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THE IDEA OF A USEABLE PAST

*Cass R. Sunstein**

When historians write about historical issues associated with the American Constitution, what is their goal? What are they trying to *do*? At one stage the answer was simple: Offer an accurate description of the facts. If it turns out that the Framers were good democrats attempting to discipline potentially evil representatives by reference to the will of the assembled people, the historian should simply announce that (happy) fact. If, on the other hand, the facts show that the Framers were manipulative, self-interested aristocrats seeking to limit the power of the public, the historian's job is to say so.

It is now much disputed whether and to what extent this conception of the historian's role can be sustained.¹ Of course there is no view from nowhere; of course we all stand somewhere. Perhaps any historical account, offered by someone in a particular time and place, will reflect current preoccupations and potentially controversial assumptions. To say the least, it is hard to avoid forms of selectivity in dealing with the past. This possibility should certainly not be read for more than it is worth.² No one ought to doubt that nations, including the United States, have had a past; no one should doubt that there are really facts to which any historical account must attempt to conform. But human beings see history through their own filters, including their own assumptions, and the result is, inevitably, something other than unmediated access to what happened before. Whether this is a serious obstacle to the traditional understanding of the historian's task is a large and disputed question.

The traditional constitutional lawyer³ tends to view the historian's role in pretty conventional terms, as a search for "the facts."⁴ Often historians have been sharply critical of constitutional history as done by constitutional lawyers; when they are, they tend to see the constitutional lawyer as an advocate, or as a debased historian, mining the past for insights

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1. See Peter Novick, *That Noble Dream: The "Objectivity Question" and the American Historical Profession* 1-17 (1988).

2. See Joyce Appleby et al., *Telling the Truth About History* (1994); Gordon S. Wood, *The Usable Past*, *The New Republic*, Nov. 7, 1994, at 46 (book review). On similar issues in philosophy, involving the consequences of critiques of metaphysical realism, see Hilary Putnam, *Renewing Philosophy* 180-200 (1992).

3. By this term I mean to refer not only to judges and lawyers involved in constitutional law, but also to academic lawyers involved in constitutional argument.

4. Martin Flaherty seems not to be an exception, especially insofar as he challenges historical writing for being untrue to the facts or selective about them. See Martin S. Flaherty, *History "Lite"* in *Modern American Constitutionalism*, 95 *Colum. L. Rev.* 523, 552-53 (1995).

congenial to the lawyer's political convictions.⁵ One of my prime purposes here is to respond to historians who think of the historically-inclined constitutional lawyer in these terms. What I want to suggest is that the historian and the constitutional lawyer have legitimately different roles. The constitutional lawyer interested in history need not be a politically motivated scavenger of real historical work, but a different sort of creature altogether, with a special and not dishonorable function.

In short, the constitutional lawyer thinking about constitutional history has a particular purpose and a recognizable project, and what a constitutional lawyer finds from history may, for legitimate reasons relating to that purpose and that role, be quite different from what a historian finds there. This does not reduce the constitutional lawyer to a mere advocate. But it does mean that the function of the constitutional lawyer, even if historically inclined, is properly and unembarrassingly distinctive.

Nothing in what I have said, or will say, denies that the constitutional lawyer owes certain duties of fidelity to the past. The constitutional lawyer should not claim that the history supports a particular view when it does not. The history can falsify much of what the constitutional lawyer might seek to say, at least if the constitutional lawyer genuinely cares about history. History imposes constraints on the lawyer as well as the historian.

If they are reflective, however, many constitutional lawyers will happily acknowledge that they see their task not as uncovering the "facts," and not as simply describing what happened, but instead as interpretive in something like Ronald Dworkin's sense of that term.⁶ On this view, constitutional lawyers, unlike ordinary historians, should attempt *to make the best constructive sense out of historical events associated with the Constitution*. They do owe a duty of "fit" to the materials;⁷ they cannot disregard the actual events, which therefore discipline their accounts. But they also try to conceive of the materials in a way that makes political or moral sense, rather than nonsense, out of them to current generations.

Everyone can see that the political or moral commitments of the constitutional lawyer are an omnipresent part of the constitutional lawyer's constitutional history.⁸ Why is this? Is it an embarrassment, or does

5. See Flaherty, *supra* note 4; Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 *J. Am. Hist.* 11, 33 (1992); G. Edward White, *Reflections on the "Republican Revival": Interdisciplinary Scholarship in the Legal Academy*, 6 *Yale J.L. & Human.* 1 (1994).

6. See Ronald Dworkin, *Law's Empire* 49-55 (1986) (describing interpretive nature of law). Dworkin is not, however, speaking of the use of history, and on Dworkin's view of constitutional law, the history behind a provision appears to be barely relevant. I do not mean to endorse Dworkin's view of constitutional interpretation; see Cass R. Sunstein, *Incompletely Theorized Agreements*, *Harv. L. Rev.* (forthcoming 1995); Cass R. Sunstein, *Legal Reasoning and Political Conflict* ch. 3 (1994) (unpublished manuscript, on file with author).

7. See Flaherty, *supra* note 4, at 580-81.

8. As emphasized in White, *supra* note 5.

it reveal something disturbing or untoward? I do not think so. Political or moral commitments play a role because of the interpretive nature of the lawyer's enterprise, which involves showing how the history might be put to present use. I think that this interpretive enterprise is typified, for example, in Bruce Ackerman's work, though Ackerman often writes as if he were simply describing the facts.⁹ I also think that this interpretive enterprise is far from mere advocacy. The distinction requires more elaborate treatment than I can offer here. For the moment, let me simply suggest that the true advocate begins with a preestablished conclusion, is interested only in persuasion, and allows his political convictions to dominate everything that he says, whereas the historically-inclined constitutional lawyer is interested in truth, and owes duties of objectivity and fairness to the materials that he invokes.¹⁰

With this in mind we come to the idea of a *useable past*.¹¹ This idea points to the goal of finding elements in history that can be brought fruitfully to bear on current problems. The search for a useable past is a defining feature of the constitutional lawyer's approach to constitutional history. It may or may not be a part of the historian's approach to constitutional history, depending on the particular historian's conception of the historian's role. The historian may not be concerned with a useable past at all, at least not in any simple sense. Perhaps the historian wants to reveal the closest thing to a full picture of the past, or to stress the worst aspects of a culture's legal tradition; certainly there is nothing wrong with these projects. But constitutional history as set out by the constitutional lawyer, as a participant in the constitutional culture, usually tries to put things in a favorable or appealing light without, however, distorting what actually can be found.

Is the constitutional lawyer's approach—as I am describing it here—cynical, or dishonest, or debased, or reflective of a form of “history lite”? The question cannot be answered in the abstract. Sometimes the charge of cynicism, dishonesty, debasement, or “liteness” is entirely warranted. For example, it is familiar to find a constitutional lawyer reading history at a very high level of abstraction (“the Framers were committed to freedom of speech”) and concluding that some concrete outcome follows for us (“laws regulating obscenity are unconstitutional”). This use of history is not honorable. It is a bad version of formalism—the pretense that concrete cases can be resolved by reference to general propositions, when in fact some supplemental value judgments are required.¹²

9. See 1 Bruce Ackerman, *We the People* (1991).

10. On how the notion of objectivity might be maintained despite the inevitability of a form of selectivity, see Putnam, *supra* note 2, at 180–200.

11. See Akhil R. Amar, *Of Sovereignty and Federalism*, 96 *Yale L.J.* 1425 (1987).

12. An honorable species of formalism is defended in Frederick Schauer, *Playing By the Rules* 229–33 (1991); this species of formalism calls for adherence to the literal text of legal materials.

Moreover, constitutional lawyers, preoccupied with the idea of a useable past, may draw from history a lesson that comes pretty much entirely from their own political commitments, and not at all from the history itself. Certainly this is true of some of Robert Bork's use of history.¹³ Bork's particular understanding of the so-called Madisonian dilemma would not be appealing to Madison; consider Bork's suggestion, which Madison would not find even plausible, that "majorities are entitled to rule, if they wish, simply because they are majorities."¹⁴ Some of John Hart Ely's use of history—to support a "process-perfecting" conception of judicial review—probably belongs in this category as well.¹⁵

On the other hand, constitutional lawyers should not argue that the Constitution requires whatever they think a good constitution would say, and as a way of disciplining legal judgment, constitutional lawyers should look to history as a part of constitutional interpretation. Hence there is nothing at all dishonorable in the idea that constitutional lawyers should try to identify those features of the constitutional past that are, in their view, especially suitable for present constitutional use. The American constitutional culture gives special weight to the convictions of those who ratified constitutional provisions, and though I cannot fully defend the claim here, I believe that this interpretive practice is legitimate. Constitutional law is based on ideas about authority, not just on ideas about the good or the right. Constitutional history¹⁶ provides a way of constraining legal judgments, invoking a set of provisions with at least some kind of democratic pedigree, and providing a shared set of materials from which judicial reasoning can proceed.¹⁷

Nothing in these remarks is inconsistent with the proposition that much in our constitutional history is bad and no longer useable. Some aspects of constitutional history that are of considerable importance to

13. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind. L.J.* 1 (1971); see also Robert H. Bork, *The Tempting of America* (1990) [hereinafter Bork, *The Tempting of America*].

14. Bork, *The Tempting of America*, *supra* note 13, at 139.

15. See John H. Ely, *Democracy and Distrust* 77–101 (1980).

16. In this regard Flaherty rightly points to the importance of consulting the primary sources, and of understanding the best and most recent work by historians. See Flaherty, *supra* note 4, at 553–56.

17. See David A. Strauss, *Common Law Constitutional Interpretation* (1994) (unpublished manuscript, on file with Columbia Law Review). Of course there remains the question of deciding at what level of generality the history is to be read. If read at a high level, the history could authorize any decision at all; if read at a very low level, the result would probably be useless for current problems. It follows that some kind of intermediate course will make best sense, though I can hardly discuss this complex issue—the issue of “how to read” the past for constitutional purposes—in this space. Doubts about the possibility of the historical enterprise—how can we know what long-dead people really meant? how can we possibly reconstruct their world?—seem to me overstated in principle; but whether or not they are overstated, such doubts are hard for the constitutional lawyer to entertain. For better or for worse, the lawyer participates in a culture in which historical arguments are important, and it is therefore unhelpful to throw up one's hands.

constitutional historians may not be so useful for constitutional lawyers. Slavery was of course accepted in the Founding period; the Framers' conception of free speech was almost certainly much narrower than anyone would find reasonable today; the Framers' conception of equality would permit forms of discrimination that the Supreme Court would unanimously condemn. It is undoubtedly worthwhile for people to explore old and sometimes unacceptable understandings for purposes of grasping our own constitutional past.

What I am suggesting is that the constitutional lawyer, thinking about the future course of constitutional law, has a special project in mind, and that there is nothing wrong with that project.¹⁸ The historian is trying to reimagine the past, necessarily from a present-day standpoint, but subject to the discipline provided by the sources and by the interpretive conventions in the relevant communities of historians. By contrast, the constitutional lawyer is trying to contribute to the legal culture's repertoire of arguments and political/legal narratives that place a (stylized) past and present into a trajectory leading to a desired future. On this view, the historically-minded lawyer need not be thought to be doing a second-rate or debased version of what the professional historians do well, but is working in a quite different tradition with overlapping but distinct criteria.

My own interest in constitutional history¹⁹ has largely stemmed from an effort to re-evaluate two understandings common in the last generation: that the Framers were principally or exclusively concerned with the protection of preexisting private rights (the so-called Lockean account²⁰), or that they sought instead to set out the terms for interest-group struggle (the so-called pluralist account²¹). These understandings are quite inadequate.²² The Framers were republicans, and they were republicans in the distinctive sense that they prized civic virtue and sought to promote deliberation in government—deliberation oriented toward right answers about the collective good. We cannot understand our constitutional heritage without resort to these points.

Republicanism, thus understood, does not stand opposed to liberalism, and indeed the opposition between republicanism and liberalism

18. I am very grateful to Richard Ross for helpful discussion of the thoughts in this paragraph.

19. See Cass R. Sunstein, *The Partial Constitution* 17–39, 123–61 (1993); Cass R. Sunstein, *Beyond the Republican Revival*, 97 *Yale L.J.* 1539 (1988); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 *Stan. L. Rev.* 29 (1985). Historical claims also play a central role in Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *Colum. L. Rev.* 1 (1994).

20. See Louis Hartz, *The Liberal Tradition in America* 3–20 (Harcourt Brace Jovanovich 1991) (1955).

21. See Robert A. Dahl, *A Preface to Democratic Theory* 4–32 (1963).

22. The best demonstrations are Gordon S. Wood, *The Creation of the American Republic: 1776–1787* (1969); Gordon S. Wood, *The Radicalism of the American Revolution* (1992).

has been quite damaging to the academic study of law (and to the profession of history as well).²³ But republicanism is sharply opposed to interest-group pictures of governance. It favors instead a conception of deliberative democracy. For constitutional lawyers as well as historians, this is a matter of considerable importance. It bears on how we think about the Founding document and it also relates to, though it certainly does not resolve, a range of concrete constitutional controversies.

Of course the republican tradition, in some of its incarnations, has been associated with unappealing and unusable ideals—exclusion of women, militarism, lack of respect for competing conceptions of the good, and more. But the commitment to deliberative democracy is not logically connected with those unappealing ideals; indeed, as an abstraction it is in considerable tension with them. Constitutional lawyers who are interested in republicanism need not be embarrassed by its contingent historical connection with unjust practices. Nearly all traditions, and nearly all expositors of traditions, can be shown to have had blind spots, and this does not mean that it is wrong to attend to traditions and to their best expositors.

To be sure, there is a freestanding, nonhistorical argument for deliberative democracy as a central political ideal.²⁴ But for constitutional lawyers, the argument for deliberative democracy should be interpretive (in the sense I have described) rather than freestanding. That argument draws substantial support from historical understandings. All this leaves open a wide range of questions, to say the least; but I think that it helps to explain the interest in republicanism as an historical phenomenon from the standpoint not just of historians, but also of constitutional lawyers in particular. I think that it also helps explain why the constitu-

23. Liberalism and republicanism are opposed, for example, in White, *supra* note 5, and Rodgers, *supra* note 5. Rodgers in particular identifies liberalism with an “inability to imagine politics as anything other than interest group pluralism,” and as committed to “procedural neutrality.” These understandings of liberalism, found in much historical work, are extremely odd, and based at most on certain strands in liberalism. Those strands should hardly be identified with the liberal tradition itself. Mill, Rawls, and Raz, for example, thoroughly reject these ideas, and reject them because of their understanding of what liberalism entails. See John Stuart Mill, *Considerations on Representative Government* (Gateway Editions 1962) (1861); John Rawls, *A Theory of Justice* (1971); Joseph Raz, *The Morality of Freedom* (1986).

To say this is not to deny that some republicans emphasized some goals that some liberals tend to view skeptically. Some liberals, for example, emphasize the likely role of self-interest in politics, whereas some republicans stress pre-modern ideas involving corruption in government and the concept of “virtue.” See White, *supra* note 5, at 7. But these differences of emphasis should not be taken to suggest that the liberal and republican traditions are at war or even distinguishable. Better antonyms to republicanism are interest-group pluralism and conceptions of politics that see protection of private rights as the sole purpose of constitutional structure.

24. See, e.g., Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *The Good Polity* 17, 18–26 (Alan Hamlin & Philip Pettit eds., 1990); Jürgen Habermas, *Three Normative Models of Democracy*, 1 *Constellations* 10 (1994).

tional lawyer's conception of republicanism need not entirely track that of the historian.

In his instructive article, Flaherty does not contest the view that the Framers were republicans in a distinctive sense, nor does he challenge the claim that the Framers sought to promote deliberation in government. Insofar as he discusses my views, Flaherty's principal argument is that I have stressed the Framers' emphasis on political deliberation at the expense of their concern about rights and, in particular, about natural rights. This is an important and complex issue, and it is good to see the issue raised at the level of both historical understanding and constitutional theory.²⁵ By way of response, I offer a few brief remarks here, intended not to resolve this complex issue, but to point to some directions for future inquiry.

Of course the Framers were committed to rights, and of course they sometimes spoke in terms of natural rights. No eighteenth-century American or British republican opposed rights, or saw the slightest tension between his commitment to republicanism and his commitment to rights. But—my first point—many of the rights that the Framers prized were in fact a precondition for political liberty and thoroughly understood as such.²⁶ The right to freedom of speech is the best example, but it is complemented by the right to a jury trial, the right to bear arms, the right to private property, and much more. To this extent, an emphasis on rights, and even natural rights, is not inconsistent with the emphasis on deliberative democracy as a conception of republicanism. On the contrary, a properly-functioning deliberative democracy prizes rights. The Framers well understood this point.

As Flaherty shows, the Framers did not believe that all rights, to qualify as such, must be associated with political deliberation; and the category of natural rights, extending beyond politics, was one with which the Framers were familiar. But—and this is my second point—we should be extremely careful with the idea of “natural rights” as it was understood in the eighteenth century. It would be interesting to ask random constitutional lawyers a trivia question: How many times does the phrase “natural rights” appear in *The Federalist Papers*? The term occurs not a hundred times, not twenty times, not ten times, but only once—and then in an inconsequential place.²⁷ The notion of natural rights was much less of a defining theme than many observers think.

Moreover, the phrase “natural rights,” when used, had certain complex meanings, and it is important for modern observers to be careful in

25. As to constitutional theory, compare James E. Fleming, *Constructing the Substantive Constitution*, 72 Tex. L. Rev. 211 (1993), with Cass R. Sunstein, *Liberal Constitutionalism and Liberal Justice*, 72 Tex. L. Rev. 305 (1993).

26. See generally Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131 (1991).

27. See *The Federalist Concordance* 343 (1988). By contrast, the term “rights” occurs 149 times. *Id.* at 475.

reconstructing those meanings. Even those who believed in natural rights need not have thought that there was a correspondence between such rights and the rights guaranteed by the Constitution. Recall that Hume conceived of property rights as part of convention rather than nature.²⁸ Jefferson thought in the same terms.²⁹ When the Founding generation spoke of “natural rights,” it is not simple for twentieth-century observers to understand what they meant. Often the term “nature” has been identified with the best conception of human flourishing, rather than with what would happen without governmental interference. This is the classical understanding,³⁰ and it had a strong influence on the Framers. Perhaps the Framers, when speaking of natural rights, were responding to those who spoke of the “divine right” of kings, and perhaps they were deploying the rhetoric of “nature” for the distinct purpose of meeting that way of seeing things.³¹

Notwithstanding these points, Flaherty is undoubtedly correct to point to the area of eighteenth-century “rights” as one that modern constitutional commentators have inadequately understood, certainly in law. There is a great deal more to do on this important subject. Perhaps Flaherty’s essay can help constitutional lawyers to embark on this long overdue task. When they do so, it will probably be as part of their interpretive enterprise, and what I am emphasizing here is that this enterprise has special characteristics that distinguish it from the enterprise of the ordinary historian.

28. See David Hume, *A Treatise on Human Nature* 491 (1973) (“Our property is nothing but those goods, whose constant possession is establish’d by the laws and society A man’s property is some object related to him. This relation is not natural” *Id.* at 501–13.)

29.

It is agreed by those who have seriously considered the subject, that no individual has, of natural right, a separate property in an acre of land, for instance. By an universal law, indeed, whatever, fixed or movable, belongs to all men equally and in common, is the property for the moment of him who occupies it, but when he relinquishes the occupation, the property goes with it. Stable ownership is the gift of social law, and is given late in the progress of society.

Letter from Thomas Jefferson to Isaac McPherson, Aug. 13, 1813, *in* *The Life and Selected Writings of Thomas Jefferson* 576 (Adrienne Koch & William Peden eds., 1993).

30. See Aristotle, *Aristotle’s Physics* 25–27 (Hippocrates G. Apostles trans., 1980).

31. I am grateful to Stephen Holmes for this suggestion.