

In other cases, however, the protestant and catholic historical approaches have diverged more sharply. *Seminole Tribe v. Florida*[76] presents an exceptional example of Justices' use of historical evidence for several reasons. First, *Seminole Tribe* in general, and Justice Souter's extremely long and dense dissent in particular, is practically a monograph on the original understanding of state sovereign immunity. Second, both the Court and the dissent argued that the historical conclusions of earlier cases should be abandoned. But while the Court overturned an eight-year-old decision that departed from the traditional understanding of the original meaning of state sovereign immunity, the dissent challenged a one-

72. *Thornton*, 514 U.S. at 885-93 (Thomas, J., dissenting); *see also* THE FEDERALIST NO. 60 (Alexander Hamilton) (arguing that the *national* government should not be able to impose extra qualifications on representatives). See *Thornton*, 514 U.S. at 807 n.18, for the Court's objection to Justice Thomas's reading of the *Federalist* papers.

73. *Thornton*, 514 U.S. at 903-04 ("The Framers' prohibition on state-imposed religious disqualifications for Members of Congress suggests that other types of state-imposed disqualifications are permissible.").

74. *Id.* at 904-14.

75. *Id.* at 926.

76. 517 U.S. 44 (1996).

hundred-year-old decision and a sixty-year-old decision that contradicted compelling primary and secondary evidence. Finally, rather than simply stating their respective arguments, the Court strongly rebuked the dissent for engaging in a far-reaching independent historical inquiry, and the dissent responded by assaulting the Court's blind reliance on an entrenched historical narrative.

The *Seminole Tribe* Court held that the Eleventh Amendment, in spite of its text,[77] forbids Congress from abrogating the sovereign immunity of a state, even when an express constitutional provision such as the Indian Commerce Clause vests in Congress lawmaking authority over a particular domain. In reaching its conclusion, the Court relied heavily on *Hans v. Louisiana*,[78] an 1890 decision that interpreted the Eleventh Amendment to guarantee to states complete immunity from federal statutory claims, and *Monaco v. Mississippi*,[79] a 1933 decision barring suits by foreign states against states without their consent.[80] The *Hans* Court, meanwhile, which the *Monaco* Court followed, based *its* decision on both the documentary history of the Founding, which revealed to that Court that the Framers considered state sovereign immunity to be irrevocable, and its historical judgment that the Eleventh Amendment was ratified for the specific purpose of reviving the principle of state sovereign immunity in the face of *Chisolm v. Georgia*.[81]

The *Seminole Tribe* Court found that *Pennsylvania v. Union Gas*,[82] a 1989 case in which a plurality of Justices found that the Commerce Clause grants Congress the authority to render states liable for damages, "eviscerated [the] decision in *Hans*."[83] On that basis, the *Seminole Tribe* Court overruled *Union Gas* and rested its decision on *Hans*. For the *Seminole Tribe* Court, *Union Gas* was an anomaly that could not be reconciled with the established historical understanding of the Eleventh Amendment, and it therefore had to be overruled.[84] The *Seminole Tribe*

77. U.S. CONST. amend. XI ("The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."); *see also Seminole Tribe*, 517 U.S. at 54 ("Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, 'we have understood the Eleventh Amendment to stand not so much for what it says but for the presupposition . . . which it confirms.'" (quoting Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991))).

78. 134 U.S. 1 (1890).

79. 292 U.S. 313 (1933).

80. *Seminole Tribe*, 517 U.S. at 54, 68-71.

81. *Compare Hans*, 134 U.S. at 12-16 (drawing from *The Federalist Papers* and earlier judicial decisions to argue in favor of sovereign immunity), *with* Chisolm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) (holding that states do not possess sovereign immunity in federal courts).

82. 491 U.S. 1 (1989).

83. *Seminole Tribe*, 517 U.S. at 64.

84. *Id.* at 66 ("[B]oth the result in *Union Gas* and the plurality's rationale depart from our established understanding of the Eleventh Amendment and undermine the accepted function of

Court's argument thus presents a textbook case of what has been termed catholic originalism. While the Court evinced respect for precedent in general, it privileged those precedents that isolated the original understanding of state sovereign immunity, and it ended its own historical inquiry where those precedents did.

Just as the majority opinion in *Seminole Tribe* exemplifies the catholic historical approach, Justice Souter's dissent exemplifies the protestant approach. Its thesis was that the Court's official historical narrative is fundamentally flawed, and that it should be replaced with a narrative that coheres with the available historical evidence. According to the dissent, rather than reestablishing the nonexistent doctrine of complete state sovereign immunity after *Chisolm*, the Eleventh Amendment simply overrode the narrow result of *Chisolm* by eliminating citizen-state diversity jurisdiction.[85] For Justice Souter, even Justice Iredell's dissent in *Chisolm*, which the majority, following *Hans*, viewed as providing the content of the Eleventh Amendment, did not expressly reserve absolute state immunity from federal lawsuits.[86] Such a principle could never have been established, in Justice Souter's view, because the Framers of the Constitution themselves never intended to adopt the common-law principle of sovereign immunity, and neither did the Framers of the Eleventh Amendment.[87] Justice Souter, therefore, in marked opposition to the majority, saw *Hans* and its progeny as the cases that departed from the original understanding, and therefore the cases whose history should be abandoned.[88] Employing classic originalist parlance, Justice Souter thus condemned the elevation of

Article III."); *see also id.* at 54 n.7 (offering a long list of cases since *Hans* that have adhered to *Hans*'s understanding of the Amendment).

85. *Id.* at 101 (Souter, J., dissenting) ("The adoption of the Eleventh Amendment soon changed the result in *Chisolm*, not by mentioning sovereign immunity, but by eliminating citizen-state diversity jurisdiction over cases with state defendants.").

86. *Id.* at 108-11 & 109 n.7.

87. *Id.* at 137-64 (offering evidence from the writings of the Framers, the ratification debates, and the work of contemporary historians for the proposition that the Constitution was not intended to incorporate the common law to protect the states from federal jurisdiction); *see also id.* at 109-14 & 111 n.8 (arguing that the history of the ratification of the Eleventh Amendment reveals that the Amendment was meant to apply only to diversity jurisdiction). In addition to canvassing the available primary evidence, Justice Souter drew on a wide range of secondary sources in his argument and relied very heavily on the scholarship of Akhil Amar and Gordon Wood. *E.g.*, *id.* at 152 n.47, 153 n.48, 154, 155 & n.50, 164 n.58.

88. *Id.* at 117-23 (arguing that *Hans* was merely an anomalous face-saving measure to avoid directly challenging states in the post-Reconstruction South and mistook the meaning of the Eleventh Amendment). Despite his outright rejection of *Hans*'s history, however, Justice Souter declined—based on stare decisis—to conclude that *Hans* should be overruled. Instead, Justice Souter argued that *Hans*, though wrongly decided, established only "a doctrine of federal common law" that could be abrogated by statute, and therefore could be reconciled with the result he desired in *Seminole Tribe*. *Id.* at 183.

a dusty nineteenth-century opinion with bad history to the status of a constitutional rule as naked judicial activism.[89]

Instead of responding directly to Justice Souter's independent historical argument, however, the Court took on the dissent's interpretative approach.[90] In scathing terms, the Court denounced the dissent for departing from "established Eleventh Amendment principles"[91] in order to divine the original understanding of the Amendment. The Court stated that the dissent "disregards our case law in favor of a theory cobbled together from law review articles and its own version of historical events."[92] In no uncertain terms, the Court thus dismissed the protestant originalist approach. For the majority, the dissent's documented historical conclusion was simply a subjective preference. In its view, the Court's reliance on previous cases' historical analysis, no matter how thin such analysis might be in comparison to the dissent's, shielded the holding from extralegal criticism.[93]

Rather than objecting to the majority's characterization of its method, however, the dissent both defended its approach and berated the Court for its reliance on official history.[94] According to Justice Souter, if the text and the overwhelming historical evidence surrounding it point toward a certain result, and scholars agree about the significance of that historical evidence, the Court's official but false history cannot carry the day.[95] Justice Souter wrote, "I have discovered no commentator affirmatively advocating the position taken by the Court today. As one scholar has observed, the

89. *Id.* at 117 (asserting that the Court's ruling "takes its place with other historic examples of textually untethered elevations of judicially derived rules to the status of inviolable constitutional law").

90. In a few instances, the Court did object to the dissent's selective reading of primary sources. *Id.* at 70 & nn.12-13 (dismissing the dissent's quotations from *The Federalist Papers* and the ratification debates as misleading).

91. *Id.* at 68.

92. *Id.* at 68. The Court flatly rejected the dissent's original interpretation of *Hans*, according to which the case did not establish a mandatory constitutional rule, on similar grounds: "Its undocumented and highly speculative extralegal explanation of the decision in *Hans* is a disservice to the Court's traditional method of adjudication." *Id.* at 68-69.

93. In relying on the traditional understanding of the Eleventh Amendment to maintain state sovereign immunity, the *Seminole Tribe* Court followed the plurality in *Welch v. Texas Department of Highways & Public Transportation*, 483 U.S. 468 (1987). In that case, Justice Powell, responding to Justice Brennan's historically based dissent, wrote: "Although the dissent rejects the Court's reading of the historical record, there is ample support for the Court's rationale, which has provided the basis for many important decisions." *Id.* at 480 (plurality opinion). Later in the opinion, Justice Powell asserted that "the fundamental principle enunciated in *Hans* has been among the most stable in our constitutional jurisprudence." *Id.* at 486.

94. Like the Court, however, the dissent did defend itself briefly on the opposition's ground. Although Justice Souter devoted much of his opinion to historical and textual analysis, he also argued that *Union Gas* was in line with the Court's jurisprudence before *Hans*. *Seminole Tribe*, 517 U.S. at 112-13 (Souter, J., dissenting).

95. Justice Souter supported this point by citing several cases in which Justices in the *Seminole Tribe* majority drew the same conclusion that text and history must prevail. *Id.* at 116 n.13.

literature is 'remarkably consistent in its evaluation of the historical evidence and text of the amendment.'"[96] Footnote five of the dissent offered the most direct critique of the Court's posture. First, Justice Souter took issue with the majority for not responding to the clear historical evidence that *Chisolm* was not the driving force behind the ratification of the Eleventh Amendment: "The Court's response to this historical analysis is simply to recite yet again *Monaco*'s erroneous assertion that *Chisolm* created 'such a shock of surprise that the Eleventh Amendment was at once proposed and adopted.' This response is, with respect, no response at all."[97] Justice Souter flatly rejected the Court's conclusion that reliance on traditional understanding is the sole acceptable form of historical analysis. He continued: "*Monaco*'s *ipse dixit* that *Chisolm* created a 'shock of surprise' does not make it so. This Court's opinions frequently make assertions of historical fact, but those assertions are not authorities as to history in the same way that our interpretations of laws are authoritative as to them."[98] Justice Souter thus denied that the Supreme Court's declared historical conclusions could be called "law" or "precedent" in any sense.

C. *Implications for Historical Evidence*

Each of the two approaches outlined above leads inevitably to a distinct posture toward persuasive new historical analysis, whether it be by historians or judges, that challenges an established version of history. Justice Souter, with the help of scholars, studied a wide of array of available evidence in *Seminole Tribe*, and the majority rejected his argument on that basis. The protestant originalist, following Justice Souter, is ready to apply his own judgment and the most convincing scholarship to the case at hand. Drawing on the work of historians, he is ready to engage in independent historical research and codify his conclusions into law. Yet the catholic originalist is wary of surrendering the adjudicatory process to historians or enshrining her own unsubstantiated historical conclusions into the law. She is unwilling to engage in the independent research that might lead to replacing an established historical narrative with a personal judgment that might soon be discredited. The Court's history-oriented jurisprudence, therefore, leads to contradictory approaches in the many cases in which contrasting judgments can be reached based on the available evidence. Yet neither of these approaches presents a plausible account of the way in which the Court actually behaves in cases like *Thornton*.

96. *Id.* at 110 n.8 (quoting Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 44 n.179 (1988)).

97. *Id.* at 107 n.5 (citation omitted) (quoting Monaco v. Mississippi, 292 U.S. 313, 325 (1934)).

98. *Id.*

These examples, however, do not fully account for how the Rehnquist Court deals with documentary evidence that was not available to earlier Courts. The case law suggests that the division between protestant and catholic originalists might dissolve when such evidence is introduced. In *Camps Newfound/Owatonna, Inc. v. Town of Harrison*,[99] for example, Justice Thomas argued vehemently that the expansive reading of the dormant Commerce Clause in *Woodruff v. Parham*[100] was essentially worthless, because Justice Nelson "seems not to have had in his arsenal many of the historical materials cited above."[101] In a footnote, Justice Thomas went on to prove that every single key piece of primary evidence about the Commerce Clause was not compiled until the twentieth century, concluding that "our ready access to, as well as our appreciation of, such documents has increased over time."[102] Justice Thomas's argument, as well as his eagerness to obliterate bad history from the Court's record, exemplifies the protestant historical approach. But it is significant that Justice Scalia and Chief Justice Rehnquist, both of whom have eschewed aggressive independent historical analysis, and one of whom—Chief Justice Rehnquist—might be classified as a catholic originalist on the basis of *Seminole Tribe*, joined Justice Thomas's dissent in *Owatonna*.[103] Because judges revisit so few early cases with historical analyses, the emergence of completely new and pertinent primary evidence is exceptionally rare. When it happens, however, even staunchly catholic originalists probably will not ignore it.

D. *The Merits of the Approaches*

Because cases like *Owatonna* are so rare, the two approaches lead to fundamentally different postures toward most innovative historical analysis. Yet both approaches have strengths and weaknesses from an originalist point of view. The catholic originalist approach enjoys the advantages of self-sufficiency and stability. It does not rely on extensive historical research by nonhistorians, nor does it require judges to depend on the research of nonlawyers. It also has a predictable effect on the Court's jurisprudence, while protestant historical analysis, because it can undermine the understanding of a clause on which Justices have relied in many decisions, has at times a profoundly destabilizing effect. By dismissing the

99. 520 U.S. 564 (1997).

100. 75 U.S. (8 Wall.) 123 (1868).

101. *Owatonna*, 520 U.S. at 632-33 (Thomas, J., dissenting).

102. *Id.* at 633 n.17.

103. *Cf.* Scalia, *supra* note 10, at 859 (suggesting that Chief Justice Taft in *Myers v. United States*, 272 U.S. 52 (1926), did not benefit from full access to the historical record as today's judges would).

dissent for offering an innovative historical argument rather than relying on official history, the *Seminole Tribe* Court itself emphasized the relationship between catholic originalism and doctrinal stability.

The destabilizing effect of protestant historical analysis, moreover, is not always justified by greater historical accuracy. Indeed, in the case of a Supreme Court that seeks to recover the original meaning of language that is often around 210 years old, the link between novelty and accuracy can be particularly tenuous, especially with regard to Justices who lived during the nineteenth century. Although thorough historical research sometimes yields an accurate understanding of a historical text, Justices who lived closer in time to the Framers were surely in a better position to interpret the Framers' language and grasp the Framers' worldview than their successors.[104] The proposition that established historical conclusions deserve deference is thus consistent with the basic assumption that the meanings of historical texts become more difficult to discern over time, and that an established practice can be a better guide to discerning an original meaning than a historical inquiry. The catholic historical approach therefore corresponds with a fundamental goal of the originalist project—doctrinal stability once the original meaning has been established—without necessarily undermining historical accuracy, a second fundamental goal of the originalist project. By privileging *Powell*'s well-documented historical conclusions over its own because of the *Powell* Court's especially thorough examination of the documentary evidence, the *Thornton* Court linked catholic originalism to the creation of reliable history. *Thornton* and *Seminole Tribe*, in addition to showcasing both genres of originalism, thus highlight different advantages of catholic originalism in particular.

Yet the protestant originalist approach also has distinct advantages. First, once the premise that text and history should be the main guides to interpreting the Constitution is accepted, reflexively privileging the historical conclusions of previous courts invites visibly uninformed decisions, particularly when the declared history in question has been only recently established. Second, by simply relying on the conclusions of past courts—even though those courts might have relied on the historians of their time rather than the understanding of the Constitution that had been transmitted since the Founding—catholic originalists sometimes just adopt the independent judgments of past judges and scholars over present ones. On the other hand, protestant originalists, along with the historians on whom they rely, can benefit from the research and judgment of their predecessors as well as from their own judgment. While they may reach

104. *See* BORK, *supra* note 9, at 158 ("[T]here are not only the claims of stability and continuity in the law, but respect for the knowledge and intelligence of those who have gone before.").

historical conclusions that are ultimately incomplete, their understanding of constitutional provisions is, in many cases, more likely to be accurate than their predecessors', especially when their predecessors had no continuous traditional understanding of a provision from which to draw. Finally, in the long run, the informed historical narrative created by protestant originalists, assuming it is based on a wide-ranging study of the available evidence, could lead to greater doctrinal stability than its counterpart. The protestant historical approach, therefore, in direct contrast to its catholic counterpart, corresponds with the fundamental originalist goal of historical accuracy without necessarily compromising long-term doctrinal stability.

Considering the strengths and weaknesses of what have been termed the protestant and catholic historical approaches, it is not surprising that Justices often employ both, as they did most noticeably in *Thornton*. Nevertheless, as is evidenced by the sharp methodological dispute in *Seminole Tribe*, Justices continue to assume that the two approaches are incompatible. The next two Parts question that assumption by drawing a broad analogy to Jewish law and conclude that the underlying goals of the originalist project might be best achieved if certain elements of the catholic and protestant approaches were used together in hard cases.

V. THE ANALOGY TO JEWISH LAW

Since the publication of Robert Cover's article *Nomos and Narrative*,[105] a growing number of scholars have recognized similarities between the American and Jewish legal traditions and have turned to Jewish law to advance debate in American law.[106] This Part argues that while any attempt to use Jewish law as a foil for American constitutional law must address several differences between the two traditions, those differences do not preclude a comparative approach in the narrow area in question. Rather, because the de-evolutionary assumptions underlying originalism in constitutional law are comparable to the assumptions underlying the Jewish legal system, rabbis' extensive experience with historical evidence can serve as a useful lens through which to assess the post-originalist problem

105. Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) (positing the Jewish model of voluntary obligation as an alternative to the legal regime in which the law is legitimized by the power of the state).

106. *See, e.g.*, Burt, *supra* note 14, at 1691-94 (contrasting Justice Scalia's hostile attitude toward precedent with the collaborative approach of the rabbinic tradition); Steven Davidoff, *A Comparative Study of the Jewish and the United States Constitutional Law of Capital Punishment*, 3 ILSA J. INT'L & COMP. L. 93 (1996) (arguing that the Jewish legal experience with capital punishment is a useful analogy for American lawyers); Irene Merker Rosenberg & Yale L. Rosenberg, *Advice from Hillel and Shammai on How To Read Cases: Of Specificity, Retroactivity and New Rules*, 42 AM. J. COMP. L. 581 (1994) (arguing that the Talmudic rabbis' approach to interpreting precedent is superior to the approach used in cases such as *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

in constitutional law. Based on a brief survey of classical and modern Jewish law, this Part concludes that, in cases in which unambiguous new primary evidence presents itself, the classical Jewish practice of incorporating that evidence into the law even if it means discarding established precedent is compatible with the originalist practice. However, in the far more common scenario in which reinterpretation of evidence challenges official history, a methodology inspired by the decisions of some modern rabbis—a methodology that I call the multitextual approach—combines some of the advantages of the historical approaches outlined above.

The multitextual approach is unique because, while it invites judges to look beyond the entrenched historical narrative and engage in an independent historical inquiry, it also limits the judge's frame of reference to "intermediate texts," or previous judicial inquiries into the original meaning of the foundational text. Ultimately, as Part VI shows, the approach sets boundaries for originalist historical analysis by preempting both the selective incorporation of purely independent historical analysis into the common law of history and the elevation of official history to the status of legal precedent. Moreover, even without any application to real cases, it opens the door to criticism of judicially generated history that accounts for the complex goals of the originalist project.

A. *Parallels and Discrepancies*

Despite the many academic comparisons between the Jewish and American legal traditions, their comparability is not self-evident. Indeed, Cover's own turn to Jewish law has been criticized on the grounds that he glossed over the uniquely religious aspects of Jewish law in a rushed effort "to understand secular legal institutions through religious categories."[107] This Section, therefore, begins by noting some of the deep underlying similarities between the two legal traditions, and concludes that the analogy between Jewish law and originalism in constitutional law is far stronger than the analogy between Jewish law and constitutional law generally. It then isolates several crucial distinctions between the two traditions, even as far as originalism is concerned, and assesses the relevance of those distinctions for the discussion of historical evidence and post-originalist constitutional development.

107. Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813, 821 (1993).

1. *Parallels: Jewish and Constitutional Originalism*

The basic interpretative methods of Jewish law and American constitutional law are similar in a number of respects.[108] First, in both systems, no matter how radical or misguided a particular judicial decision, the most recent judge—or majority of judges—has final authority to decide cases.[109] At the same time, however, just as American judges usually follow precedent as they decide questions of law, so too do rabbis. Although rabbis have never formally embraced the doctrine of stare decisis, "Jewish judicial decisions reveal a remarkable loyalty to the body of codified law."[110] In the Jewish tradition, respect for precedent flows naturally from the axiom that earlier rabbis, and especially the earliest rabbis, were superior to their successors in knowledge of the Torah—the foundational legal text.[111] As one early authority said, "If the earlier [scholars] were sons of angels, we are sons of men; and if the earlier [scholars] were sons of men, we are like asses."[112] It is fair to conclude that precedent in Jewish law exerts an even greater force than it does in American law.[113] Perhaps the most striking parallel between the two traditions, however, is that Jewish law, like American constitutional law, records the position of dissenters, thus opening the door for later judges to revisit those dissents.[114] After surveying the tradition of relentless dissent during the classical period, Elliott N. Dorff

108. *See generally* Samuel J. Levine, *Jewish Legal Theory and American Constitutional Theory: Some Comparisons and Contrasts*, 24 HASTINGS CONST. L.Q. 441 (1997) (comparing Jewish law and American constitutional law in a variety of areas).

109. *See* BABYLONIAN TALMUD, TRACTATE NIDDAH 20b; *id.*, TRACTATE SANHEDRIN 6b; *id.*, TRACTATE BAVA BATRA 130b (Maurice Simon & Israel W. Slotki trans., The Soncino Press 1976) ("The judge must be guided only by what his eyes see."). *See generally* Israel Ta-Shma, *The Law Is in Accord with the Later Authority*—Hilkhata Kebatrai*: Historical Observations on a Legal Rule*, *in* AUTHORITY, PROCESS AND METHOD: STUDIES IN JEWISH LAW 101 (Hanina Ben-Menahem & Neil S. Hecht eds., 1998) (describing the origins and history of the rule).

110. Norman Lamm & Aaron Kirschenbaum, *Freedom and Constraint in the Jewish Judicial Process*, 1 CARDOZO L. REV. 99, 129 (1979).

111. *E.g.*, TOSEFTA TA'ANIT 2:5, *quoted in* ELLIOTT N. DORFF & ARTHUR ROSETT, A LIVING TREE: THE ROOTS AND GROWTH OF JEWISH LAW 223 (1988) (describing an encounter between Rabbi Joshua and the other rabbis of the Sanhedrin in which Rabbi Joshua's position on a particular issue was defeated without argument simply because it was inconsistent with the position of Rabban Gamliel, who had recently passed away).

112. BABYLONIAN TALMUD, TRACTATE SHABBAT 112b (H. Freedman trans., The Soncino Press 1972); *see also id.*, TRACTATE ERUVIN 53a (Israel W. Slotki trans., The Soncino Press, 1983) ("The hearts [i.e., intellectual powers] of the ancients were like the door of the *Ulam* [a temple chamber whose door was twenty cubits wide], but that of the last generations was like the door of the *Hekhal* [of the Temple which was ten cubits wide], but ours is like the eye of a fine needle.").

113. *See* DORFF & ROSETT, *supra* note 111, at 223 (1988) ("American political theorists acknowledge the practical truth that the Supreme Court reads the election returns. Jewish tradition has followed a more conservative pattern, less willing to change course to meet changing social attitudes.").

114. *See* Michael Rosenweig, Eilu ve-Eilu Divrei Elohim Hayyim*: Halachic Pluralism and Theories of Controversy*, *in* RABBINIC AUTHORITY AND PERSONAL AUTONOMY 93, 110-23 (Moshe Sokol ed., 1992) (discussing the significance of dissents in Jewish law).

and Arthur Rosett conclude: "Tolerating this degree of vigorous disagreement was not common among the Church Fathers or, for that matter, the leaders of any society, ancient or modern, until the advent of the United States."[115]

The underlying origins of the Jewish tradition and the American constitutional tradition are also comparable in some respects. Just as American constitutional law rests on a foundational text that was adopted by consent into law, namely the Constitution, so too does Jewish law rest on the Torah. The comparison is not exact, however, because the term "Torah" includes a large body of oral law that was, according to tradition, revealed to Moses but not articulated until centuries later.[116] Therefore, the early texts of the *Halakhah*, or the body of Jewish law, despite their internal inconsistencies, are not understood to be mere commentaries on the Torah but instead part of the Torah itself.[117]

The broad analogy between American constitutional and Jewish law begins to break down, however, when one considers the precise role of the Torah as a divinely inspired document. Unlike provisions of the Constitution, which have been interpreted out of existence and decisively expanded by judges, the words of the Torah, because they are believed to be of divine origin, are dispositive, at least by all pre-modern rabbinical accounts. Although rabbis in the classical tradition had great latitude to interpret the Torah in reference to its original meaning, the "living constitution" has no analogue in traditional Jewish law. Therefore, when rabbis have seen fit to change the law, they have done so by referring directly to the Torah itself, offering a new interpretation of a textual provision, or denying that the question being debated is answered directly by the Torah at all.[118] In other words, because "the Jewish tradition . . . rules out . . . any divine intervention subsequent to the initial revelation,"[119] "constitutional" change in Jewish law, at least formally, is

115. DORFF & ROSETT, *supra* note 111, at 227.

116. *Id.* at 213-14 (showing that in classical Jewish law the "Oral Torah . . . is virtually identical with the Bible itself"); *cf.* MAIMONIDES, MISHNEH TORAH, LAWS OF REPENTANCE 3:6, 8 (classifying people who deny the sanctity of the Oral Law as heretics who deny the Torah itself).

117. There are many variations on this view. For example, rabbis have distinguished between those opinions in the oral tradition that became law and those that did not. *See generally* DAVID WEISS HALIVNI, PESHAT AND DERASH: PLAIN AND APPLIED MEANING IN RABBINIC EXEGESIS 112-19 (1991) (outlining interpretations of the status of oral law). For further discussion, see GERSHOM SCHOLEM, *Revelation and Tradition as Religious Categories in Judaism*, *in* THE MESSIANIC IDEA IN JUDAISM 282, 283 (1971).

118. *See* JOEL ROTH, THE HALAKHIC PROCESS 10 (1986) ("The primary systematic assumption of the halakhic system, therefore, is the existence of an undeniable legal category that is called *de-oraita* [from the Torah]. Any legal sources so categorized are, by definition, authoritative, since they are included in that document, which by presupposition, it behooves man to obey.").

119. Noam J. Zohar, *Midrash: Amendment Through the Molding of Meaning*, *in* RESPONDING TO IMPERFECTION 307, 308 (Sanford Levinson ed., 1995).

necessarily the product of historical rediscovery. As a result of the unique status of the Torah—both the written text and the oral tradition—the analogy between Jewish law and originalism in American constitutional law is neater than the broader analogy between Jewish law and constitutional law as a whole. For the rabbi, as for the originalist, authoritative textual exegesis, supplemented by reliable evidence as to what the foundational text means, is the source of law.[120] The rabbis' response to the countless pieces of new primary and secondary evidence that have challenged Jewish law's official history is thus highly relevant to this discussion.

2. *Discrepancies: Amendability and "Historical Evidence"*

It would be rash, however, to accept even the narrower analogy between the rabbinic interpretative method and originalism without some qualification. In spite of the substantive parallels between the traditions outlined above, Jewish law as a whole remains fundamentally different from constitutional law in at least two critical ways: First, the Torah cannot be amended, and, second, what constitutes new historical evidence is different in the Jewish context than in the originalist context. Before moving on to any comparison between the two traditions, these distinctions must be explored.

The American originalist argues that the text and original meaning of the Constitution should guide judges because the Constitution can be amended. In response to the oft-made claim that there is no real reason the living should be governed by the dead, Bork, for example, responds simply that "[w]e remain entirely free to create all the additional freedoms we want by constitutional amendment."[121] The rabbi cannot reply to the critic of religious law along these lines, because there is no established institutional mechanism in Jewish law that allows for democratic change.[122] The capacity for amendment in American law presents a barrier to any comparison of responsive legal development[123] within the two traditions.[124]

120. *E.g.*, DORFF & ROSETT, *supra* note 111, at 198 ("[T]he rabbinic tradition of interpretation starts with supreme confidence that, however subtle the text may be, somewhere within it correct guidance on every legal issue can be found.").

121. BORK, *supra* note 9, at 170-71.

122. The closest parallel to an amendment in Jewish law is the *takkanah*, or legislative revisions of the law by rabbis. There has been a long tradition of such revisions in Jewish legal history. DORFF & ROSETT, *supra* note 111, at 402-07. Ultimately, however, they cannot be viewed as the equivalents of amendments because "authority in Jewish law still does not rest with the people." *Id.* at 407. Also, to a large degree, the *takkanah* has been interpreted as an emergency power to be exerted only under special circumstances. *Id.* at 416.

123. Post, *supra* note 4, at 24-26.

124. For a vigorous argument against the conventional assumption that classical Jewish law has no mechanism for "responsive" amendment, see Zohar, *supra* note 119, at 307, which argues

Nevertheless, in the specific area in question, namely doctrinal change driven by historical analysis, the amendment distinction is beside the point. While the originalist objects vigorously to "responsive" constitutional development, her attitude toward constitutional development based on improved historical understanding is an entirely separate question, and the originalist would never argue that new historical evidence should affect the law only through the amendment process.

The different definitions of "historical evidence" in the two legal traditions are more directly relevant to the specific comparison attempted here. There is a long tradition in American constitutional law of turning to the public records surrounding the Constitutional Convention and ratification debates in order to elucidate the meaning of the Constitution. Yet there is no such tradition in Jewish law, because adjudication in Jewish law rests exclusively on the exegesis of legal documents themselves.[125] Thus, while historical evidence in the American constitutional context includes a wide array of sources that help clarify the context of the constitutional project, historical evidence in the Jewish tradition must be defined differently.

In the ancient period, one form of new historical evidence was definitive proof that an authoritative rabbi had made a particular pronouncement of law based on his own interpretation of the Torah. Therefore, because the oral tradition is considered part of the Torah broadly defined, new historical evidence for classical rabbis was essentially a discovery of a new part of the authoritative oral tradition. Such a discovery, in light of the aforementioned Jewish conception of precedent and authority, falls neatly within the traditional category of a primary source. While cases with new evidence as it emerged in the Talmudic period can be loosely compared to the rare Supreme Court cases such as *Owatonna* in which Justices used new primary evidence to advocate a change in the law, one must turn to modern Jewish law for more useful analogues to the types of historical arguments that usually matter in constitutional interpretation.

Yet the new historical evidence affecting modern Jewish law also does not fit together easily with the evidence addressed in cases like *Thornton*. First, the premises of Jewish law are challenged by a large body of primary and secondary evidence that falls under the general banner of "biblical criticism." This evidence includes not only new fragments of the oral law, but also undiscovered fragments of the written Torah itself. Moreover, the

that Midrash—the rabbinically generated oral supplement to the Torah—allowed rabbis to "'amend' divine revelation."

125. *See* JAY M. HARRIS, HOW DO WE KNOW THIS? 3 (1995) ("Exegesis of the Torah was the means through which the rabbis established the authority of the extrabiblical laws and practices they inherited; it was the medium they employed to create new laws in their own times; and it was the tool they used to resolve more far-reaching problems . . . .").

challenge to Jewish law comes from disciplines such as archeology, evolutionary biology, and even literary criticism, in addition to history. To meet this challenge, rabbis committed to maintaining the legal tradition intact have had to distinguish between historical evidence that falls within the legal framework and other evidence.[126]

The comparison between the uses of historical evidence in the two legal traditions, therefore, can be made only in reference to the historical evidence that is deemed by rabbis to be within the legal framework. Even that evidence, however, is different from the evidence commonly used by Supreme Court Justices. First, while Justices, recognizing their shortcomings as students of history, often draw from professional historians as they engage in independent historical reasoning, rabbis themselves act as both historians and judges. More importantly, as was noted above, while constitutional historians look for and analyze documents with no legally binding authority in order to divine the original meaning of the Constitution, modern rabbis who are committed to rediscovering the formative legal process basically limit their analysis to legal texts themselves. They can reinterpret those texts, thus creating tension between their own reading of the relevant legal sources and their predecessors', not by referring to extralegal sources, but by drawing on the encyclopedic knowledge of the ancient canon now available. New historical evidence in the modern rabbinic tradition is thus to a large extent the product of creative intertextual readings of the vast legal canon that would not have been possible before the tradition could be viewed as a whole.[127] New historical evidence in modern Jewish law, in contrast to classical Jewish law, is therefore most akin to the evidence that lies close to the secondary end of the continuum of historical evidence used by constitutional lawyers.

In the Jewish context, then, the conventional distinction between primary and secondary sources reemerges, and a second major distinction between legal and extralegal evidence cuts right through the first distinction. The divide between judge and historian is also obliterated. Despite these differences between the two legal traditions, however, the comparative project is possible in the narrow area in question. Regardless of the specific types of evidence that carry weight in each context, declared history and innovative historical analysis pose a major problem for rabbis. Just as previously available but newly synthesized documents from the Founding period can shed fresh light on a constitutional provision, previously available but newly synthesized passages from the vast body of

126. *See infra* text accompanying notes 135-137.

127. *E.g.*, David Weiss Halivni, On the Ordination of Women 1-2 (n.d.) (unpublished manuscript, on file with *The Yale Law Journal*) (arguing that decisions about women and Jewish ritual can be made only after a rabbi engages in a wide-ranging historical inquiry that encompasses the "Biblical, Talmudic, and post-Talmudic periods").

oral law can undermine the conclusions of pre-modern authoritative codes. Rabbis, like American originalists, must decide how to reconcile the traditional understanding of a foundational document with the best contemporary approximation of its original meaning.

B. *The Classical Period*

Because pertinent new historical evidence in the classical period differs from its modern analogue, this section treats classical Jewish law and modern Jewish law separately and only briefly addresses the classical period. For various reasons, including the dispersal of the Jews both in 586 B.C.E. and 70 C.E., rabbis already had to deal with the problem of new primary evidence in the ancient world.[128] Like the majority in *Erie* and the dissenters in *Owatonna*, classical rabbis sometimes took such evidence seriously and reconsidered their conclusions of law.[129] In general, new evidence in the Talmudic period consisted of a reliable quotation from a previous rabbinic source that was unknown to a rabbi who made a legal pronouncement. Because the statements of the earliest rabbis were as authoritative as the written Torah itself,[130] a new version of a rabbi's statement could, under certain circumstances, settle an open debate.[131] For example, the Talmud recounts a story in which one rabbi, Rabbi Kahana, said that the ritual Purim meal could be eaten at night. As soon as another rabbi told him that he was certain that Rava, one of the most respected rabbis of the period in which the oral law was initially recorded in writing, held that the meal could only be eaten during the day, Rabbi Kahana recanted his own judgment and repeated Rava's holding forty times.[132]

128. Berachyahu Lifshitz, *The Age of the Talmud*, *in* AN INTRODUCTION TO THE HISTORY AND SOURCES OF JEWISH LAW 169, 169-75 (N.S. Hecht et al. eds., 1996) (describing the break between the Babylonian and Palestinian talmudic traditions).

129. ROTH, *supra* note 118, at 318 ("[T]he halakhic system has always dealt with new legal sources—variant readings, previously unknown interpretations, etc.—as valid data of potential legal significance for decision-making.").

130. One of the most famous passages in the Talmud recounts a dispute in which the majority of rabbis held that the Oven of Akhnai was impure, but Rabbi Eliezer disagreed:

> [Rabbi Eliezer] said to them: "If the *halachah* agrees with me, let it be proved from Heaven!" Whereupon a heavenly voice cried out: "Why do you dispute with R. Eliezer seeing that in all matters the *halachah* agrees with him!" But R. Joshua arose and exclaimed, "It is not in heaven." What did he mean by this? Said R. Jeremiah: "That the Torah had already been given at Mount Sinai; we pay no attention to a Heavenly Voice . . . ." Rabbi Nathan met Elijah and asked him: "What did the Holy One, Blessed be He, do in that hour?" He laughed with joy, he replied, saying: "My sons have defeated Me."

BABYLONIAN TALMUD, TRACTATE BABA METZIA 59b (Salis Daiches & H. Freedman trans., The Soncino Press 1986).

131. ROTH, *supra* note 118, at 320 ("There is a long history of the use of new legal sources assumed to have been unknown to the original *posek* [authority] as grounds for the abrogation of his view.").

While a complete survey of the subject is impossible and unnecessary here, it does seem clear that the rabbis in the Talmud, as well as their medieval successors,[133] saw fit to revise their entrenched historical narratives when decisive new primary evidence emerged.

C. *The Modern Period*

The hard question for historically minded judges is not how to deal with the rare groundbreaking new document, but how to reach a historically defensible result in the face of a large documentary record and a contentious historical debate. Modern scientific history has challenged both the underlying assumptions of Jewish law regarding the authorship and history of the Torah and specific conclusions of law offered by rabbis with a less complete knowledge of the legal canon than their successors. Just as originalists have responded to historiography with contrary impulses, so too have rabbis. Although the analogy has limitations that will be exposed, the catholic historical approach can be compared to the response of some traditionalist rabbis, and the protestant approach to the response of some progressives. A coherent third approach, however, can also be gleaned from the decisions of some modern rabbis, an approach that has no fully articulated analogue in the constitutional context.

1. *Jewish Traditionalists*

Many traditional rabbis follow catholic originalist judges in not allowing historical research to affect the linear narrative of the law. Like their American counterparts, these traditionalists argue that historical conclusions are necessarily ephemeral, and the law cannot rest on transitory principles.[134] Their objection goes further, however. For a traditionalist rabbi, revelation is the starting point of legal analysis, and historical evidence must be assessed from that point of view.[135] Modern biblical

132. BABYLONIAN TALMUD, TRACTATE MEGILLA 7b, *quoted in* ROTH, *supra* note 118, at 320.

133. For discussion of medieval rabbis' treatment of new historical sources, see ROTH, *supra* note 118, at 338-41; and Ta-Shma, *supra* note 109, at 125.

134. Louis Jacobs, *A Synthesis of the Traditional and Critical Views*, *in* CONSERVATIVE JUDAISM AND JEWISH LAW 112, 117 (Seymour Siegel ed., 1977) ("[C]riticism, even at its best, is speculative and tentative." (quoting J. Abelson, *Bible Problems and Modern Knowledge*, JEWISH REV., Mar. 1913, at 483)).

135. DORFF & ROSETT, *supra* note 111, at 20-21 (distinguishing the "fundamentalist view" of the Bible, according to which "the whole Pentateuch was given by God to Moses at Sinai," from the "historical view," according to which "the Bible consists of a number of texts, composed by a variety of people in a number of places and times"); Emanuel Feldman, *Changing Patterns in Biblical Criticism*, *in* CHALLENGE: TORAH VIEWS ON SCIENCE AND ITS PROBLEMS 432, 442 (Aryeh Carmell & Cyril Dumb eds., 1976) ("[O]ne [of] the major weaknesses of

criticism, which starts from the premise that the Torah was written by people, therefore has no legal status.[136]

Because it challenges the legal regime itself, modern biblical criticism represents a category of historical evidence without a good analogue in the American constitutional context. The relevant question, therefore, is how traditionalist rabbis deal with the array of historical evidence that challenges the "declared" legal narrative without undermining the foundational premises of Jewish law. In that area, many traditionalists maintain that the *Shulhan Arukh*, a sixteenth-century code of law written by Rabbi Joseph Caro, is the final arbiter of Jewish law.[137] Like the *Seminole Tribe* majority, to the extent that they engage in historical analysis, these interpreters rely primarily on the traditional understanding of the original meaning of the written and oral Torah. But rather than looking to a wide range of authoritative cases to find that understanding in each particular area, rabbis look to a dispositive code containing conclusive interpretations of many provisions of the Torah.[138]

That is certainly not to say that dynamic legal development, even for the most traditional interpreters of the law, ended in the sixteenth century. Indeed, rabbis have presented new answers to a variety of critical questions through the present.[139] These questions, however, often deal with new technology and other unique characteristics of the modern world, and are therefore beyond the scope of any other pre-modern authority.[140] The complex answers to these questions do not offer a workable analogy to the Court's treatment of historical evidence that challenges an established version of history. Rather, they offer an analogy to originalists' treatment of specific issues that were not even conceived of by the Framers, and

Biblical criticism has been its tendency to judge the ancient world by modern frames of reference.").

136. Ze'ev W. Falk, *Jewish Religious Law in the Modern (and Postmodern) World*, 11 J.L. & RELIGION 465, 472 (1994-1995) (arguing that traditional Judaism "closes its eyes vis-à-vis biblical and other historical criticism of Judaism and opposes any *reform* of Jewish law").

137. ROTH, *supra* note 118, at 106 (arguing that legal development for traditionalists essentially ends with the *Shulhan Arukh*); *cf.* Edward Fram, *Jewish Law from the Shulhan Arukh to the Enlightenment*, *in* AN INTRODUCTION TO THE HISTORY AND SOURCES OF JEWISH LAW, *supra* note 128, at 359, 364-65 (tracing the *Shulhan Arukh*'s rise to dominance in Jewish law).

138. *Cf.* DORFF & ROSETT, *supra* note 111, at 394 (arguing that the codes in general and the *Shulhan Arukh* in particular "engendered opposition to the genre" of collaborative legal interpretation, thus effectively "freezing" the traditional *halakhic* process in a wide variety of areas).

139. *See generally* JONATHAN SACKS, ARGUMENTS FOR THE SAKE OF HEAVEN: EMERGING TRENDS IN TRADITIONAL JUDAISM (1991) (describing conflicts among traditional scholars and changes in Jewish law).

140. *E.g.*, MOSES FEINSTEIN, RESPONSA OF RAV MOSHE FEINSTEIN: CARE OF THE CRITICALLY ILL 111-17 (Moshe Dovid Tendler ed. & trans., 1996) (answering the question of whether emergency medical personnel may violate the laws of the Sabbath by driving and using electronic medical equipment).

therefore must be addressed by referring to the Framers' broader purposes and values. These issues are not the primary concern of this Note.

2. *Jewish Progressives*

In contrast to their traditionalist counterparts, many modern progressive rabbis embrace scientific history without distinguishing between legally cognizable and extralegal historical evidence. In their mind, "all empirical aspects of the Jewish past should become the legitimate object of modern rational inquiry,"[141] and that inquiry necessarily leads to a departure from Jewish law. The analogy between progressive rabbis and independent-minded originalists is only workable insofar as classical Reform thinkers in particular, by subverting the rabbinic tradition, privilege the Bible over other texts and oral traditions while also granting post-biblical generations equal interpretative authority over that one text.[142] The progressive, however, is not a textualist in any sense; rather, he is committed to understanding the Bible as a hybrid product of ancient civilizations.[143] Since doing so leads him essentially to abandon the Jewish legal regime and preserve only the broad moral teachings of the Jewish tradition,[144] the analogy to constitutional interpretation is not workable.

3. *An Alternative Approach*

Some rabbis might be classified as full-scale traditionalists or full-scale progressives, but the purpose of this Note is not to take any normative stance regarding Jewish law itself. Many characteristics of Jewish law that are not addressed here, including its revelatory origins and its noncoercive character, would need to be considered before making any prescriptive judgment about what rabbinic approach is preferable. For the discussion of

141. Emil Fackenheim, *Two Types of Reform: Reflections Occasioned by Hasidism*, *in* REFORM JUDAISM: A HISTORICAL PERSPECTIVE 458, 462 (Joseph L. Blau ed., 1973).

142. *See* Abraham Geiger, *Der Kampf christlicher Theologen gegen die burgerliche Gleichstellung der Juden, namentlich mit Bezug auf Anton Theodor Hartmann*, *in* 1 WISSENSCHAFTLICHE ZEITSCHRIFT DER JÜDISCHE THEOLOGIE 349 (1835), *quoted and translated in* HARRIS, *supra* note 125, at 158 ("The principle of tradition, to which the entire talmudic and rabbinic literature owe their emergence, . . . is the principle not to be subservient to the letters of the Bible, but rather to continuously generate anew in accordance with its spirit and genuine religious consciousness that has penetrated the synagogue.").

143. *See generally* Emil G. Hirsch, *The Philosophy of the Reform Movement in American Judaism*, *in* REFORM JUDAISM: A HISTORICAL PERSPECTIVE, *supra* note 141, at 24, 36-37 (arguing that modern biblical criticism reveals the universalistic origins and message of the Bible).

144. David Philipson, THE REFORM MOVEMENT IN JUDAISM 356 (1931) (quoting *Authentic Report of the Proceedings of the Rabbinical Conference Held at Pittsburgh, Nov. 16, 17, 18, 1885*, JEWISH REFORMER, Jan. 15, 1886, at 4) ("We recognize in the Mosaic legislation a system of training the Jewish people for its mission during its national life in Palestine, and to-day we accept as binding only its moral laws.").

the post-originalist problem in American constitutional law, however, the most fruitful Jewish model lies with those rabbis who have gradually adopted a third approach, or a multitextual approach, to innovative historical analysis.

The multitextual approach is inspired by the work of individuals who acknowledge new research without abandoning a fundamental commitment to the Jewish legal regime. Following their traditionalist counterparts, rabbis who use this approach are unconcerned with biblical criticism and its extralegal implications. Because they accept the authority of the legal regime for reasons beyond the historical accuracy of biblical history, the overarching scientific objections to Jewish law are outside the scope of their project.[145] Rabbi Joel Roth explains the position succinctly: "Since in the halakhic system, as in all others, presupposing the existence of a *grundnorm* requires a 'leap of faith,' the truth or falsity of the historical claims of the *grundnorm* is legally irrelevant."[146] After dismissing the legal significance of historical criticism, however, a jurist like Roth does not go on to dismiss historical analysis altogether. Rather, he considers historical evidence that has ramifications within the legal system.[147] For example, according to Roth, if a medieval rabbi rendered a decision based on the demonstrably false presumption that a Babylonian rabbi knew a Palestinian source, a modern rabbi could alter the decision.[148] Like the protestant originalist, he can revise the law based on an improved understanding of a foundational text.[149]

Yet rabbis like Roth do not simply embrace the independent impulse displayed by Justice Souter's *Seminole Tribe* dissent. Like catholic originalists, they will not bypass the tradition between the founding moment and the present, even if they believe that their independent conclusions might sanction such boldness. Instead, their analysis is three-pronged. In addition to looking at the text itself and the current scholarly account of that text, these rabbis also rely on intermediate texts, or previous legal decisions in which the original meaning of the foundational text is fully explicated. For some rabbis, the sixteenth-century *Shulhan Arukh* is the focal point of legal decisionmaking. For the rabbis that concern us,

145. *E.g.*, ROTH, *supra* note 118, at 6-7 ("From the fact that historical sources are legally insignificant, it follows that the demonstration by scholars that the true historical sources of a given norm are different from what had generally been assumed is an interesting revelation, but *legally* insignificant.").

146. *Id.* at 9.

147. *Id.* at 10-12 (elucidating the distinction between historical objections to the legal system and historical argument within the law).

148. *Id.* at 370.

149. *Id.* at 374 ("The newly rediscovered *peshat* [original meaning] of a legal source derived from such evidence can be called a historical-legal source . . . ."); *see also* HARRIS, *supra* note 125, at 262-63 (discussing the work of David Weiss Halivni, who, like Roth, "offers a theory of the restoration of the original meaning of the text to resolve the religious problem").

however, intermediate texts consist of the *Shulhan Arukh* and other privileged codes along with codes or opinions that dissent from the privileged codes and challenge the official exegesis of the Torah.[150] For these authorities, the *Shulhan Arukh* in particular, while deserving of deference, should not necessarily spell the end of legal development.[151] In short, a direct, unmediated return to the written and oral law is too drastic, and for the reasons outlined above, potentially destabilizing. But a blind reliance on a canonical document with an official historical narrative is equally undesirable.

In reaching a decision that departs from the traditional understanding of a foundational text, the authority employing the multitextual approach assesses that text itself from her own vantage point while also consulting the pre-modern authorities who have interpreted that text.[152] When the best contemporary reading of a text is complemented by a vigorous pre-modern reading that was not ultimately accepted by rabbinic authorities, the law in question can be reexamined. On the other hand, when a new interpretation of a text that contradicts the entrenched historical narrative has no firm historical foundations, the interpretation cannot be incorporated into the law. Insofar as he engages in independent analysis while also consulting and deferring to the established traditional understandings of a legal text, the rabbi thus draws from both the protestant and catholic historical approaches.

A number of legal decisions from the modern rabbinic tradition could serve as good examples of what has been called the multitextual approach.[153] Rabbi Aaron H. Blumenthal's decision to discard the law as stated in the *Shulhan Arukh* and allow women to receive the honor of blessing the Torah in front of the congregation is a relatively

150. Indeed, the *Shulhan Arukh*, even according to some traditionalist scholars, departs from traditional practice in not recording minority opinions. Rosenweig, *supra* note 114, at 117.

151. Boaz Cohen, *The Shulhan Arukh as a Guide for Religious Practice Today*, *in* CONSERVATIVE JUDAISM AND JEWISH LAW, *supra* note 134, at 80, 86 ("[T]he *Shulhan Arukh* has no more claim to our unquestioned obedience than the Mishneh Torah or the *Semag* or the *Tur* [other early modern codes] . . . .").

152. *See, e.g.*, Aaron H. Blumenthal, *An Aliyah for Women*, *in* CONSERVATIVE JUDAISM AND JEWISH LAW, *supra* note 134, at 266, 277-79 (arguing that rabbis must "reverse the direction" of the *Halakhah* in areas in which the Talmud and various pre-modern authorities have been subjugated to other pre-modern authorities).

153. For one excellent and straightforward example of this approach, see Philip Siegel, *Women in a Prayer Quorum*, *in* CONSERVATIVE JUDAISM AND JEWISH LAW, *supra* note 134, at 282, in which Siegel argues that the pre-modern decision that women could not be counted in a quorum for prayer was at odds with both the classical and an alternative pre-modern tradition. A far more complicated example is Roth's decision that women should be permitted to become rabbis. Roth argues that if women can voluntarily observe those commandments from which they are legally exempt, and even undertake legal obligations, one of the objections to their ordination dissolves. To make his argument, Roth draws heavily from both modern scholarly resources and medieval and early modern authorities. Joel Roth, *On the Ordination of Women as Rabbis*, *in* THE ORDINATION OF WOMEN AS RABBIS: STUDIES AND RESPONSA 127 (Simon Greenberg ed., 1988).

straightforward example.[154] To reach his decision, Blumenthal reinterprets the two early rabbinic passages on the subject with the aid of historical research, and then shows that intermediate texts from the medieval period point toward a traditional understanding of the foundational documents that buttress his result.[155] Blumenthal starts by citing a rabbinic text quoted in the Talmud that reads as follows: "Anyone may ascend for an *aliyah* . . . even a woman, but the sages have said that a woman shall not read in public because of the dignity of the congregation."[156] An earlier version of the same authoritative text, meanwhile, says: "Anyone may ascend for the seven honors[,] . . . even a woman. One may not bring a woman to read in public."[157]

Emphasizing the qualification in both texts, many pre-modern codifiers of the law read the texts to exclude women from making the blessing.[158] Blumenthal, however, noting that "the positive, the granting of the permission, must have had some relevance,"[159] engages in an independent inquiry. After canvassing the early rabbinic texts to uncover the original meaning of the terms "dignity of the congregation" and "read in public," Blumenthal concludes that the qualifications in the texts were ultimately secondary to the positive grants of permission. The term "read in public," Blumenthal shows, referred specifically to reading the Torah itself rather than blessing the Torah—in which case the word "read" would have been used alone.[160] Moreover, the "dignity of the congregation," which appears in the later text, demanded only that a woman from outside the congregation not be brought in to read the Torah, thus humiliating the men in the congregation.[161]

Blumenthal does not rely only on his own independent exegesis and research to reach his judgment; rather, he demonstrates that pre-modern authorities were themselves deeply split on the question at hand and, crucially, an alternative traditional understanding of the text complemented his own reinterpretation. The *Ran*, for example, a fourteenth-century authority, also emphasized the grant of authority in the text and interpreted the term "dignity of the congregation" to mean only that all seven of the

154. Blumenthal, *supra* note 152, at 266.

155. *Id.* at 266-67 ("We shall try . . . in a moment to discuss what this text might have meant to the *Tannaim* [rabbis from the mishnaic period] in their day, and to bring to it the comments of later authorities.").

156. BABYLONIAN TALMUD, TRACTATE MEGILLA 23a (Maurice Simon trans., The Soncino Press 1984).

157. TOSEFTA MEGILLA 3, *quoted in* Blumenthal, *supra* note 152, at 269.

158. *See* Blumenthal, *supra* note 152, at 270-71 (citing a variety of sources, including the *Shulhan Arukh*, that use the classical text as a basis for the exclusion of women).

159. *Id.* at 270.

160. *Id.* at 270-71.

161. *Id.* at 267-68, 271.

blessings could not be said by women.[162] Rabbi Isserles, meanwhile, whose codification of the law during the same period was enormously influential, reached the same conclusion.[163] In Blumenthal's judgment, the prohibitive posture of the stringent pre-modern authorities constituted a misguided detour from the original and authentic legal narrative.[164] Because that narrative was kept alive by authorities who were aware of and committed to an alternative tradition, even if they were unable to provide Blumenthal's own decisive historical argument for that tradition, it could now be resuscitated.

VI. THE POST-ORIGINALIST PROBLEM: A PRELIMINARY RESPONSE

Part V outlined an interpretative approach used by individual rabbis that presents a coherent alternative to the approaches articulated in *Seminole Tribe*. That approach invites judges to engage in a direct exegesis of constitutional provisions while also drawing from the conclusions of the historians who are best situated to uncover the original meaning of the text. At the same time, however, except in the rare case of groundbreaking primary evidence, it compels judges to consider pertinent and thorough intermediate texts, thus effectively limiting the possible interpretations of a clause to those that have been previously articulated, though not necessarily by a majority.

This Part attempts to measure the substantive implications of the multitextual approach for originalism in constitutional law. Because historical analysis is only one element of most judicial decisions, even in cases that ultimately turn on the original meaning of a clause, it is difficult to discuss the implications of any historical approach primarily in terms of how cases ultimately come out. For example, even if every Justice on the Court believed that *Marbury v. Madison* was wrongly decided based on persuasive historical evidence, the Court would most likely uphold the decision based on stare decisis. Also, because originalism, despite its prominence, is not a dominant interpretative method, and because even so-called originalists sometimes choose to privilege nonhistorical modes of interpretation, approaches to historical analysis can be irrelevant. For example, despite Justice Thomas's introduction of devastating historical evidence in *Owatonna*, the Court avoided the historical question altogether. Nevertheless, since results in some cases rest to some extent on historical conclusions, a limited discussion of the analogy's implications for originalists is possible.

162. *Id.* at 271-72.
163. *Id.* at 272.
164. *Id.* at 279.

From the point of view of a committed originalist, a judge who accepts the premises of originalism but is faced with a record of dense, historically oriented decisions has the potential to exert a dangerous influence on the common law of history in two ways. First, she can codify independent historical conclusions, thus ignoring the court's official history. Alternatively, she can blindly rely on that history, thus exposing the court to overbearing extralegal critique. The multitextual approach prevents the former by limiting judges' capacity to cast aside the historical conclusions of their predecessors in favor of their own independently derived historical conclusions. At the same time, the approach also prevents the latter because it allows judges to go beyond a single intermediate text and reassess relevant documentary evidence when intermediate texts justify such reassessment. The approach, therefore, sets external boundaries outside of which judges risk undermining essential originalist goals.

Two cases from the sovereign immunity context, both of which preceded *Seminole Tribe*, illustrate how the multitextual approach sets boundaries for originalists, and why those boundaries are useful. The potential pitfalls of a purely catholic historical approach are evident in *Pennsylvania v. Union Gas Co.*,[165] in which the Court sustained a statute passed under Congress's Commerce Clause authority that abrogated state sovereign immunity from particular environmental damage suits. Justice Brennan's majority opinion in *Union Gas* did not take a primarily historical approach. Indeed, Justice Brennan disposed of the extremely complex historical debate surrounding the Eleventh Amendment simply by referring to *Monaco v. Mississippi*'s[166] reliance on *The Federalist No. 81*, in which Hamilton conceded that state sovereign immunity might be limited when a limitation was "in the plan of the convention."[167] The bulk of the historical analysis in *Union Gas* was left to Justice Stevens's concurrence. Rather than revisiting any original sources, however, Justice Stevens asserted that Justice Brennan's dissenting opinion in *Atascadero State Hospital v. Scanlon*,[168] which contained an extended historical essay on the original understanding of sovereign immunity, "conclusively" settled the matter.[169] Yet Justice Brennan's dissenting opinion, after quoting a number of speeches from the ratification period as well as *The Federalist No. 81*, could conclude only that "there was no firm consensus concerning the

165. 491 U.S. 1 (1989).

166. 292 U.S. 313 (1934).

167. *Union Gas*, 491 U.S. at 19 (quoting *Monaco*, 292 U.S. at 322-23 (quoting THE FEDERALIST NO. 81 (Alexander Hamilton))).

168. 473 U.S. 234, 247 (1985) (Brennan, J., dissenting).

169. *Union Gas*, 491 U.S. at 24 (Stevens, J., concurring). Justice Stevens also noted that "the works of numerous scholars" supported Justice Brennan's conclusion. *Id.* at 24. Yet Stevens merely listed a number of articles without mentioning the many articles that reach the opposite conclusion or explicating any of the analysis in even one article.

extent to which the judicial power of the United States extended to suits against States."[170] Although Justice Brennan went on to argue in the *Atascadero* dissent that the most plausible reading of the historical evidence permits the abrogation of state sovereign immunity, the opinion certainly did not "conclusively refute[] the contention that the Eleventh Amendment embodies a general grant of sovereign immunity,"[171] as Justice Stevens claimed.

The weakness of the *Union Gas* concurrence as a historical opinion, from the point of view of the multitextual approach, is not that it relied on Justice Brennan's conclusions in *Atascadero*. Rather, as Justice Scalia pointed out in his dissent,[172] it is that the opinion privileged one intermediate text while also shunning the wide array of primary evidence that *Atascadero* and the many intermediate texts preceding it interpreted to different ends. Beginning with *Hans*, which the *Seminole Tribe* Court would later resuscitate, the Court presented extensive documentary evidence to establish that "[a]ny such power as that of authorizing the federal judiciary to entertain suits by individuals against the States, had been expressly disclaimed, and even resented, by the great defenders of the Constitution."[173] Yet Justice Stevens declined to revisit *Hans* and its progeny, choosing instead to rely on Justice Brennan's dissent in *Atascadero* and on a sweeping interpretation of the post-*Hans* case law, according to which that case law was "premised on a prudential balancing of state and federal interests" rather than on a particular reading of the Eleventh Amendment.[174] In light of Justice Brennan's structural and textual arguments in favor of sustaining the statute in question in *Union Gas*, it is unlikely that the case would have been decided differently had Justice Stevens employed a more complete historical approach. Nevertheless, the Court would have been forced at the very least to give a richer historical argument for its "solitary departure from established law."[175]

Union Gas therefore exposes the potential risks of purely catholic historical analysis. Justice Brennan's dissent in *Atascadero*, meanwhile, exposes the potential risks posed by the opposite extreme. In *Atascadero*,

170. *Atascadero*, 473 U.S. at 278 (Brennan, J., dissenting).

171. *Union Gas*, 491 U.S. at 24 (Stevens, J., concurring).

172. In a display of catholic historical reasoning, Justice Scalia subjugated his own independent analysis to *Hans*'s even though they reached the same result:

> Even if I were wrong, however, about the original meaning of the Constitution, or the assumption adopted by the Eleventh Amendment . . . it cannot possibly be denied that the question is at least close. In that situation, the *mere venerability of an answer consistently adhered to for almost a century*, and the difficulty of changing . . . the intervening law that has been based on that answer, strongly argue against a change.

Id. at 34 (Scalia, J., concurring in part and dissenting in part) (emphasis added).

173. Hans v. Louisiana, 134 U.S. 1, 12 (1890).

174. *Union Gas*, 491 U.S. at 28 n.3 (Stevens, J., concurring).

175. Seminole Tribe v. Florida, 517 U.S. 44, 66 (1996).

Justice Brennan contended that "[r]ecent research has discovered and collated substantial evidence that the Court's constitutional doctrine of state sovereign immunity has rested on a mistaken historical premise . . . . New evidence concerning the drafting and ratification of the original Constitution indicates that the Framers never intended to constitutionalize the doctrine of state sovereign immunity."[176] Justice Brennan's "new evidence" was not made up of previously unknown primary sources, however, but of an array of academic articles that challenge *Hans*'s history.[177] Using these articles as a guide, Justice Brennan cited a variety of primary sources to support his historical conclusion, some of which already appeared in *Hans* and other cases. In doing so, he went directly back to the Founding period, grounding his historical position primarily in scholarly accounts of the Founding that would soon be contested, and not in relevant intermediate texts. Nevertheless, Justice Brennan's thoroughly independent approach laid the groundwork for Justice Stevens's *Union Gas* concurrence, which used *Atascadero* to depart from *Hans*. The *Seminole Tribe* Court, therefore, was faced with the historical reasoning of a protestant dissent that was incorporated into the common law of history by a catholic majority in *Union Gas*. Had Justice Brennan's original dissent begun its inquiry with the traditional understandings of the original meaning of sovereign immunity, the unwieldy historical dispute in *Seminole Tribe* might have been avoided.

In *Union Gas* and *Atascadero*, the multitextual approach would have constrained Justices' historical analyses. But the approach guarantees no particular results. Even if judges employed historical argument to the exclusion of other forms of legal analysis and then constrained their historical analyses based on intermediate texts, there is often room for substantial disagreement within intermediate traditions themselves. For example, in addition to all the independent historical arguments presented in the *Thornton* opinions, both sides still maintained that their historical conclusions were grounded in *Powell*. Ultimately, even within the confines of the multitextual approach, judges can reach different historical conclusions and must exert their own judgment about the available evidence. The multitextual approach, therefore, just sets boundaries within which to reassess declared history. It does not offer a comprehensive historical method for originalists or a complete response to the post-originalist problem.

Whether or not judges employ the multitextual approach, the analogy to Jewish law remains useful, for it invites critics of the Court's history to look

176. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 258-59 (1985) (Brennan, J., dissenting).

177. *Id.* at 258 n.11.

at that history from an originalist's point of view rather than a historian's point of view. Using the rabbinic interpretative framework as a starting point, students of the Court's turn to history can move away from the claim that Justices have mistaken the Framers' intent in a particular area. That claim, made on its own, does not take into account the array of factors that influence originalist judges, including the need for doctrinal stability after the turn to history and the fragility of particular historical conclusions. Meanwhile, the framework also leads observers away from the claim that the common law of history becomes dangerously subjective and unstable whenever judges codify a revised historical conclusion. That claim, made on its own, rests on the unfounded assumption that earlier judges, even if they lived well after the Founding, had superior knowledge of the Framers' intentions and a clearer understanding of their language. The multitextual approach, therefore, despite its limitations as a practical guide, promotes discussion of judicially generated history that acknowledges the tension within originalism between the protestant impulse to reinterpret the original text and the catholic desire to yield to tradition.

VII. CONCLUSION

Michael Oakeshott distinguished between a "historical attitude" toward the past, according to which "the past is *not* viewed in relation to the present," and a "practical attitude" toward the past, which leads people "to read[] the past backwards."[178] The originalist project demands that judges adopt a practical attitude toward the past, as it requires them to justify their current interpretations of constitutional provisions with historical analysis. Yet judges compensate for the limits of their practical attitude by deferring to historians, whose presumably historical attitude grants much-needed legitimacy to the declared historical narrative. Moreover, even as judges essentially codify historical conclusions, they too try to adopt a "historical attitude," for they frame their results as the product of detached historical inquiries rather than as the starting point for those inquiries.

This Note argued that the attempt to combine the practical application of historical knowledge with a historical attitude toward the past yields a particular problem. Simply put, the historical conclusions in judicial opinions sometimes become outdated, or at the very least questionable. Without taking any position on the merits of originalism as a theory of constitutional interpretation, the Note explicated two divergent responses to the problem that can be extracted from recent Supreme Court decisions, but concluded that neither response is fully compatible with originalists' fundamental goals or actual judicial practice. The Note then suggested that

178. OAKESHOTT, *supra* note 1, at 168-69.

Jewish law, which has long struggled with the post-originalist problem, might offer a useful perspective on that problem. Finally, the Note demonstrated that an interpretative framework constructed by some modern rabbis, irrespective of its value within the Jewish tradition itself, might be used to define boundaries within which judges can reinterpret history without undermining the goals of the originalist project.

Ultimately, the argument of this Note relies to some extent on the possibly naïve assumption that originalist judges, and rabbis for that matter, modify their historical conclusions for historical reasons instead of working backwards from desired results. Yet even if this assumption is in some cases unwarranted, I have tried to contribute to the study of originalism by making originalists' prevailing historical approaches more transparent, and exposing results-oriented history, along with all judicially generated history, to criticism on originalists' own terms. Following Oakeshott, this Note does not deny that judges' use of history, even when it does not appear results-oriented, will remain an "incursion of a practical attitude into what purports to be an 'historical' inquiry."[179] It does deny, however, that the common law of history should be treated either as history or as precedent, and suggests that it can be treated as something in between.

179. *Id.* at 176.