An Appeal to Books

Amir H. Ali

Harvard Law School

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Legal History Commons, Legal Writing and Research Commons, and the Supreme Court of the United States Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mlr/vol121/iss6/2

https://doi.org/10.36644/mlr.121.6.foreword

This Foreword is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
FOREWORD

AN APPEAL TO BOOKS

Amir H. Ali*

This feels a fit, even urgent, moment to celebrate our books and the role they play vis-à-vis the law, the courts, and the truth.

As this issue goes to print, our nation’s highest court faces forceful criticism that some of its most significant decisions have been detached from objective fact. In recent Terms, the Supreme Court’s majority has doubled down on deciding major constitutional questions based on “history and tradition”—that is, the majority’s understanding of what the nation was like centuries ago.1 Just as quickly as these justices praised the objectivity of their fealty to history, they met widespread rebuke from historians. These actual experts in history observed that the Court’s work fails basic standards for historical analysis and distorts historical facts toward a particular end. This occurs at a time when public confidence in the Supreme Court is at an all-time low,2 and concern for the spread of misinformation is high and rising.3

This predicament—anointing “history and tradition” the centerpiece for delineating important rights, only to offer an inexpert and inaccurate historical account—has profound societal implications. It differs from the usual critiques of judicial decisionmaking, such as disagreement as to what the outcome is in a case, what the law is, or what methodology is best. The worry here is that a branch of government, led by the country’s highest court, is issuing opinions that endorse questionable—even fringe—accounts of our nation’s history. Those decisions are broadcast with a built-in megaphone:

---


Supreme Court opinions, along with any false history in them, are widely disseminated by a media characterized by rapid news cycles and 280-character takes, rather than critical analysis. The Court’s major opinions, along with any dubious history, are incorporated into textbooks that the next generation of students will read in their high school civics classes. And because the Supreme Court gets the final word in our legal system, a whole machinery of lawyers and judges will be required to accept the Supreme Court’s version of history as precedent and even build on it, irrespective of its truth.

So, how do we set the record straight? That question—how society responds when the judiciary embraces an untrue or incomplete narrative of who we are and how we came to be as a country—is an immense one. While I don’t have all the answers, I am sure of one thing: books will have a central role to play. The Supreme Court binds lawyers and judges in our courts, but it does not bind an author’s pen. Books, in their depth and their unique ability to pull us in, will tell us the full story.

Admittedly, this inverts the usual orientation of the legal profession when considering the relation of books and courts. Many prior Forewords to this esteemed Book Review, for instance, indulged the question of how books can or have been useful to, or endorsed by, courts. This orientation toward seeking validation from courts is second nature for us lawyers. We look to judges every day to evaluate and judge the arguments we make. Our legal education places judicial opinions at the center of most classes and exams. Many legal scholars, including one whose book is reviewed in this volume, convey their prominence based on the number of times they’ve been cited by justices.

This is a moment to resist that reflex—to ask not whether and how our literature has been validated by courts, but whether and how our courts have been validated by literature. After all, if our books don’t tell us the whole story, who will?

I. AN INCOMPETENCE TO RECOUNT IMPARTIAL HISTORY

In its 2021–2022 Term, the U.S. Supreme Court’s majority took a decisive turn toward defining our constitutional rights based on its understanding of the country’s affairs centuries ago, when the relevant text was adopted. In those cases, the majority repeatedly stressed that its outcome was compelled by history—in some cases, so much so that the Court had to overrule decades-long precedent. The majority also commended its own objectivity for fastening itself to history.


5. See, e.g., Akhil Reed Amar, Yale L. Sch., https://law.yale.edu/akhil-reed-amar#biography [perma.cc/9UD7-6UGM] (emphasizing his Supreme Court citation count in the second sentence of the biography).
This resort to and self-praise for historical analysis was front and center in the Court’s most politically charged cases of the 2021–2022 Term. In *New York State Rifle & Pistol Association v. Bruen*, the Court extended the Second Amendment to protect the public carry of handguns based on what it called a “straightforward historical inquiry.” Going further than any prior Second Amendment case, the Court declared any governmental interest in preventing gun violence irrelevant; a gun regulation may stand only if determined to be “consistent with the Nation’s historical tradition.” And according to the Court’s “long journey through the Anglo-American history of public carry,” there was “no historical basis” for prohibiting public carry and, to the contrary, “history reveals a consensus” of guaranteeing it. The Court commended its recourse to history as a “more legitimate” and “more administrable” way to delineate rights. One justice in the majority wrote separately, at least in part, to commend the majority’s “exhaustive historical survey.”

The next day, in *Dobbs v. Jackson Women’s Health Organization*, the Court’s majority espoused the same adherence to history, this time as the basis for overruling its fifty-year-old precedent in *Roe v. Wade*. The majority wrote that this outcome was compelled by “respect for the teachings of history” and its conclusion from historical sources that the right to abortion was not “rooted in our Nation’s history and tradition.” The Court again praised the objectivity of this history-centered inquiry, assuring readers that resorting to history safeguarded against an “unprincipled approach” and “the natural human tendency to confuse what [the Constitution] protects with [the justices’] own ardent views about the liberty that Americans should enjoy.”

The unstated assumption, of course, is that the Supreme Court can reliably ascertain the “teachings of history” in the first place. Looking at the institution on its face, there’s little reason to think it’s well suited to do that. Justices are not historians; each generally has an undergraduate degree followed by training in the law (and even those credentials are not constitutionally required). Their legal education teaches them how to be lawyers—how to read and analyze caselaw—not how to accurately and impartially examine historical sources. Nor are the justices assisted by historians. The law clerks who help them assess arguments, research law, and draft opinions are generally a few

6. 142 S. Ct. 2111.
8. *Id.* at 2130.
9. *Id.* at 2145–46, 2156.
10. *Id.* at 2130.
11. *Id.* at 2157 (Alito, J., concurring).
14. *Id.* at 2247–48.
years out of law school with a year or two of experience working for other judges.\textsuperscript{15}

Rather than draw contextualized and accurate conclusions about the state of the country centuries ago, the judicial branch is designed to resolve particular factual and legal disputes between parties, based on the evidence and arguments they offer. Trial courts make findings about what occurred in an individual case based on the evidence. And judges all the way up the system hear arguments and determine who has the better one. That this adversarial process provides a mechanism to decide which witnesses are credible and which party has the better precedent does not mean it’s effective at reaching accurate conclusions about history. And even if the adversarial system were a sound method, it’s hard to imagine courts are well positioned to engage in deep and accurate historical analysis given their demanding dockets. The Supreme Court, which has a far smaller docket than other courts, still generally produces opinions in over sixty cases per year, which are drafted in a matter of months, if not weeks. Lower courts may preside over hundreds of cases at once.

It is not surprising then that historians, who are expert in and have time to do history, have been underwhelmed by the Supreme Court’s work. According to one historian who studies the early American history of gun regulation, \textit{Bruen}’s analysis shows “ignorance of basic legal historical method” and a “shocking and amateurish use of history.”\textsuperscript{16} He argues that this enabled a distortion of the past in ways that were “breathtaking in scope.”\textsuperscript{17} Another historian has similarly commented that \textit{Bruen}’s analysis “fails to adhere to even basic academic standards,”\textsuperscript{18} while yet another believed the opinion reveals that the authoring justices “aren’t well-versed in history” and reflects “an unserious game of cherry-picking examples—a political outcome in search of a supporting argument.”\textsuperscript{19} Yet another historian summarizes \textit{Bruen}’s historical

\begin{thebibliography}{99}
    \bibitem{footnote19}Joshua Zeitz, \textit{The Supreme Court’s Faux ‘Originalism,’} POLITICO (June 26, 2022, 7:00 AM), https://www.politico.com/news/magazine/2022/06/26/conservative-supreme-court-gun-control-00042417 [perma.cc/6C3C-H3R5].
\end{thebibliography}
analysis by saying: “There is no method to it, nothing but inconsistency and caprice.”

The majority’s historical analysis in Dobbs similarly met widespread disapproval from historians. Following the Court’s opinion, the American Historical Association, the largest organization of historians in the United States, and the Organization of American Historians, the largest organization of historians who study and teach American history, issued a statement that the Court’s analysis “does not meet” the standards for historical scholarship and advances a “flawed” and “troubling” account of history. Another historian who reviewed the opinion writes that, “as a piece of historical analysis Dobbs is weak,” including reasoning that “is circular and lacks contextualization,” and that the opinion’s “use of historical records reads like cherry-picking and proof-texting, attempts to mine the historical record for support for an already decided-upon position rather than allowing the historical record to illuminate that position.”

One common critique has been that history simply is not as clear as the justices say. In other words, one of the strongest tells of the Court’s ineptitude has been its own unabashed self-confidence. In Dobbs, for instance, the Court’s majority proclaims that until Roe there was “an unbroken tradition of prohibiting abortion on pain of criminal punishment” which “persisted from the earliest days of the common law until 1973.” But historians have traced a very different account, including “the strong presence in US ‘history and traditions’ at least from the Revolution to the Civil War of women’s ability to terminate pregnancy before the third to fourth month.” Historians have insisted that history is “far blurrier” than the Court’s majority acknowledged and


22. About the OAH, ORG. AM. HISTORIANS, https://www.oah.org/about/ [perma.cc/ESVD-2GNS].


“only distorting or misunderstanding the historical record” allowed the majority to draw the historical conclusions that it did.27 According to one group of historians, “To suggest . . . there is a consistent and continuous line of cases establishing that abortion was a crime in our modern sense is either incredibly bad history or simply dishonest.”28

A stronger form of this critique charges the Court with embracing fringe theories that have been widely repudiated. For example, one federal judge has observed that the Supreme Court’s embrace of an individual rights history of the Second Amendment has caused “a serious disconnect between the legal and historical communities” and adopts an account for which “an overwhelming majority of historians remain unconvinced.”29 Even to nonhistorians, that disconnect has some intuitive force. In 1991, former Chief Justice Warren Burger, a conservative, described the individual rights theory, then still just a project of the National Rifle Association, as “one of the greatest pieces of fraud, I repeat the word fraud, on the American public by special interest groups that I have ever seen in my lifetime.”30 Thirty years later, a majority of justices would enshrine that asserted “fraud” as the authoritative history of the Second Amendment, tripling down on it in Brues.31

Other criticisms of the Court’s use of history focus on its arbitrary determinations of which historical sources are relevant,32 its disregard of historical evidence that does not fit the chosen narrative,33 and its distortion of other historical evidence to fit that narrative.34 Historians point to the Court’s pronouncement that “not all history is created equal,” and its dismissal of certain historical sources as “ambiguous at best,” while it elevates other sources as


32. Lepore, supra note 20.

33. Id.; Cornell, supra note 16.

34. Cornell, supra note 16.
“particularly instructive.” On one historian’s assessment, the Court’s majority has “conveniently cherry-picked whatever historical evidence supported [its outcome] and rejected or explained away any evidence that did not.”

Similarly, another historian observes that the majority’s historical conclusions regarding abortion excluded any consideration of historical evidence “authored by women and people of color.” Similarly, another historian observes that the majority’s historical conclusions regarding abortion excluded any consideration of historical evidence “authored by women and people of color.”

The result has been that, after assigning itself the task of discerning America’s “history and traditions,” the majority in Dobbs enshrined a narrative of our country, in which the views of White men at the time of the founding are “presented as representing America’s history and traditions, without a single woman’s voice represented.”38 In her Review of Civil Rights Queen in this issue, Professor Murray picks up on a similar concern, noting that Dobbs operates on the “assumption that the views of white men bear the patina of objectivity and neutrality that eludes the perspectives of women and minorities.”39 These apprehensions bring to the forefront an important question: what training and expertise do the justices have in the accurate and proper evaluation of historical sources?

These concerns do not just raise doubt as to whether the Court is getting history right. They also undermine the very objectivity of historical analysis that the justices repeatedly celebrate in their opinions. The Court cannot tout the impartiality of ascertaining history yet ignore the standards developed for ascertaining history in an impartial manner. We see a version of this debate unfold later in this issue. In The Words That Made Us, law professor Akhil Amar celebrates his construction of a “usable past” for lawyers to deploy through the adversarial system.40 Professor Ablavsky, a historian, responds that Amar “fails” to do so and, in the end, provides a “surprisingly unusable past” that is “remarkably one-sided” and disregards sounder work that historians have done for decades.41

History is malleable and, absent training and adherence to sound methods in analyzing it, it is difficult to see how the Court’s reading of history would be safeguarded from personal biases and experiences. As one commentator summarized, the justices “don’t have the time, resources, or expertise” to fact-

37. Lepore, supra note 20.
check their historical sources and thus the actual result may be “an echo chamber where the history the justices cite is the history pressed to them by the groups and lawyers they trust, which conveniently comports with their preexisting worldviews and normative priors.”

II. PENNING OUR TRUE STORY

What does it mean when the country’s highest court assigns itself the responsibility to ascertain our “history and traditions” and then endorses a false, perhaps even fringe, account? The most immediate and concrete consequence, of course, is that we either lose rights we should have or we lose the ability to regulate things that we should be able to regulate. Misguided history in Dobbs will prevent pregnant people from obtaining abortions and embolden states to criminalize reproductive medicine and attack other fundamental rights. Misguided history in Bruen will prevent governments from keeping their citizens safe from gun violence. The bad history can also have a domino effect that knocks down other rights. As the American Historical Association and the Organization of American Historians have described: “These misrepresentations are now enshrined in a text that becomes authoritative for legal reference and citation in the future.”

The “history and tradition” embraced in Dobbs has accordingly raised alarm for the rights of same-sex or interracial couples to marry, as well as the right to contraception.

These costs and risks to our legal rights are acute and understandably the focus of most activists and commentary.

But having the judicial branch embrace a false or insular narrative of how our country came to be also presents a broader threat to truth and to belonging in a pluralistic nation. What the Supreme Court says matters. Although public confidence in the Supreme Court has been deteriorating, society still largely assumes it is a reliable institution. The media generally covers Supreme Court opinions by sharing some basic facts of the case, the positions of each party, and what the Supreme Court said. The Court’s narrative is rarely presented alongside a critical counternarrative. In his Review, Professor Ablavsky expresses a concern that incomplete and poor history by prominent legal scholars like Amar “depict[s] the state of the field for nonspecialists and translate[s]...
scholarship to a general audience; they get space and attention.”\footnote{Ablavsky, supra note 41, at 1122.} The space and attention given to the Supreme Court is, of course, magnitudes greater.

These societal consequences deserve attention. Our next generation of high school civics students will read Supreme Court opinions on major issues of the day and may take the narrative they read for granted. The options seem to be the perpetuation of an inaccurate history that is exclusive of certain voices or, for the student who knows better, a deepening distrust in the Supreme Court as an institution. As Professor Waldman puts it in his Review of \textit{Vice Patrol}, when courts act as arbiters of truth, choices about which facts to accept as true and which to discard—about “who gets to decide what reality really is”—play a significant role in defining public perceptions about fundamental aspects of our identities and communities.\footnote{Ari Ezra Waldman, \textit{Policing Queer Sexuality}, 121 Mich. L. Rev. 985, 987 (2023) (revising Anna Lvovsky, \textit{Vice Patrol: Cops, Courts, and the Struggle Over Urban Gay Life Before Stonewall} (2021)).}

So who sets us back on course? That question warrants consideration well beyond this Foreword, but I offer a few starting points.

First, perhaps stating the obvious, course correction is unlikely to come from the Court itself any time soon. Indeed, the Court’s majority appeared all but self-aware of its incompetence to accurately recount history. In the course of adopting its history-focused inquiry in \textit{Bruen}, the majority acknowledged in a footnote the criticism that “judges are relatively ill equipped to ‘resolv[e] difficult historical questions’ or engage in ‘searching historical surveys.’”\footnote{142 S. Ct. 2111, 2130 n.6 (quoting \textit{Bruen}, 142 S. Ct. at 2177, 2179 (Breyer, J., dissenting)).} The majority responded that it was “unpersuaded.”\footnote{\textit{Id.}} This was so because “[t]he job of judges is not to resolve historical questions in the abstract; it is to resolve legal questions presented in particular cases or controversies” and to “decide a case based on the historical record compiled by the parties.”\footnote{\textit{Id.} (emphasis in original).} One legal scholar has offered a similar explanation that criticism of the Court’s competence to analyze history “misses the point” because “the court is doing law, not just history.”\footnote{William Baude, \textit{Of Course the Supreme Court Needs to Use History. The Question Is How.}, WASH. POST (Aug. 8, 2022, 9:27 AM), https://www.washingtonpost.com/opinions/2022/08/08/supreme-court-use-history-dobbs-bruen/ [perma.cc/4K3T-PAQA].}

It’s hard to see how that response offers any comfort. Perhaps if historians were raising some technical challenge to the Court’s jurisdiction to discuss history in its opinions, it would be responsive to point out that the history is offered in the course of resolving a legal question. But that’s not the concern. Critiques of the Court’s competence to accurately ascertain history do not dispute the Court is also “resolv[ing] legal questions” or “doing law, not just history.” The concern is precisely that \textit{when} the Court is “doing law, not just
history” it is doing bad history, and therefore getting both the law and our history wrong.

A second observation is that we can’t count on lawyers or other judges to straighten this out. Because the Supreme Court’s word is binding in the legal system, lawyers who believe the Supreme Court’s account of “history and tradition” is wrong are unlikely to advance their clients’ interests by making that argument in court. We can instead expect that lawyers will accept the Supreme Court’s version of “history and tradition,” fringe or not, and extend it to new contexts. To be sure, the Court’s embrace of inaccurate history does raise some confounding questions for lawyers and judges to wrestle with. If, in fact, the Supreme Court has premised the scope of a right on its understanding of a historical world that never existed in the first place, how does one advance or evaluate arguments about whether history supports an extension of that right? Nonetheless, the fact that lawyers and judges will be required to accept the Supreme Court’s history means they are poorly positioned to unsettle it.

That brings me back to literature. Books are bound by glue, but not by any court.

In books, the inaccurate or incomplete story of our nation from courts can be met with a true and full account. Books can be written by people who are experts in their subject and, in the case of history, by trained historians. And, unlike Supreme Court opinions, books about our past can be written in the time needed to adequately verify and contextualize sources, and to account for the complexities of the historical record. In the future, concrete policies for change must ultimately come from organizers, activists, and politicians. But those actors need to be equipped with our full and true history in hand, and they depend on a public that is informed and receptive.

Books have the power to immerse us in those stories. Here, the best guidance comes not from something any justice wrote in a judicial opinion, but what one of them wrote for our children. In her picture book, Turning Pages, Justice Sotomayor describes the unique power of books to instill knowledge, courage, imagination, and empathy—ingredients of justice and change.\(^53\) In her words, “Reading was like lighting candles, each book a flame that lit up the world around me” and each book carrying the potential to “bring[] into focus the truths about the world around me.”\(^54\)

Yet, as much as this is a moment to celebrate the power of literature, it’s a moment when we can’t take literature for granted. As this Foreword goes to print, we face a newfound attack on books, and particularly those that advocate for a more complete and inclusive understanding of history. Legislatures across the country have passed or are presently considering dozens of bills that would ban schools from discussing literary works that challenge the accuracy

---


54. *Id.*
of conventional narratives of our past. At least one book reviewed in this issue, *Borderlands/La Frontera*, had already been banned in one state because the author dared to share her own story about race, ethnicity, and sexuality; and others reviewed herein could easily be swept within vague language aimed at chilling discussion of race and identity. Safeguarding the role for books to share stories and expose truths requires resisting these efforts to censor it.

Several of the books and Reviews on display in this issue engage with our “history and tradition,” inching us toward a richer and more complete understanding of our past, and toward more just institutions. In their Reviews of *Critical Race Judgments*, Professors Erman, Okidegbe, and Pearl have much to say about the issues of today and tomorrow by looking backward. Each Review contrasts a Supreme Court decision that overlooked or minimized the experiences of certain groups—*Chae Chan Ping*’s choice to prioritize “alien-age” over residency, *McKleskey*’s dismissiveness of statistical evidence of discrimination, and *Adoptive Couple*’s ahistorical racialization of Native children—with the author’s reimagining of how a more inclusive opinion could have looked. These explorations suggest ways of thinking about our present and future that might avoid perpetuating the injustices that these earlier decisions have wrought. And in his Review of *Allow Me to Retort*, Professor Hasbrouck builds on Elie Mystal’s vision of a new constitution that is ready to reckon with our Constitution’s broken promises to historically excluded groups—America’s “dream deferred.”

Ultimately, I place my hope in books, and their potential to challenge superficial narratives and build a more complete past.


