



8-18-2023

The Next Required Law School Course: History of America's Foundings

Kevin Frazier

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Recommended Citation

Kevin Frazier, *The Next Required Law School Course: History of America's Foundings*, 54 ST. MARY'S L.J. 1025 (2023).

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ARTICLE

THE NEXT REQUIRED LAW SCHOOL COURSE: HISTORY OF AMERICA'S FOUNDINGS

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I. INTRODUCTION

The Supreme Court has cited the Federalist Papers hundreds of times to analyze the meaning of the Constitution.¹ The Anti-Federalist Papers, on the other hand, receive few citations in the Court's opinions.² The prevalence of Federalist Paper citations and the dearth of Anti-Federalist references necessitate a similar response from law schools everywhere: a required history class that covers the Founding Era, among other periods. The Court's citations to the Federalist Papers alone evidence the importance of this era to constitutional law. The prominent role of amicus briefs from historians confirms that importance.³ But law schools must do more than teach what the advocates for ratifying the Constitution believed it meant. They must also provide students with the tools of historical analysis needed to develop a nuanced understanding of what made the Constitution so revolutionary and how its ratification process revealed important hopes and fears.

Law schools should also make the Reconstruction Era a part of that required course. Coined *The Second Founding* by Eric Foner⁴ and others,⁵ this era transformed the Constitution through the Thirteenth, Fourteenth, and Fifteenth Amendments and witnessed fundamental changes in the general understanding of "We, the People."⁶ This era's Congress has been called "the Congress of the Revolution" for its work on civil rights.⁷ Supreme Court opinions have hinged on channeling the spirit of these "Reconstruction Amendments" and their accompanying legislation.⁸

1. A Lexis search performed on February 22, 2023, for "Federalist Paper" OR "Federalist No." returned 419 Supreme Court cases.

2. A Lexis search performed on February 22, 2023, for "Anti-Federalist Paper" returned zero Supreme Court cases. Even a Lexis search for the generic "Anti-Federalist" yielded a meager seventeen results.

3. See Joshua Stein, Note, *Historians Before the Bench: Friends of the Court, Foes of Originalism*, 25 YALE J.L. & HUMAN. 359, 359 (2013) (explaining the importance of the role of a lawyer as a historian).

4. See generally ERIC FONER, *THE SECOND FOUNDING* (2019) (titling his book *The Second Founding* in reference to the Reconstruction Era).

5. Cf. Sonu Bedi & Elvin Lim, *The Two-Foundings Thesis: The Puzzle of Constitutional Interpretation*, 66 UCLA L. REV. 110, 110 (2018) ("The first founding established state governments (between 1776 and 1781) and the second founding established the federal or national government (in 1787).").

6. U.S. CONST. pmb1.

7. Eric Foner, *Remarks at the Conference on the Second Founding November 14, 2008*, 11 U. PA. J. CONST. L. 1289, 1290 (2009).

8. See *Bush v. Vera*, 517 U.S. 952, 968–69 (1996) ("If the promise of the Reconstruction Amendments, that our Nation is to be free of state-sponsored discrimination, is to be upheld, we

Similarly, many justices have leaned on the spirit and text of these transformational amendments to ensure their core is preserved. For example, in *Maine v. Thiboutot*,⁹ the Court held that laws from the Reconstruction Era “‘must be given the meaning and sweep’ dictated by ‘their origins and their language’—not their language alone.”¹⁰ It is those “origins” that are unacceptably absent from legal pedagogy.

Students must also learn how to analyze and respond to legal arguments grounded in historical analysis. Though students necessarily master a narrow type of historical inquiry, identifying and evaluating precedent,¹¹ too few students learn how to spot and challenge historically-oriented adjudication that activist judges have used to break from precedent.¹² Fearful of being called out for “law-office history,” courts avoid attempting to ground their decisions in superficial historical analysis.¹³

This Article makes a case for the American Bar Association (ABA) requiring law students to complete a history class on the nation’s two “Foundings.”¹⁴ Part II briefly outlines the significance of the Founding Era to modern jurisprudence. Part III does the same for the Reconstruction Era. Then, Part IV surveys current ABA requirements and notes the problematic absence of history. Part V proposes a sample syllabus for a history class focused on the nation’s Foundings. And finally, Part VI

cannot pick and choose between the basic forms of political participation in our efforts to eliminate unjustified racial stereotyping by government actors.”); *Younger v. Harris*, 401 U.S. 37, 61 (1971) (Douglas, J., dissenting) (“Just as the first Judiciary Act and the ‘anti-injunction’ statute represented the early views of American federalism, the Reconstruction statutes, including the enlargement of federal jurisdiction, represent a later view of American federalism.” (citation omitted)); *Felder v. Casey*, 487 U.S. 131, 139 (1988) (“As we have repeatedly emphasized, ‘the central objective of the Reconstruction-Era civil rights statutes . . . is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief.’” (omission in original) (quoting *Burnett v. Grattan*, 468 U.S. 42, 55 (1984))).

9. *Maine v. Thiboutot*, 448 U.S. 1 (1980).

10. *Id.* at 14 (Powell, J., dissenting) (quoting *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 549 (1972)).

11. *Cf.* Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 121 (referencing precedent as “the time-honored Anglo-American technique”).

12. *See id.* at 131 (arguing the use of “history as a device for activist judicial intervention, in particular as a precedent breaking mechanism,” is prototypical “of the present-day use of history by the Court”).

13. *See id.* at 122 n.13, 142 (contending the *Brown v. Board of Education* Court shied away from resting its decision on history because the briefing exposed the historical record’s vagueness and ambiguity).

14. This Article collectively refers to the Founding and Reconstruction Eras as the “Foundings.” When discussed separately, this Article often calls the Founding Era the “First Founding,” and the Reconstruction Era the “Second Founding.”

reviews a recent Supreme Court opinion to illustrate the importance of training advocates to conduct historical analyses—especially in the context of representing members of historically persecuted communities—and outlines topics that deserve additional research from legal scholars.

There is insufficient research on the significance of history in constitutional interpretation and its absence in law schools. The words “history,” “Constitution,” and “constitutional” do not even appear in the 2022–2023 ABA Standards.¹⁵ Many law schools offer courses on legal history. Still, students can avoid them—and most do—causing many graduates to possess a poor understanding of the Federalist Papers, even less knowledge of other Founding Era materials, like the Anti-Federalist Papers, and no practical experience with the historical record. Students may also graduate without taking a course on constitutional law, which only briefly explores the Foundings.¹⁶ To the extent this course dives into the details of the past, it is usually confined to the facts of old opinions.¹⁷ There, impressionable students see that, for most jurists, history amounts to a buffet from which they can pick the historical facts most aligned with their preferred outcome. A complete understanding of the Foundings and developing proficiency in conducting historical analyses will prepare the next generation of advocates and jurists to interpret and apply the law more accurately.

However, this is not the first call for such a requirement. Harold Southerland advocated for including American history in the legal curricula, but his advocacy emerged from a concern that students graduated without an understanding of what the law ought to be based on the trials and tribulations of different American communities.¹⁸ Douglas Abrams discussed the value of his American history course but qualified it by

15. See generally SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2022–2023 (2022) (outlining the course requirements for law students without mentioning these terms).

16. But see J.D. *Academic Guidance*, BERKELEY L., <https://www.law.berkeley.edu/academics/registrar/j-d-academic-guidance/> [https://perma.cc/XC5F-AAAQ] (making constitutional law a graduation requirement, though there is no guarantee that these courses spend any time reviewing the Foundings).

17. See Stein, *supra* note 3, at 361 (“Just as [lawyers] hunt for favorable precedent, so too they try to illuminate a sympathetic past.”); see also *id.* at 374 (“Historians should learn from the habeas cases that in constitutional litigation there is thus no more powerful tool than precedent.”).

18. See Harold Southerland, *The Case for American History in the Law-School Curriculum*, 29 W. NEW ENG. L. REV. 661, 661 (2007) (stating law students learn that “a court can almost always find a technically acceptable way of rationalizing whatever result it wishes to reach”).

reminding readers that it was a four-hour elective that would have an indirect impact on their legal practice.¹⁹ Joshua Stein offered advice on how to more persuasively engage with the Court to professional historians, who, with increasing frequency, participate in amicus briefs.²⁰ Alfred Kelly called out activist judges for often trying to “prove too much from too little [historical] evidence”²¹ but noted that lawyers well-versed in conducting historical analyses could brief courts in a way that mitigated judicial reliance on the superficial consideration of history.²² Absent familiarity with the Foundings, law students cannot independently persuade jurists.²³ Instead, they will continue outsourcing this activity to professional historians.

There is, of course, a limit to how much history a law student should have to ingest. After all, if you are what you eat, we don’t want to turn J.D.’s into Ph.D.’s. However, by requiring law students to take a course focused on teaching the tools of historical analysis and the details of the Foundings, students will encounter the debates and facts most likely to inform how a judge reviews the Constitution and its amendments. There will still be plenty of time for students to learn the other fundamentals of lawyering. And the limited temporal focus of the course will discourage students from improperly believing they can go toe-to-toe with historians when matters of American history crop up. But historians should not be counted on to bear the full burden of bringing historical analyses to courts.

19. Cf. Douglas E. Abrams, *Teaching Legal History in the Age of Practical Legal Education*, 53 AM. J. LEGAL HIST. 482, 483 (2013) (“Veterans of my course, for example, tell me that historical analogies frequently punctuate arguments in their briefs and other court filings.”).

20. Specifically, Stein argued that historians fail to win originalist debates because

(1) they traffic in certitudes, which are anathema to the historical vocation; (2) they accept and legitimize the normative, originalist premise that the past *ought* to inform the present; and (3) they search for historical analogies to satisfy the Court’s originalists when they are better served locating or contextualizing persuasive case law.

Stein, *supra* note 3, at 360. Instead, Stein concludes that historians should “(1) attack originalist arguments by destabilizing their historical conclusions, (2) adopt alternatives to originalist advocacy in their amicus briefs, or (3) craft briefs narrowly in the fashion of a historical ‘special master.’” *Id.*

21. Kelly, *supra* note 11, at 139.

22. See, e.g., *id.* at 145–46 (intimating a previous brief was persuasive enough to be incorporated in future cases before the Court).

23. See Stein, *supra* note 3, at 373 (describing how the well-used historical analysis amounts to a “combined land, sea, and air assault” on the opposing side).

Lawyers are uniquely situated to combine history with one of the most persuasive forms of courtroom analysis—the study of legal precedent.²⁴ The ability to conduct a robust and meaningful historical analysis, though, does not emerge from reading old cases;²⁵ it must be taught to law students. And, even if those students do not conduct historical analyses independently, their practice will benefit from their ability to direct historians to potential sources. Our high schools and institutions of higher education cannot be trusted to sufficiently educate law students on the Foundings,²⁶ other critical periods in legal history,²⁷ or the means to conduct a thorough review of history.²⁸ In 2011, fewer than 25% of high school seniors could name a power granted to Congress by the Constitution.²⁹ Soon after the publication of those results, Justice Sandra Day O'Connor remarked, “We cannot afford to continue to neglect the preparation of future generations for active and informed citizenship.”³⁰ That preparation must apply to law students.

As long as jurists make history a core component of their analyses, law schools are obligated to equip their students to contest inaccurate historical accounts. But history will not fit neatly into a black-and-white conception. Its complexity and ambiguity may test the patience of lawyers, but it must not frustrate them into a false sense of certainty.

24. *See id.* at 374 (“[I]n a common-law system, binding or persuasive court rulings serve as the most apt representative of the past in adjudication.”); *see also* Kelly, *supra* note 11, at 121 (“When a court ascertains the nature of the law to be applied to a case through an examination of a stream of judicial precedent, after the time-honored Anglo-American technique, it plays the role of historian.”).

25. As stated above, old cases likely cherry-pick the facts preferred by the jurist and, therefore, cannot be counted on to accurately outline the relevant history. *See, e.g.*, Kelly, *supra* note 11, at 135 (“To put the matter bluntly, Mr. Justice Black, in order to prove his point, mangled constitutional history.”).

26. *See, e.g.*, Olivia B. Waxman, *A New Report Finds that 45 States Are ‘Failing’ to Teach Students About the Period that Shaped Race Relations After the Civil War*, TIME (Jan. 12, 2022, 8:08 AM), <https://time.com/6128421/teaching-reconstruction-study/> [<https://perma.cc/98UG-5A5H>] (finding 90% of states’ K–12 programs either do not teach or partially teach the Reconstruction Era).

27. *See generally* KATE SHUSTER, S. POVERTY L. CTR., *TEACHING HARD HISTORY* (Maureen Costello, ed., 2018) (explaining how the history of slavery is systemically mistaught to students).

28. *See, e.g.*, Daniel Armond Cowgill II & Scott M. Waring, *Historical Thinking: An Evaluation of Student and Teacher Ability to Analyze Sources*, 8 J. SOC. STUD. EDUC. RSCH. 115, 124 (2017) (“Overall, there seemed to be very little difference in the abilities of teachers and AP level students to engage in the . . . historical document analysis.”).

29. Sam Dillion, *Failing Grades on Civics Exam Called a ‘Crisis’*, N.Y. TIMES (May 4, 2011), <https://www.nytimes.com/2011/05/05/education/05civics.html> [<https://perma.cc/H8DT-UN8B>].

30. *Id.* (internal quotation mark omitted).

II. THE SPREAD OF ORIGINALISM MAKES THE STUDY OF FOUNDING ERA HISTORY ESSENTIAL TO LEGAL EDUCATION

Contemporary Supreme Court jurisprudence frequently turns on an originalist approach.³¹ Conservative justices have embraced this approach, and its influence “now extends to leading progressive academics and judges like Jack Balkin and Justice [Elena] Kagan.”³² Any system with such widespread adoption and extensive influence merits study by the lawyers who may encounter it in their work. Just as many law students learn about the most commonly used canons of interpretation, they should understand the ins and outs of an approach that wields persuasive power on a significant number of judges. Even if originalism as an interpretive approach is losing steam since the loss of one of its champions, Justice Antonin Scalia,³³ its underlying focus on studying the context in which the Constitution emerged will benefit lawyers seeking to resolve constitutional questions. This Article does not advocate immersing students in originalism so much as it argues for equipping students to investigate historical claims made by originalists and anyone else relying on the past to interpret the Constitution.

A firm understanding of Founding Era history—and how to probe it—represents a prerequisite to advancing and rebutting originalist arguments. Originalism “seeks to give [amendments their] ordinary meaning at the time of ratification.”³⁴ Yet two individuals pursuing this goal may derive different meanings because “[b]oth ordinary meaning and ordinary citizens are, by necessity, imaginary constructs.”³⁵ It follows that students who can identify and evaluate the credibility and meaning of Founding Era sources will be able to sort through various meanings to determine which is best suited to their interests.

Justices demonstrated the central role of history in resolving constitutional questions in *District of Columbia v. Heller*.³⁶ In that case, Justice Scalia used originalism to advocate for his interpretation of the

31. Logan E. Sawyer III, *Principle and Politics in the New History of Originalism*, 57 AM. J. LEGAL HIST. 198, 198–99 (2017).

32. *Id.*

33. *Id.*

34. Todd B. Adams, *Should Justices Be Historians? Justice Scalia's Opinion in District of Columbia v. Heller*, 55 U. S.F. L. REV. 301, 316 (2021).

35. *Id.*

36. *District of Columbia v. Heller*, 544 U.S. 570 (2008).

Second Amendment.³⁷ Justices Stevens and Breyer, in their respective dissents, also relied on Founding Era history to bolster their arguments, though their approaches varied from Justice Scalia's focus on detecting the ordinary meaning of the text in question.³⁸ Justice Scalia leaned substantially on briefs from historians.³⁹ He also consulted a dictionary from 1773,⁴⁰ a thesaurus from the era,⁴¹ and "written documents of the founding period."⁴² Justice Stevens attempted to learn more about the Second Amendment by reviewing state constitutions that emerged simultaneously.⁴³ Similarly, Justice Breyer consulted gunpowder regulations to deepen his knowledge of the relevant context.⁴⁴

Students must learn how to identify such sources as well as how to evaluate their credibility and accuracy. For instance, some of the arguments Justice Scalia leaned on originated from historians with questionable credentials, as one of the authors of the brief in question had no formal background as a historian.⁴⁵ Still, their insights helped support the legal reasoning that won the day. If the dissenting Justices or advocates had a firmer grasp of history, they might have had better odds of refuting Justice Scalia's arguments.

Todd Adams, the former assistant attorney general of Michigan, contends Justice Scalia did not place the Second Amendment in adequate context.⁴⁶ Adams supports his allegation by consulting several sources unlikely to appear in a Lexis search, including a newspaper article from 1787,⁴⁷ minority reports from the ratification process,⁴⁸ speeches from prominent Anti-

37. *See generally id.* (relying on historical records to conclude that the Second Amendment acknowledged a preexisting individual right to keep and bear firearms).

38. *See, e.g., id.* at 637 (Stevens, J., dissenting) ("The Second Amendment . . . was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States.").

39. *See* Stein, *supra* note 3, at 366 ("Justice Scalia's opinion, which tracked Olson and Hardy's [historical] argument closely, was a classic example of his own brand of textual originalism.").

40. *Heller*, 544 U.S. at 581.

41. *Id.* at 581–82.

42. *Id.* at 582.

43. *Id.* at 642 (Stevens, J., dissenting).

44. *Id.* at 684–85 (Breyer, J., dissenting).

45. Stein, *supra* note 3, at 365–66.

46. *See* Adams, *supra* note 34, at 320 ("Justice Scalia limited his context to the circumstances directly related to the Amendment's ratification, but this approach omitted an important context for re-enacting Madison's actions.").

47. *Id.* at 319–20.

48. *Id.* at 323.

Federalists,⁴⁹ and factual accounts related to the Second Amendment's ratification.⁵⁰ Most law students are not equipped to conduct a similar analysis.

Students must know not only how to identify sources but also how to evaluate them. From Justice Scalia's opinion in *Heller*, Adams cautioned originalists and lawyers to define a standard for the relevance of a source before assessing the ordinary meaning of a text.⁵¹ For starters, Adams recommended prioritizing "concrete examples" over dictionaries, even though the former will include "ambiguities and uncertainties."⁵² In the case of the Second Amendment, concrete examples included how it influenced—or failed to influence—events soon after its ratification. One example Adams included was a speech by the Treasury Secretary to the House regarding the Second Amendment, where he referenced its creation in the context of forming militias.⁵³ On the whole, Adams taps into best practices⁵⁴ by using a collage of sources that put the Second Amendment in context, whereas Justice Scalia asserts a still image of its "plain" meaning from a limited and lazily curated range of sources.⁵⁵

Students should also learn to take another important step that distinguishes Adams's historical analysis from that of Justice Scalia. Adams not only consulted more sources but also tested conclusions derived from them against whether they made narrative sense or, in other words, if his findings "show the connections between people, ideas, and the [a]mendment" in question.⁵⁶ This method is only possible when several concrete examples are accumulated.

Had the Justices and advocates in *New York State Rifle & Pistol Ass'n v. Bruen*⁵⁷ heeded Adams's advice, the quality of the historical analysis may

49. *Id.* at 320.

50. *Id.* at 320–21.

51. *See id.* at 317 ("Originalists cannot begin to find the ordinary meaning of a text until they start the onerous and difficult task of defining the standard they will use to determine whether a source is relevant.").

52. *Id.*

53. *Id.* at 328.

54. A text's meaning will evolve between moments in history. Geoffrey Schotter, *Diachronic Constitutionalism: A Remedy for the Court's Originalist Fixation*, 60 CASE W. RES. L. REV. 1241, 1260–61 (2010). Even an originalist can and should acknowledge that meaning is "fixed by patterns of usage in the United States" during the relevant period. *Id.* at 1260.

55. *See, e.g.*, Foner, *supra* note 7, at 1289 (noting the meaning of constitutional amendments "cannot be frozen at a particular moment in time").

56. Adams, *supra* note 34, at 318.

57. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022).

have markedly improved. In this recent Second Amendment case, the majority “invoke[d] the authority of history but present[ed] a version of that past that is little more than an ideological fantasy,” according to Saul Cornell, the chair in American history at Fordham University.⁵⁸ Cornell points out that Justice Thomas clearly did not heed Adams’s guidance regarding identifying and assessing historical sources—Justice Thomas relied on a “yet unpublished and error-filled account by one of his former clerks.”⁵⁹ Also, Justice Thomas appears to have ignored Adams’s insistence on a standard of relevance to any historical evidence, as demonstrated by the majority dismissing, without sufficient justification, contrary evidence.⁶⁰ From Cornell’s assessment, as well as many others,⁶¹ the tools of historical analysis must become a part of legal education to avoid reliance on “obscure sources,” “galling” omissions from the historical record, and “distortions” of the past to support an ideological agenda.⁶²

Beyond the Second Amendment, laws, amendments, and ideas that emerged in the Founding Era have and will continue to impact contemporary jurisprudence.⁶³ The context must guide lawyers’ interpretation of historical events and texts. Lawyers seeking to identify that context must look beyond the text to explore “the thoughts of the people ratifying the Constitution.”⁶⁴ Merely picking out the perfect line from a single Federalist Paper will not give the reader an adequate understanding of the context in which those words were written.⁶⁵ “[N]o interpretation of

58. Saul Cornell, *Cherry-Picked History and Ideology-Driven Outcomes: Bruen’s Originalist Distortions*, SCOTUSBLOG (June 27, 2022, 5:05 PM), <https://www.scotusblog.com/2022/06/cherry-picked-history-and-ideology-driven-outcomes-bruens-originalist-distortions/> [<https://perma.cc/U6RT-9AF4>].

59. *Id.*

60. *Id.*

61. *See, e.g.*, Steven Lubet, *The Supreme Court’s Bad History*, HILL (Nov. 16, 2022), <https://thehill.com/opinion/judiciary/3737503-the-supreme-courts-bad-history/> [<https://perma.cc/6VMC-TGMN>] (contending *Bruen* was based on “bad history and worse law”).

62. Cornell, *supra* note 58.

63. *See, e.g.*, Stein, *supra* note 3, at 375 (discussing how historical analyses have helped resolve habeas cases).

64. *Id.* at 365.

65. *See* Brief of Jack N. Rakove et al. in Support of Petitioners at 2, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290) (“Recovering that context involves more than snatching a line from Blackstone’s *Commentaries* or Madison’s 46th *Federalist*”); *see also* Nils Gilbertson, Note, *Return of the Sceptics: The Growing Role of the Anti-Federalists in Modern Constitutional Jurisprudence*, 16 GEO. J.L. & PUB. POL’Y 255, 255 (2019) (“Because our Constitution is a result of a dialogue, understanding the arguments on both sides is an important prerequisite to understanding the resulting text.” (italics omitted)).

the [F]ramers' intent can make any claim to accuracy unless it takes into account the context in which Federalist statements were made."⁶⁶ Law students need to know what sources provide that context so they, or another team member, perhaps a trained historian, can investigate them.

The bar should not wait for students to graduate to learn such skills. Like reading a case, perusing the historical record requires training. According to Adams, the "watchwords" for conducting a thorough and accurate historical analysis are "context and concreteness."⁶⁷ The text of any case, law, statute, article, or other legal document amounts to "blank symbols that gain meaning only in context and through usage."⁶⁸ An aimless search of history will not uncover that meaning, and a criteria-less search will produce skewed results.

Even with historical training, lawyers may not amass the skills of professional historians. Also, lawyers may be unable to shake their bias toward their client or cause. Generally, historians fault jurists and lawyers for conducting historical reviews with a "results[-]oriented methodology in which evidence is selectively gathered and interpreted to produce a preordained conclusion."⁶⁹ Of course, any advocate will tell you that they have an obligation to their clients to present the strongest facts in their favor. So, even though lawyers may not conduct a historical analysis like a historian, law students should receive training to identify when the opposing counsel has performed a biased historical analysis. This training may be valuable in expanding old constitutional protections to new situations. As recently demonstrated by the Supreme Court, conducting such an exercise in a case involving workplace discrimination, this training may assist advocates representing clients, such as members of the LGBT community, to write authoritative historical accounts of persecution.⁷⁰

The obligation of the bar to teach history goes beyond those advocating before judges. If, as the jurisprudence of many members of the current Supreme Court suggests, legal history remains a prominent tool in deciding cases, the bar has an obligation to reduce the odds of non-expert judges

66. Suzette Hemberger, *Dead Stepfathers*, 84 NW. U. L. REV. 220, 227 (1989).

67. Adams, *supra* note 34, at 318.

68. *Id.*

69. Saul Cornell, Heller, *New Originalism, and Law Office History: "Meet the New Boss, Same as the Old Boss,"* 56 UCLA L. REV. 1095, 1098 (2009).

70. *See generally* *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (holding discrimination by employers against an individual on the basis of sexual orientation is unlawful).

leaning on disputed history to reach their conclusions.⁷¹ This is especially true concerning the history of the Founding Era because of its relevance to so many constitutional questions.

III. CONTEMPORARY CONCERNS WITH THE ISSUES THAT ANIMATED RECONSTRUCTION ERA LAW MERIT FURTHER STUDY IN LAW SCHOOLS

The leaders of the Reconstruction Era transformed the system of government developed by the Founders.⁷² Their actions turned a slaveholding republic into one more “consistent with the Declaration’s promise of liberty and equality.”⁷³ This transformation has received disproportionately little attention in legal culture despite its impact on the Constitution and society.⁷⁴ Blinded by an obsession with the Founding Era, legal elites have neglected to incorporate the changes made by the reconstruction into constitutional theory.⁷⁵ Judges, including Supreme Court justices, are among this elite. Justice Scalia, for instance, failed in *Heller* to consider the significance of the Reconstruction Era when assessing the scope of the protections found in the Bill of Rights.⁷⁶

Some members of the legal profession have given due credit to the Reconstruction Era when reviewing the constitution. The fact that advocates and jurists alike look toward the Reconstruction Amendments for interpretive guidance illustrates the significance of that era.⁷⁷ These individuals have challenged the notion that the Founding Era marked a sort of “big bang” in the development of the Constitution.⁷⁸ After all, the Reconstruction Era presided over a major update to the Constitution by taking “a crumbling and somewhat obscure edifice [in the Bill of Rights],

71. See *McDonald v. City of Chicago*, 561 U.S. 742, 914 (2010) (Breyer, J., dissenting) (“[S]ubsequent scholarly writing reveals why disputed history provides treacherous ground on which to build decisions written by judges who are not expert at history.”).

72. Tom Donnelly, *Our Forgotten Founders: Reconstruction, Public Education, and Constitutional Heroism*, 58 CLEV. ST. L. REV. 115, 117 (2010).

73. MICHAEL LES BENEDICT, PRESERVING THE CONSTITUTION 3 (2006).

74. See Donnelly, *supra* note 72, at 118 (noting bookstores contain “few works on Reconstruction and even fewer biographies of our Reconstruction Founders”).

75. *Id.*

76. See Akhil Reed Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 177 (2008) (positing if Justice Scalia had included the Ninth and Fourteenth Amendments in his analysis in *Heller*, his argument would have been “dramatically strengthened”).

77. See, e.g., Brief of Thirty-Four Professional Historians and Legal Historians as Amici Curiae in Support of Respondents at 2, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521) (discussing how states continued to regulate guns after the enactment of the Fourteenth Amendment).

78. Donnelly, *supra* note 72, at 138.

placed it on new, high ground, and remade it so that it truly would stand as a temple of liberty and justice for all.”⁷⁹ The authors and advocates of the Reconstruction Amendments offered a “constitutional vision for a rights-enforcing, equality-protecting national government.”⁸⁰ That vision ought to influence how contemporary legal scholars see them.

The Thirteenth Amendment exemplifies how the Reconstruction Era altered the legal foundations of the country. Only by understanding the context in which it came about can scholars accurately interpret its meaning. The Thirteenth Amendment was not meant to be a piecemeal step forward. Foner points out that, “[e]ven after the Emancipation Proclamation . . . , [President] Lincoln continued to think about a transitional period of apprenticeship, the transportation of at least some freed people outside the country, and paying owners for their loss of property in slaves.”⁸¹ Yet, the Thirteenth Amendment had no qualifiers, transitions, or phases. It was immediate in its nationwide application and included nothing about apprenticeships or colonization.⁸² The fact that it passed without such limits has an interpretive value that law students may miss if they rely solely on its subsequent interpretation.

But the historical analysis also suggests that the Thirteenth Amendment did not guarantee all the freedoms many anticipated. In the years leading up to its passage and for decades after, it was framed in the context of the freedom to work for compensation rather than a protector of rights.⁸³ Courts, politicians, and labor activists championed this interpretation in various contexts.⁸⁴ The limits of the Thirteenth Amendment can also be gleaned from the fact that advocates for blacks continued to push Congress for additional action in the wake of its enactment.⁸⁵ From this perhaps unanticipated interpretation, Foner concludes that “definitions of freedom are never fixed.”⁸⁶ Identifying the proper definition at any point requires more work than simply looking at dictionaries and briefs.

Recent and persistent racial unease, income inequality, and disparate levels of access to opportunity have placed a renewed focus on the national

79. AKHIL REED AMAR, *THE BILL OF RIGHTS* 288 (1998).

80. Donnelly, *supra* note 72, at 145.

81. Foner, *supra* note 7, at 1290–91.

82. *Id.* at 1290.

83. *Id.* at 1292–93.

84. *Id.* at 1293.

85. *Id.* at 1294.

86. *Id.* at 1293.

government as a “rights-enforcing [and] equality-protecting” entity,⁸⁷ placing freedom through yet another definitional change. This focus means legal professionals ought to have a higher degree of familiarity with the facts of the era and the context in which its legal transformations took place. Efforts to advance and enforce new and old civil rights will inevitably require an analysis of the Reconstruction Era. The Reconstruction Amendments paved the way for the twentieth-century civil rights movement and the Civil Rights Act of 1866.⁸⁸ The scope of the Fourteenth and Fifteenth Amendments may play a role as a new civil rights movement emerges and once again pushes the national government to identify and protect fundamental rights. The Reconstruction Amendments broke new ground in the effort to identify and safeguard rights by giving Congress the power to “define and enforce” individual rights.⁸⁹

To understand congressional limits on exercising that power, law students must receive a more thorough education on the Fourteenth Amendment. Many modern civil rights issues hinge on its interpretation by the Court. How justices have interpreted Section Five of the Fourteenth Amendment, for example, has impacted its adjudication of medical leave,⁹⁰ disability discrimination,⁹¹ and age discrimination.⁹² Scholars question if the Court's adjudication of these issues has comported with the intent of its Framers, who “intended it to alter the structure of our government in terms of both federalism and separation of powers [by] assigning a leading role to Congress as the protector of individual rights.”⁹³

Studies of the Reconstruction Amendments should go beyond legislative history. Just as legal research on the Founding Era has relied on the study of the Founders, like Alexander Hamilton, legal research on the Reconstruction Era should include the thoughts and actions of leaders like

87. Donnelly, *supra* note 72, at 145.

88. *Id.* at 154.

89. Rebecca E. Zietlow, *Juriscentrism and the Original Meaning of Section Five*, 13 TEMP. POL. & C.R. L. REV. 485, 487 (2004).

90. *See Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 725 (2003) (holding state employees “may recover money damages” if the state failed to comply with the Family and Medical Leave Act of 1993).

91. *See Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 364 (2001) (limiting the ability of state employees to sue their employer under the strictures imposed by the Fourteenth Amendment).

92. *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 67 (2000) (holding the Age Discrimination in Employment Act's abrogation of states' immunity “exceeded Congress'[s] authority under [Section] 5 of the Fourteenth Amendment”).

93. Zietlow, *supra* note 89, at 487.

Thaddeus Stevens.⁹⁴ Stevens had a major role in building the legal framework that defined the Reconstruction Era. His actions, concerning both the era's key amendments and most consequential laws, provide the context invaluable to legal research.⁹⁵ For example, Stevens aimed to pass a reconstruction program that would “give [African Americans] perfect equality before the law and . . . ‘overcome the prejudice and ignorance and wickedness which resisted such reform.’”⁹⁶ Stevens had a clear goal for reconstruction—making real the Founding Era's principles, as outlined in the Declaration.⁹⁷ This insight adds tremendous detail to the scholarly review of other contemporaneous sources.

In some cases, the Founders of the Reconstruction Era even tried to provide future generations with interpretive guides for their work. Charles Sumner, regarded by Donnelly as one of the forgotten Founders of the Reconstruction Era,⁹⁸ identified the principles of the Declaration of Independence as his lodestars for the reconstruction of the South.⁹⁹ His insistence on legalizing and enforcing equality serves as another guide to analyzing his work and the work of his fellow radicals.¹⁰⁰ Further, his failures shed light on how to interpret his successes. For instance, his efforts to pass a civil rights bill that would have banned discrimination in schools reveal what he perceived as a limit of the Fourteenth Amendment.¹⁰¹

Other Reconstruction Era leaders must be a part of any robust analysis of the Bill of Rights. John Bingham, a Republican, albeit not a radical one,

94. *See id.* at 500 (“Following the War, the antislavery constitutionalists’ vision of national citizenship and the rights that adhered thereto became an animating force behind the Reconstruction Era Amendments and the Civil Rights statutes of the Reconstruction [E]ra.”).

95. As the leader of the radical wing of the Republican Party in the House, Stevens had his hands in just about every meaningful debate during the Reconstruction Era. *See, e.g.*, Donnelly, *supra* note 72, at 173 (“During Reconstruction, Stevens was the undisputed leader of the Radical wing of the Republican Party in the House.”).

96. KENNETH M. STAMPP, *THE ERA OF RECONSTRUCTION* 88 (1965).

97. W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* 303–04 (1935).

98. *See* Donnelly, *supra* note 72, at 175–76 (characterizing Charles Sumner as one of the forgotten Founders of the Reconstruction Era, robbing students “of his prescience on issues of equality”).

99. STAMPP, *supra* note 96, at 88.

100. *See* Donnelly, *supra* note 72, at 176–77 (discussing Sumner's involvement in “numerous reform movements, including ‘world peace, temperance, women's rights, prison reform, and, of course, abolitionism’”).

101. *See* Mark E. Neely, Jr., *The Civil War, in* *THE AMERICAN CONGRESS* 207, 222 (Julian E. Zelizer ed., 2004) (“At the time of his death, he was trying to secure the passage of a far-reaching civil rights bill, which would have prohibited discrimination in schools, transportation, and public accommodations.”).

drafted Section One of the Fourteenth Amendment.¹⁰² His concerns about the vulnerability of civil rights legislation to various legal challenges birthed the effort to draft and pass the Fourteenth Amendment.¹⁰³ Akin to James Madison,¹⁰⁴ Bingham was a serious student of constitutional protections, but the law failed to apply his interpretation of the Bill of Rights.¹⁰⁵ Yet Bingham “helped change the vocabulary of legal discourse,”¹⁰⁶ resulting in substantive and structural changes that ought to factor into a historical inquiry.

And, just as legal research of the Founding Era regularly includes a review of the context, especially the legal and regulatory context in which the Constitution came to be, research of the Reconstruction Amendments must, at a minimum, study the legal context before and immediately after their creation. Congressional debates from the era touch on a slew of important topics, such as “constitutional values, including federalism, separation of powers, and the role of government in protecting individual rights.”¹⁰⁷ These debates were in response to Supreme Court cases and congressional action or inaction in their aftermath.¹⁰⁸

The debate over the federal government’s role in protecting individual rights had a rich effect on the history of the Antebellum and Reconstruction Eras. Failing to consult that debate has perpetuated a faulty conception of Congress’s role in enforcing individual rights. Soon after the Reconstruction Era and, for the most part ever since, the Court dismissed the intent of the Reconstruction Era’s leaders by placing itself at the center of the Fourteenth Amendment.¹⁰⁹ Republicans at the helm of the reconstruction agenda “contested the Court’s role in constitutional interpretation and asserted alternative interpretations of the

102. Donnelly, *supra* note 72, at 178.

103. Zietlow, *supra* note 89, at 501–02.

104. *See* Donnelly, *supra* note 72, at 182 (“Steven Calabresi has similarly added that ‘our modern understanding of the Bill of Rights developed [more] out of the thinking of John Bingham . . . than of James Madison.’” (alteration and omission in original)).

105. *See* Zietlow, *supra* note 89, at 501 (discussing Bingham’s support for the Civil Rights Act of 1866).

106. AMAR, *supra* note 79, at 284.

107. Zietlow, *supra* note 89, at 492.

108. *See id.* at 492–93 (listing “*Barron*, *Dred Scott*, and *Prigg*” as three cases that “defined the contours of the relationship between the constitutional structure at the time and the enforcement of individual rights”).

109. *See generally id.* (explaining how the Supreme Court has usurped the role of Congress in the enforcement of the Fourteenth Amendment by implementing a “juriscentric approach”).

Constitution.”¹¹⁰ They also challenged the idea that “individual rights were the province of the States.”¹¹¹ To effectuate a new approach to protecting rights, the Republicans passed the Reconstruction Amendments, the Civil Rights Act of 1866, the Enforcement Act of 1871, and the Civil Rights Act of 1875.¹¹² “Congressional power to enforce the rights of its citizens,” according to Zietlow, “was a crucial component of Reconstruction.”¹¹³

This new approach came in direct response to “Congress’[s] distrust of federal courts, [which was] born in the [Antebellum Era and] continued during the Reconstruction Era.”¹¹⁴ Yet, the Supreme Court has sidelined Congress by “characteriz[ing] itself as the only legitimate interpreter of the Fourteenth Amendment.”¹¹⁵ As a result, the Court has stymied efforts by Congress to advance equality. For instance, in *United States v. Morrison*,¹¹⁶ the Court disregarded Congress’s protestations that the Violence Against Women Act was a sex equality measure and struck it down.¹¹⁷ Perhaps the Court would have reached a different conclusion if it had more exposure to the fact that “the Framers had a very broad view of congressional power . . . when they enacted the enforcement provisions of the Reconstruction Era Amendments.”¹¹⁸

Analysis of the Court’s decisions and the subsequent congressional response sheds light on how the Framers of the Reconstruction Amendments would have interpreted them in light of modern problems. In other words, the Reconstruction Amendments must not be applied as though they are without historical baggage adding detail to their text. Law students need training to intelligently handle that baggage and avoid advancing jurisprudence that wrongly places the Court at the center of the debate.

110. *Id.* at 498.

111. *See id.* at 493 (“[M]any members of Congress ridiculed these rulings and championed their own constitutional interpretations that would have mandated a larger federal role in the protection of rights than that recognized by the Court.”).

112. *Id.* at 505–06.

113. *Id.* at 503.

114. *Id.* at 506.

115. *Id.* at 511.

116. *United States v. Morrison*, 529 U.S. 598 (2000).

117. *See generally id.* (discussing how gender-based crimes are not economic activity that can be regulated under the Commerce Clause).

118. Zietlow, *supra* note 89, at 504.

IV. THE PROBLEMATIC DEARTH OF HISTORY IN TODAY'S LEGAL EDUCATION

Americans have a stake in how jurists and advocates understand the original public meaning of the Constitution and its amendments.¹¹⁹ Since the 1950s, the Supreme Court has increasingly relied on history to avert claims of bias and judicial activism.¹²⁰ Yet law schools have not acted on the constitutional significance of history by informing students of the context of certain critical eras nor by equipping them with the tools of historical inquiry. This denies students a critical perspective. As when viewing elephants, “examining [history] from only one perspective gives a distorted image of the whole.”¹²¹ Interdisciplinary instruction, which “emphasizes the beneficial connection of two or more academic disciplines,”¹²² should be implemented at law schools by combining the study of law and history. Specifically, this practice should be required by the ABA for matriculation.

The importance of an interdisciplinary approach to law has caught on in other contexts. Scholars have pushed schools to account for increasing societal complexity by helping students learn to work with others in various professions.¹²³ A review of interdisciplinary courses around the United States reveals an array of offerings, such as law and economics, law and familial issues, and law and intellectual property.¹²⁴ Law schools have also started clinics to give students experience working with other professionals.¹²⁵ Despite these efforts, “actual ‘interdisciplinary’ offerings at most law schools are limited,”¹²⁶ and their interdisciplinary breadth is similarly scant.¹²⁷ Schools also do not require students to take specific interdisciplinary courses to ensure they graduate with particular skills.

119. Foner, *supra* note 7, at 1289.

120. Schotter, *supra* note 54, at 1264; cf. Kelly, *supra* note 11, at 132 (explaining how activist judges fabricate rationales with “law-office history”).

121. Kim Diana Connolly, *Elucidating the Elephant: Interdisciplinary Law School Classes*, 11 WASH. U. J.L. & POL'Y 11, 13 (2003).

122. *Id.* at 17 n.15.

123. *Id.* at 14; see Andrew J. Pirie, *Objectives in Legal Education: The Case for Systematic Instructional Design*, 37 J. LEGAL EDUC. 576, 584 (1987) (noting an uptick in the number of interdisciplinary courses at law schools).

124. Connolly, *supra* note 121, at 25–27.

125. See *id.* at 27–28 (explaining the benefits students receive from interdisciplinary approaches).

126. *Id.* at 17–18 (footnote omitted).

127. See *id.* at 29 (“Despite these clinical opportunities, the inclusion of non-law students in legal ‘interdisciplinary’ training is rare. The majority of ‘interdisciplinary’ courses merely incorporate non-law ideas.”).

Few courses exist that introduce students to historians and their tools. The common databases law students use lack the cases from pre-constitutional British law and other Founding Era sources.¹²⁸ The archives that hold these cases have been unexplored by law students for too long, leaving the exploration to historians.¹²⁹ Absent this sort of archival information, law students often fail to understand the context critical to analyzing any historical decision.¹³⁰ Adams, as discussed above, went far beyond merely reviewing the Articles of Confederation to put the text of the Constitution in context.¹³¹ Though he did consult the Articles, Adams also knew how to look for and interpret the text of state constitutions as well as drafts and markups of amendments.¹³²

If lawyers know where to look, historians can help the entire legal industry reach a common understanding of complex history. “[T]he peer-review process among historians results in professional consensus” that lawyers can hone in on when starting their own historical investigations.¹³³ Where consensus is lacking, lawyers need tools to determine the law’s context. The value of context is not lost on originalists¹³⁴ or those who rely on alternative methods of interpretation. Originalist scholars welcome the consideration of “newspapers, political pamphlets, and a variety of other general sources,”¹³⁵ yet law schools do little to equip students to find them.¹³⁶

Law students must also learn a key lesson of historical research: in most cases, records directly on point “are not readily available.”¹³⁷ The challenge

128. See Stein, *supra* note 3, at 376 (discussing how some important topics are only found in archives, not legal databases).

129. Cf. *id.* (“The historians’ victory in these cases can be best explained by the fact that they served less as historians and more as paralegals who were unusually nimble in finding cases from the past.”).

130. See Adams, *supra* note 34, at 302 (explaining how “Justice Scalia’s arguments f[e]ll short because he lacked a sound historical method”); Connolly, *supra* note 121, at 14 (“[T]raditional legal education does little to provide law students with the skills relevant to working with non-legal ideas and professionals who are trained in those ideas.”).

131. Adams, *supra* note 34, at 323–24.

132. *Id.*

133. Schotter, *supra* note 54, at 1266.

134. See Lawrence B. Solum, Semantic Originalism 33 (Nov. 22, 2018) (unpublished research paper) (on file with the University of Illinois College of Law) (discovering the meaning of vague and ambiguous texts necessitate “reference to [the] context of the particular utterance”).

135. *Id.* at 51.

136. See Connolly, *supra* note 121, at 14 (explaining how law students are not prepared to work with “non-legal ideas”).

137. See Adams, *supra* note 34, at 326 (“Unfortunately, records of how ordinary citizens interpreted the [Second] Amendment are not readily available.”).

for any reviewer of history is to recognize “unavoidable” ambiguity and see if a norm or common understanding emerges.¹³⁸ A reviewer must also shed light on systematically excluded perspectives from the historical period. Eric Foner, for instance, reviewed black newspapers from the Civil War period to deepen his understanding of the Thirteenth Amendment.¹³⁹

Though law students would benefit from a fundamental understanding of how to find and interpret far-flung historical sources, schools must not endanger their core mission in the process. A line exists beyond which law students have spent too much time learning the principles of history rather than those of the law. Time is finite, and law schools have an obligation to train students in the field they aim to enter. Moreover, pushing law and history without sufficient structure and forethought may decrease the educational quality of both.¹⁴⁰

Others may argue that other disciplines should be prioritized over history. For example, in light of COVID-19, legal community members may desire greater interdisciplinary learning opportunities for law and public health students. Yet, the expansion of interdisciplinary offerings suggests they need not be mutually exclusive.¹⁴¹

Some may insist that law students should learn these skills earlier in their academic careers. However, this argument fails for at least three reasons. First, lawyers must possess more than a basic familiarity with the facts of the Founding and Reconstruction Eras to make persuasive legal arguments. By incorporating history into the law school curriculum, students will learn how to probe deeper into the historical record to uncover information that is unlikely to be taught in a generic high school course but is relevant to legal issues. For instance, high school teachers are unlikely to teach how to find and interpret markups of constitutional provisions and amendments.

Second, even if those in charge of the history curricula earlier in the academic pipeline decided to teach history aligned with the demands of the legal profession, it would take years, if not decades, for the materials necessary for that education to reach classrooms. For example, Frances

138. *See id.* at 327 (explaining how historians have looked to debates to determine how guns were used when the Second Amendment was adopted).

139. Foner, *supra* note 7, at 1290.

140. *Cf.* Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1317, 1324 (2002) (arguing the invasion of interdisciplinary studies in law schools “give rise to a serious problem of quality control”).

141. *See* Connolly, *supra* note 121, at 23–25 (listing several interdisciplinary courses).

Fitzgerald estimates that it takes at least fifteen years for developments in academic history to reach high school students.¹⁴²

Third, even if a history course focused on legal research was offered at various points in the academic pipeline, many law students would not take it. For example, even though most high school students must take at least one history course to graduate,¹⁴³ they may have several options to choose from to fulfill that requirement. Moreover, many future law students may not know about their legal ambitions at that age, missing out despite their future needs. These three reasons confirm that the proposed history class must be offered during law school.

V. A DRAFT SYLLABUS FOR A FOUNDINGS CLASS

There is no comprehensive formula for the perfect way to teach a Foundings course. As discussed above, an abundance of content deserves study by current law students. The syllabus below offers a starting point for professors considering teaching such a course. The learning objectives, critical skills, and week-by-week overview of potential courses should help professors hit the ground running.

Each aspect of this syllabus should be adjusted based on the other courses offered and the students' educational backgrounds. For example, if a pre-class survey indicates that most students have taken an advanced placement course in United States history, the professor may need to spend less time covering the proper way to assess the credibility of a historical document. Professors will likely also need to supplement this syllabus in light of new Supreme Court cases, like *Dobbs v. Jackson Women's Health Org.*,¹⁴⁴ which heavily rely on American history¹⁴⁵ and could, therefore, help instruct students how best to incorporate history into their legal analyses and arguments.

The course is split into four units, which professors may opt to adjust based on the length and structure of their semesters. In the first unit, students will cover the fundamentals of historical analysis, such as how to critically analyze a historical document and where to find such records.

142. FRANCES FITZGERALD, *AMERICA REVISED* 43 (1979) (“[N]ew scholarship trickles down extremely slowly into the school texts; as it proceeds, usually by way of the college texts, the elapsed time between the moment an idea or an approach gains currency in the academic community and the moment it reaches the school texts may be fifteen years or more.”).

143. Donnelly, *supra* note 72, at 126.

144. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

145. *See generally id.* (referencing history more than sixty times).

Professors may consider inviting a historian from their school to assist with this unit. The second and third units will cover the history of the Foundings; these units will first explore the historical “Tic Tocs” of the era—that is, the key dates and events of the period—before spending the remaining weeks of the unit analyzing major documents, actors, and cases from the era. The syllabus mentions potential readings and cases that professors can incorporate into their classes. The fourth unit allows students to use the information they have acquired by inviting them to analyze how the Supreme Court has incorporated historical analyses of the Foundings into recent opinions. By this stage, students should have the skills necessary to point out the flaws in their arguments.

In the last two weeks of the course, each student will present their final assignment: a brief written for the Supreme Court on a topic from the Foundings relevant to one of the Court’s upcoming cases. Based on the class size, the professor can alter the length of the brief and presentation.

Draft Syllabus

Learning Objectives

- Understand the key economic, political, and cultural dynamics at play during the Founding and Reconstruction Eras
- Develop a list of sources to consult when analyzing the Founding and Reconstruction Eras
- Practice identifying and incorporating primary sources into legal arguments
- Evaluate the effectiveness of historical arguments in opinions and briefs
- Grok the dangers associated with the increased availability of historical sources, including flattening, cherry-picking, and snowballing¹⁴⁶

Key Skills

- How to locate and analyze primary sources
- How to grapple with historical complexity,¹⁴⁷ including the resolution of conflicting sources

146. Aaron Zelinsky, *Misunderstanding the Anti-Federalist Papers: The Dangers of Availability*, 63 ALA. L. REV. 1067, 1067 (2012).

147. See Stein, *supra* note 3, at 369 (stating historians yearn for the day when “jurists can discuss history with the kind of complexity historians prefer”).

- How much normative weight to assign to historical sources¹⁴⁸

Week-by-Week Summaries and Readings

- Unit One: Fundamentals of Historical Analysis
 - Week One
 - Classes One and Two
 - Background on how to conduct legal history research
 - Best practices
 - Common mistakes
 - Resources/databases
 - Background on the history profession
 - Norms
 - Expectations
 - Analysis of historical documents
 - Biases of the author
 - Purpose of the author
 - Impact of the document
 - Relevance of the document in a legal setting
 - Potential Readings
 - Jenni Parrish, *A Guide to American Legal History Methodology with an Example of Research in Progress*, 86 L. LIBR. J. 105 (1994)
 - Buckner F. Melton, Jr., *Clio at the Bar: A Guide to Historical Method for Legists and Jurists*, 83 MINN. L. REV. 377 (1998)
 - Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641 (2013)
 - Matthew J. Festa, *Applying a Usable Past: The Use of History in Law*, 38 SETON HALL L. REV. 479 (2008)
 - Paulo Barrozo, *Law in Time: Legal Theory and Legal History*, 31 YALE J.L. & HUMAN. 316 (2021)
 - Unit Two: Introduction to the First Founding
 - Week Two
 - Class One
 - Tic Toc of the actual history of the Founding Era (who, what, and where)
 - Class Two

148. See *id.* at 370 (arguing “the Court should not automatically give the past normative weight” because it risks “anchoring rights” to a hostile past).

- Analysis of Founding Era sources using the tools of historical analysis discussed in the first week
 - Declaration of Independence
 - Articles of Confederation
 - Personal correspondence of the Founders
 - Popular literature (*e.g.*, Thomas Paine)
- Potential Readings
 - ALFRED F. YOUNG & GREGORY H. NOBLES, *WHOSE AMERICAN REVOLUTION WAS IT?* (2011)
 - David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932 (2010)
 - Brooke J. Bowman, *Researching Across the Curriculum: The Road Must Continue Beyond the First Year*, 61 OKLA. L. REV. 503 (2008)
 - Primary documents related to the First Founding¹⁴⁹
 - THE PAPERS OF THE CONTINENTAL CONGRESS (John P. Butler ed., 1978)¹⁵⁰
- Week Three
 - Class One
 - Federalist Papers (their purpose, their authors, their effect on the ratification, and their use by the Supreme Court over time)
 - Class Two
 - Anti-Federalist Papers (their purpose, authors, effect on ratification, relationship to the Federalist Papers, and use by the Supreme Court over time)
- Week Four
 - Class One

149. The Library of Congress collects primary sources and releases them online. For a good starting place, see *Primary Documents in American History*, LIBR. OF CONG., <https://www.loc.gov/rr/program/bib/ourdocs/newnation.html> [<https://perma.cc/P5ZN-PPDT>] (collecting a panoply of primary sources related to American history).

150. This five-volume compilation is a wonderful resource to find congressional materials from the Founding Era.

- State constitutions near the First Founding¹⁵¹ (how they differ from one another as well as from the federal Constitution, and how justices on state supreme courts interpret key questions arising out of the Founding Era)¹⁵²
- Potential Readings
 - Craig Green, *United/States: A Revolutionary History of American Statehood*, 119 MICH. L. REV. 1 (2020)
 - Articles on state constitutionalism by Miriam Seifter, David Schultz, Alan Tarr, Robert Williams, or James Gardner
- Class Two
 - International events and comparative law (the key events and legal principles taking place in the United Kingdom, France, and other areas, and how those events and principles influenced the Founders in the United States)
 - Potential Readings
 - Daniel J. Hulsebosch, *The Revolutionary Portfolio: Constitution-Making and the Wider World in the American Revolution*, 47 SUFFOLK U. L. REV. 759 (2014)
 - Daniel J. Hulsebosch, *Being Seen Like a State: How Americans (and Britons) Built the Constitutional Infrastructure of a Developing Nation*, 59 WM. & MARY L. REV. 1239 (2018)
- Week Five
 - Class One
 - Actions of first presidents and congresses (how they interpreted the Founding Era, and how they diverged from its legal principles)
 - Potential Readings

151. State constitutions from the First Founding have influenced modern Supreme Court decisions. Consider that, in *Heller*, the Court analyzed the fact that nine state constitutions explicitly protected the individual right to carry a gun. Adams, *supra* note 34, at 308.

152. Professors may (and perhaps should) opt to focus on how the supreme court in the state where their school is situated has interpreted the Founding Era.

- David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789–1791*, 61 U. CHI. L. REV. 775 (1994)
- JOHN C. MILLER, THE FEDERALIST ERA (1960)
- Class Two
 - The initial practice of the Supreme Court (the role it played in giving life to the principles that animated the First Founding, and the actions, if any, the Court took contrary to those principles)
 - Potential Readings
 - D.A. Jeremy Telman, *John Marshall's Constitution: Methodological Pluralism and Second-Order Ipse Dixit in Constitutional Adjudication*, 24 LEWIS & CLARK L. REV. 1151 (2020)
- Unit Three: Introduction to the Second Founding
 - Week Six
 - Class One
 - Tic Toc of the actual history of the Second Founding (who, what, and where)
 - Potential Readings
 - ERIC FONER, THE SECOND FOUNDING (2019)
 - Burt Neuborne, *Federalism and the "Second Founding:" Constitutional Structure as a "Double Security" for "Discrete and Insular" Minorities*, 77 N.Y.U. ANN. SURV. AM. L. 59 (2022)
 - Class Two
 - Introduction to Second Founding sources
 - *Barron v. Baltimore*,¹⁵³ *Prigg v. Pennsylvania*,¹⁵⁴ and *Dred Scott*¹⁵⁵ (Antebellum Era cases that shaped the Reconstruction Amendments)
 - Fugitive Slave Act
 - Negro Seaman Acts
 - *Uncle Tom's Cabin*

153. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

154. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842).

155. *Scott v. Sandford (Dred Scott)*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

- Week Seven
 - Classes One and Two
 - Thirteenth, Fourteenth, and Fifteenth Amendments (political and cultural significance, varying legal interpretations, immediate and short-term effects)
 - Potential Readings
 - Rebecca E. Zietlow, *The Ideological Origins of the Thirteenth Amendment*, 49 HOUS. L. REV. 393 (2012)
 - Christopher W. Schmidt, Brown, *History, and the Fourteenth Amendment*, 97 NOTRE DAME L. REV. 1477 (2022)
 - Alexander Tsisis, *Enforcement of the Reconstruction Amendments*, 78 WASH. & LEE L. REV. 849 (2021)
 - Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. REV. 87 (2022)
- Week Eight
 - Class One
 - Civil Rights Act and other legislation (political and cultural significance, varying legal interpretations, and immediate and short-term effects)
 - Civil Rights Act of 1866
 - Enforcement Act of 1871
 - Civil Rights Act of 1875
 - Class Two
 - Early interpretation of Reconstruction Era legislation
 - *Ex parte McCordle*¹⁵⁶
 - *Slaughter-House Cases*¹⁵⁷
 - *The Civil Rights Cases*¹⁵⁸
 - Potential Readings
 - Kurt T. Lash, *Enforcing the Rights of Due Process: The Original Relationship Between the Fourteenth Amendment and the 1866 Civil Rights Act*, 106 GEO. L.J. 1389 (2018)

156. *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1868).

157. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

158. *The Civil Rights Cases*, 109 U.S. 3 (1883).

- James W. Fox Jr., *Re-Readings and Misreadings: Slaughter-House, Privileges or Immunities, and Section Five Enforcement Powers*, 91 KY. L.J. 67 (2002)
- Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863 (1986)
- Unit Four: Analysis of Modern Citations to the Foundings and Final Presentations
 - Week Nine
 - Classes One and Two
 - *Schwarzenegger v. Entertainment Merchants Ass'n*¹⁵⁹ (focusing on the First Amendment)
 - *District of Columbia v. Heller* and *New York State Rifle & Pistol Ass'n v. Bruen* (focusing on the Second Amendment)
 - Potential Readings
 - Stewart Jay, *The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773 (2008)
 - Patrick J. Charles, *The Second Amendment in Historiographical Crisis: Why the Supreme Court Must Reevaluate the Embarrassing "Standard Model" Moving Forward*, 39 FORDHAM URB. L.J. 1727 (2012)
 - Week Ten
 - Classes One and Two
 - *Carpenter v. United States*¹⁶⁰ (focusing on the Fourth Amendment)
 - *Gamble v. United States*¹⁶¹ (focusing on the Sixth Amendment)
 - Potential Readings
 - Andrew E. Taslitz, *Search and Seizure History as Conversation: A Reply to Bruce P. Smith*, 6 OHIO ST. J. CRIM. L. 765 (2009)

159. *Schwarzenegger v. Ent. Merchs. Ass'n*, 559 U.S. 1092 (2010).

160. *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

161. *Gamble v. United States*, 139 S. Ct. 1960 (2019).

- Ryan Aloysius Smith, Comment, “Power, Not Reason”: *Fourth Amendment Jurisprudence as a History of Interpretations*, 92 TEMP. L. REV. 629 (2020)
- Nina Varsava, *Precedent on Precedent*, 169 U. PA. L. REV. ONLINE 118 (2020)
- Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377 (1996)
- George C. Thomas III, *History’s Lesson for the Right to Counsel*, 2004 U. ILL. L. REV. 543
- Week Eleven
 - Classes One and Two
 - *Rasul v. Bush*¹⁶² or *Hamdan v. Rumsfeld*¹⁶³ (focusing on habeas)
 - Potential Readings
 - Emily Calhoun, *The Accounting: Habeas Corpus and Enemy Combatants*, 79 U. COLO. L. REV. 77 (2008)
 - Andrew P. Napolitano, *A Legal History of National Security Law and Individual Rights in the United States*, 8 N.Y.U. J.L. & LIBERTY 396 (2014)
- Week Twelve
 - Class One
 - Fourteenth Amendment, Section One
 - *Brown v. Board of Education*¹⁶⁴
 - *Loving v. Virginia*¹⁶⁵
 - Class Two
 - Fourteenth Amendment, Section Five
 - *City of Boerne v. Flores*¹⁶⁶
 - *Nevada Department of Human Resources v. Hibbs*¹⁶⁷
 - *United States v. Morrison*
 - Potential Readings

162. *Rasul v. Bush*, 542 U.S. 466 (2004).

163. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

164. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

165. *Loving v. Virginia*, 388 U.S. 1 (1967).

166. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

167. *Nev. Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721 (2003).

- Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7 (2008)
- Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Scholarship and Commentary on the Fourteenth Amendment in 1867–1873*, 18 J. CONTEMP. LEGAL ISSUES 153 (2009)
- Richard L. Aynes, *Enforcing the Bill of Rights Against the States: The History and the Future*, 18 J. CONTEMP. LEGAL ISSUES 77 (2009)
- Wayne D. Moore, *The Fourteenth Amendment's Initial Authority: Problems of Constitutional Coherence*, 13 TEMP. POL. & C.R. L. REV. 515 (2004)
- Weeks Thirteen and Fourteen
 - Brief presentations and discussions

VI. ASPIRATIONS FOR FUTURE STUDY

If the aspiration of this Article is even partially realized, then, within a few years, professors at law schools around the country will teach variants of this course. Please let the author know if you or a colleague opts to begin teaching such a course (or are already doing so). Once a few such courses commence, the priority will be to create a catalog of syllabi for other professors to consider when launching their courses. This catalog will help lower barriers that professors may face to get this kind of course off the ground.

The second priority will be tracking how students who have taken the course use their relative expertise in the Foundings. This tracking can occur through formal surveys of alums or informal observations of how these students use the lessons in their publications, practice, and advocacy. A better understanding of which skills best serve the interests of the students and the legal profession will help shape its future iterations.

The third priority will be to monitor any impact on the courts. This priority will likely prove the toughest to achieve because it requires keeping in touch with graduates and measuring how their advocacy affects jurists. However, this monitoring is crucial to getting the ABA to make the course mandatory. If the ABA observes that the course profoundly impacts how

lawyers consult and analyze history, they may feel sufficient pressure to make it compulsory.

Even if the ABA never requires this course, the author sincerely hopes law schools take it upon themselves to better train their students in historical research and analysis. For too long, a subset of the legal community has freely wielded history to advance its interpretation of the Constitution. Too many members of the profession, lacking sufficient confidence in their understanding of legal history, especially concerning the Foundings, have not challenged that group's inaccurate observations and arguments. The era of unchecked historical arguments must end.

If law school deans or curriculum committees challenge the need for such a course, like-minded professors need only point to the Supreme Court's recent decision in *Bostock v. Clayton County*¹⁶⁸ as evidence of the potentially determinative impact of historical analysis and argumentation.¹⁶⁹ In particular, *Bostock* demonstrated that lawyers lacking the ability to investigate and assert historical arguments might fail to adequately represent their clients, especially clients who represent historically and contemporaneously persecuted groups. Though framed as quintessentially textualist, the opinions considered historical context to decipher the meaning of Title VII of the Civil Rights Act of 1964.¹⁷⁰

Bostock consolidated three cases that raised the same question: "whether an employer can fire someone for simply being homosexual or transgender."¹⁷¹ The majority, as authored by Justice Gorsuch, held that because "[s]ex plays a necessary and undisguisable role in the decision" to fire someone for being homosexual or transgender, it is "clear" that firing an employee based on their sexual orientation violates Title VII.¹⁷² Justice Gorsuch reached this conclusion based on a textualist approach to the statute, which prohibits employers from discriminating "against any individual . . . because of such individual's race, color, religion, sex, or

168. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

169. *See id.* at 1731 (holding "an employer violates Title VII . . . 'because of the individual's sex, by firing an individual for being homosexual or being a transgender person").

170. *See id.* at 1750 ("[W]e must be sensitive to the possibility a statutory term that means one thing today or in one context might have meant something else at the time of its adoption or might mean something different in another context."); *id.* at 1767 (Alito, J., dissenting) (explaining how proper textualism requires "an examination of the social context in which a statute was enacted"); *id.* at 1827 (Kavanaugh, J., dissenting) (contending the failure to look at words in context "misses the forest for the trees").

171. *Id.* at 1737 (majority opinion).

172. *Id.*

national origin.”¹⁷³ This approach required the Court to “orient [itself] to the time of the statute’s adoption, here 1964, and begin by examining the key statutory terms in turn.”¹⁷⁴

The dissenters—Justice Kavanaugh, writing alone, and Justice Alito, writing for himself and Justice Thomas—also incorporated a historical approach into their legal reasoning. Justice Alito characterized the Court’s duty as interpreting “statutory terms to ‘mean what they conveyed to reasonable people *at the time they were written*.’”¹⁷⁵ Justice Kavanaugh expanded on this duty by charging the court with asking “how a reasonable person, conversant with the relevant social and linguistic conventions, would read the text in context.”¹⁷⁶ According to Justice Kavanaugh, this duty included the Court acknowledging that dictionary definitions of statutory terms often fail to express “settled nuances” and “background conventions” that may indicate the “ordinary public meaning at the time of enactment.”¹⁷⁷

Despite the critical role of history—namely, the meaning of “sex” in 1964—the employees who faced discrimination conceded a major point. Specifically, they left uncontested the conclusion that the ordinary meaning of sex did not include “sexual orientation.”¹⁷⁸ However, several amici curiae briefs presented strong arguments suggesting the opposite. For instance, Professors William Eskridge and Andrew Koppelman identified a 1961 dictionary that defined sex as “the whole sphere of behavior related even indirectly to the sexual functions and embracing all affectionate and pleasure-seeking conduct.”¹⁷⁹ A brief filed by several historians likewise argued that the statutory meaning of sex at enactment pertained to sexual orientation.¹⁸⁰ Similarly, a brief filed by linguistic scholars who analyzed

173. 42 U.S.C. § 2000e-2(a)(1).

174. *Bostock*, 140 S. Ct. at 1738–39.

175. *Id.* at 1755 (Alito, J., dissenting).

176. *Id.* at 1825 (Kavanaugh, J., dissenting).

177. *Id.* (internal quotation mark omitted).

178. *See* Brief for Petitioner at 13, *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (No. 17-1618) (arguing the statutory language prohibits ‘any kind’ of sex discrimination, even forms not contemplated by Congress when Title VII was first enacted).

179. Brief of William N. Eskridge Jr. and Andrew M. Koppelman as Amici Curiae in support of Employees at 21, *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107) (internal quotation mark omitted). Comparatively, Justice Gorsuch relied on a 1954 dictionary definition for his analysis. *Bostock*, 140 S. Ct. at 1740.

180. *See* Brief of Historians as Amici Curiae in Support of Employees at 8, *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107) (“The word ‘sex’ thus covered a broad

word usage and meaning by the public demonstrated a broad definition of sex.¹⁸¹

The advocates for the employees may have intentionally left this line of argumentation to the side. They may have (it turns out, rightfully) concluded their best chance of success came from a textualist approach less reliant on the perusal of the historical record and more based on the literal meaning of sex and “because of.” However, given the change in the Court’s composition since *Bostock*, it could be argued that advocates for the LGBT community and other communities—considered members of the “ordinary public”—cannot afford to cede any part of the historical record.

Justices and, more generally, judges likely have a very fixed and biased conception of who, at any time, has constituted a “reasonable person” or a member of the ordinary public—the two perspectives usefully cited for determining the meaning of a statutory term under a textualist approach.¹⁸² Only fourteen active federal judges identified as gay or lesbian as of February 1, 2022.¹⁸³ This shocking lack of representation likely leads to a shortage of familiarity with the history of the LGBT community and authoritative accounts of its history.¹⁸⁴ Unsurprisingly, a Supreme Court Justice with few—if any—ties to the LGBT community would conceive a “reasonable person, conversant with the relevant social and linguistic conventions”¹⁸⁵ as someone who did not hold expansive interpretations of sex and sexual orientation. In fact, even if faced with evidence that many members of the public indeed held such broad interpretations, jurists

range of meaning in the mid-twentieth century—one that encompassed the behavior, practices, and identities of LGBT individuals.”).

181. See Brief for Amici Curiae Corpus-Linguistics Scholars Professors Brian Slocum et al. in Support of Employees at 24–26, 24 fig.1, *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107) (demonstrating how sex “subsumed what now is described as *gender*”).

182. See *Bostock*, 140 S. Ct. at 1738–39 (discussing the approach courts take to understand how words were used when statutes were enacted); see also *id.* at 1755 (Alito, J., dissenting) (“[The Court’s] duty is to interpret statutory terms to ‘mean what they conveyed to reasonable people *at the time they were written*.’”); *id.* at 1825 (Kavanaugh, J., dissenting) (“[P]roper statutory interpretation asks ‘how a reasonable person, conversant with the relevant social and linguistic conventions, would read the text in context. This approach recognizes that the literal or dictionary definitions of words will often fail to account for settled nuances’”).

183. LAMBDA LEGAL, IN A RECORD-BREAKING YEAR FOR JUDICIAL NOMINATIONS, THE BIDEN ADMINISTRATION FELL SHORT ON LGBTQ+ REPRESENTATION 2 (2022).

184. See, e.g., Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1787 (2005) (identifying judicial diversity as a factor in resolving civil rights cases).

185. *Bostock*, 140 S. Ct. at 1825 (Kavanaugh, J., dissenting).

opposed to such a reading may find ways to distinguish *their* average or reasonable person from an objectively average person.

Professor James Macleod employed an empirical analysis to demonstrate that the ordinary meaning of sex was likely more expansive than Justices Gorsuch, Alito, and Kavanaugh anticipated. In his study, participants were provided with several case studies on workplace discrimination claims.¹⁸⁶ In cases involving the termination of an employee because of their sexual orientation and those involving their gender identity, the majority of participants concluded that the firings occurred because of the sex of the employee.¹⁸⁷ Yet, none of the authoring Justices accepted these empirical results. Two legal scholars defended this refusal because it would be “a disaster for textualism” if judges had to accept the “often weird” understanding the statistically average person held.¹⁸⁸ It follows that textualism effectively allows judges to define reasonable for themselves, which makes the historical accounts all the more important for advocates defending members of disadvantaged communities.

This case study should convince deans to approve history classes because it contains many examples of the historical skills necessary to defend cases in modern courts. In cases similar to *Bostock*, many advocates would fall short if they, for example, were unfamiliar with how to find dictionaries from different eras, did not know how to review legislative history and legislative proceedings, or had not been introduced to the works of authoritative and diverse historians. Absent the ability to raise history-based arguments and defenses, unsupported assertions—such as this one by Justice Alito, that “Americans in 1964 would have been shocked to learn that Congress had enacted a law prohibiting sexual orientation discrimination”¹⁸⁹—may go unchallenged and cause adverse outcomes for clients.

This Article did not set forth a complete and detailed guide on the teaching of the Foundings or the tools needed to conduct historical analyses, but it should spark a necessary and overdue conversation among deans, faculty members, and students. Though often flawed, historical analyses will continue to influence judicial decisions, regardless of whether advocates can critically assess historical arguments. Though some scholars may scoff

186. James A. Macleod, *Finding Original Public Meaning*, 56 GA. L. REV. 1, 10 (2021).

187. *Id.*

188. Mitchell N. Berman & Guha Krishnamurthi, *Bostock was Bogus: Textualism, Pluralism, and Title VII*, 97 NOTRE DAME L. REV. 67, 97 (2021).

189. *Bostock*, 140 S. Ct. at 1772 (Alito, J., dissenting).

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at yet another mandatory class, it appears more necessary than ever to equip law students with a deeper understanding of the Foundings and the competencies required to conduct similar historical inquiries into different periods.

