The (Un?)Bearable Liteness of E-Mail: Historians, Impeachment and *Bush v. Gore*

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Historians have recently used the Internet to circulate political statements about law. This paper explores the statements they issued against President Clinton's impeachment and President Bush's inauguration. It pays special attention to impeachment, comparing the position taken by historians with that taken by the law professors. While concluding that such statements can be useful, the author advises historians lacking the expertise to evaluate the positions taken in a statement to proceed carefully in signing it. She suggests that historians sign only such documents whose scholarship they have made a preliminary assessment that they could individually defend publicly. She also urges historians to craft statements that give the public a sense of the methods they use in interpreting the past.

As a child, I recall being fascinated by the television program *Lost in Space*. In my memory, it features the Robinson family, the mother played by June

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Lockhart of *Lassie* fame. Assigned to explore the galaxy, the Robinsons found nothing went according to plan. Having lost contact with Earth, they careened from one planet to the next during prime time each week vainly trying to find their way home.[1]

I recalled this show as I considered historians' statements on Bill Clinton's impeachment and on the inauguration of George W. Bush. In the first, historians came to the rescue of President Clinton; in the second, to that of Clinton's Vice-President, Al Gore. In both instances, historians used cyberspace and the Internet to amass signatures for a statement subsequently disseminated in their capacity as scholars and citizens. In this essay, I make the modest suggestion that historians sign only such documents whose scholarship they have made a preliminary assessment that they could individually defend publicly. I also discuss how historians might strengthen their credibility and give the public a better sense of how they interpret the past when they intervene in current controversies.

To one who attended graduate school in history when I did, such intervention is remarkable for a simple reason: it seems odd that anyone would care what we have to say. When I entered graduate school in the late 1970s, no one, except other historians, did.[2] Historians had not taken out newspaper advertisements or circulated open letters during Watergate, and they did not submit historians' amicus briefs. By the late 1980s, however, the resurgence of American history was everywhere in high and low culture. Suddenly, people wanted to know what historians thought. Historians, at times more visible than others, had experienced a resurgence as public intellectuals.[3]

And the spread of e-mail made it even easier for them to register a position. Today, everyone, whether historian or not, is bombarded with urgent electronic messages sent to us in our professional and personal capacities asking us to espouse all sorts of causes. The very medium makes it simple to do so without considering whether we take stands inconsistent

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1 My memory turns out to be incorrect. After a crash landing, the Family Robinson was marooned on one planet. Mark Phillips, The History of TV's Lost in Space, *available at* http://www/lostinspacetv.com.

2 *See* Michael Zuckerman, *Myth and Method: The Current Crises in American Historical Writing*, 17 Hist. Tchr. 219, 221 (1984): "American historians have rarely been less consequential than they have been in this past decade."

3 *See generally* Richard Posner, Public Intellectuals: A Study of Decline (2001). If Posner is correct, however, the resurgence came at a time when public intellectuals were generally taken less seriously than they had been during the 1930s, World War II, the 1960s, the 1970s, and the Cold War. *Id.* at 155.

with those we have taken elsewhere or how much we know about the issue: one need only read quickly; affix a signature; hit reply; forward; and delete.[4]

I find this new attentiveness to historians (a term I use to apply to those whose primary professional self-identification is with the discipline of history, whether they teach in a law school or history department) as public intellectuals and the interest in the positions they develop on e-mail gratifying, of course. I see no reason that the tension between the roles of historian as scholar and historian as activist should be irreconcilable. I believe that scholarship itself is a political act and that it is valuable — and even inevitable — for historians to blend their roles as scholars and citizens, consciously or not.[5] This essay, addressing historians' statements as scholar-citizens, is itself a political act and one in which I wear the hats of both scholar and citizen.

I argue that in the Clinton impeachment episode and *Bush v. Gore*, historians did not give the public a sense of what historians do and that their statements proved weaker than they need have been. In the Clinton impeachment trial, historians displayed the very behavior they usually condemn: they succumbed to the most rigid form of originalist analysis and ransacked the past for present answers, rather than making the nuanced explanations they usually offer. In *Bush v. Gore*, when they contended that the Court was doing something unprecedented by acting "political," historians ignored the past. In focusing on historians' appeals to history in the impeachment and 2000 election crises, I mean to urge them to enlist their scholarship more carefully in the service of their politics when they sign statements, letters, petitions, and briefs, so as to strengthen their political arguments and not to endanger their professional reputations. I seek to improve the quality of historians' work as public intellectuals,[6] not to discourage it.

I. IMPEACHMENT AND "HISTORIANS IN DEFENSE OF THE CONSTITUTION"

At one level, the Clinton impeachment reflected the extent to which the chickens of the 1970s had come home to roost. Watergate did not just

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4 E-mail from Gilad Heller to Laura Kalman (Jan. 21, 2002).

5 *See* Laura Kalman, The Strange Career of Legal Liberalism 195-208 (1996).

6 Posner, *supra* note 3, at 166 (contending that the "average quality" of public-intellectual work is "low" and may be "falling").

reduce trust in government. By creating the impetus for the 1978 Ethics in Government Act,[7] it also spurred the rise of Kenneth Starr. At the same time, the emergence of such hot-button issues in the 1970s as abortion and affirmative action was dramatically increasing popular awareness of law's relationship to politics. Americans chipped away at the barrier between public and private by making political once private matters.[8] What did the first Special Prosecutor appointed pursuant to the Ethics in Government Act investigate? The target was Jimmy Carter's Chief-of-Staff, Hamilton Jordan, who allegedly had snorted two toots of cocaine at Studio 54, though everyone agreed that had the allegation been lodged against a regular citizen, it would not have been sufficiently serious or credible to justify a U.S. attorney in pursuing it.[9]

As the nature of that investigation suggests, so too Americans moved toward a politics of personality in the mid-1970s, making the private life of public figures fair game. In the 1960s, President Kennedy's philandering had remained an open, but unreported secret. Because of the 1975 Church Committee hearings on the CIA in the Senate, though, the media reported that who the Committee delicately called one of Kennedy's "close friends," Judith Campbell Exner, was, at the time of her relationship with JFK, the girlfriend of two Mafiosi connected to CIA-assassination plots against Castro. Exner held a news conference to deny that she had been a middle-woman between Kennedy and Mob leader Sam Giancana (a story she later changed), but to confirm her "close personal ... relationship

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7 The Ethics in Government Act of 1978, Pub. L. No. 95-921, 92 Stat. 1824 (1978) (codified as amended at 28 U.S.C. 591-99 (1994)) [hereinafter Independent Counsel Act].

8 *See* Peter Morgan & Glenn Reynolds, The Appearance of Impropriety: How the Ethics Wars Have Undermined American Government, Business, and Society (1997).

9 Arthur Christy, *Trials and Tribulations of the First Special Prosecutor Under the Ethics in Government Act of 1978*, 86 Geo. L.J. 2287, 2289 (1998). Since then, independent counsels have been appointed to investigate allegations that senior government officials have been involved in wrongdoing on eighteen publicly-identified occasions (two probes in the Carter Administration, seven in the Reagan Administrations, two in the Bush Administration, and seven in the Clinton Administration) and two occasions that remain confidential. Donald Smaltz, *The Independent Counsel: A View From Inside*, 86 Geo. L.J. 2307, 2323 (1998). The number of front-page stories mentioning independent counsels went from 0 in 1978 to 120 in 1997. Cass Sunstein, *Bad Incentives and Bad Institutions*, 86 Geo. L.J. 2267, 2278 (1998). The coverage surrounding independent counsels was especially negative when they instituted criminal proceedings. Smaltz, *supra*, at 2352.

with Kennedy."[10] Though Exner initially refused to comment on whether her relationship with President Kennedy had been sexual, within a month she was publicly comparing Kennedy's skill as a lover to Giancana's. The President fared poorly.[11] (Her story here changed too.[12]) A drum roll of articles in the mid 1970s belatedly threw open the "closets of Camelot," stressing that Exner had been just one of Kennedy's many encounters.[13]

Just twenty-three years after Exner's news conference and a week before the midterm elections, Kennedy Administration historian Arthur Schlesinger, Jr., and Sean Wilentz met with reporters to discuss the Clinton impeachment. The occasion was the release of a statement, which they had drafted with C. Vann Woodward, signed by more than four-hundred "Historians in Defense of the Constitution." The statement warned against impeachment and appeared as a full-page advertisement in *The New York Times*.[14] Schlesinger, who would subsequently tell the House Subcommittee investigating the history of impeachment that "[g]entlemen always lie about their sex lives" and that "[o]nly a cad tells the truth about his love affairs,"[15] was pressed by reporters on how JFK would have fared "if his own subsequently well-documented affairs had been publicized at the time."[16] At the news conference, he maintained that "Kennedy's private life did not interfere with his duties, and rejected the notion that there was 'a parade of bimbos' around JFK."[17] According to David Broder, Schlesinger "struggled to maintain a dispassionate tone, but wound up sounding at times like [the picturesque Clinton strategist] James Carville in cap and gown," as he accused Ken Starr of being "America's No. 1 pornographer" and said, "We all lie all the time .... Why should this president be held more accountable than anyone else?"[18] (Nat Hentoff maintained Broder was wrong: it was Wilentz, who was "the James

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10 *See, e.g., J.F.K. and the Mobsters' Moll*, Time, Dec. 29, 1975, at 10; *A Shadow Over Camelot*, Newsweek, Dec. 29, 1975, at 14.

11 *Memoirs: Lady in Waiting*, Newsweek, Jan. 26, 1975, at 19.

12 Judith Exner, as told to Ovid Demaris, My Story 254 (1977).

13 *Closets of Camelot*, Newsweek, Jan. 19, 1976, at 31; *Jack Kennedy's Other Women*, Time, Dec. 29, 1975, at 1.

14 *Historians in Defense of the Constitution*, N.Y. Times, Oct. 30, 1998, at A17.

15 Prepared Statement of Arthur M. Schlesinger, Jr., *Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong., 2d Sess. 100, 101 (1999) [hereinafter *Background & History of Impeachment*].

16 John Harris, *400 Historians Denounce Impeachment*, Wash. Post, Oct. 29, 1998, at A4.

17 *Id.*

18 David Broder, *The Historian's Complaint*, Wash. Post, Nov. 1, 1998, at C7.

Carville of academia."[19]) For his part, and despite the fact that historians had declared they spoke "as historians and citizens," Wilentz insisted that the anti-impeachment statement was "a statement by the historians speaking as historians," as scholars.[20]

Recall what the historians said in their *New York Times* statement. They claimed that the Framers of the Constitution "*explicitly* reserved" the step of impeachment "for high crimes and misdemeanors *in the exercise of executive power.*" The Framers had not intended the constitutional remedy of "removal from Office on Impeachment for, and Conviction of, Treason, Bribery, or other High Crimes and Misdemeanors" to be used to reach private behavior or subsequent attempted deceit involving private behavior, they contended. "Impeachment for anything else," the historians maintained, "would, according to James Madison, leave the President to serve 'during pleasure of the Senate,' thereby mangling the systems of checks and balances that is our chief safeguard against abuses of *public* power." Further, impeachment pursuant to this "unprecedented" theory would possess "ominous" implications "for the future of our political institutions." It would "leave the Presidency permanently disfigured and diminished, at the mercy as never before of the caprices of any Congress. The Presidency, historically the center of leadership during our great national ordeals, will be crippled in meeting the inevitable challenges of the future."[21]

Here, we see historians assuming an originalist approach to the Constitution. Of course, as Martin Flaherty has observed, "[i]f ever a term muddied as much as it clarified, originalism is it."[22] In this essay, I follow Flaherty in broadly defining "originalism" as the effort to show fidelity to the Constitution by privileging "meanings from earlier eras of constitutional lawmaking."[23] Thus "originalism" refers to the narrow strategy emphasizing the possibility of determining the intent of the Framers of the Constitution, employed by former Attorney-General Edwin Meese and

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19 Nat Hentoff, *An Entirely New Impeachment Case*, Wash. Post, Mar. 6, 1999, at A21.

20 Broder, *supra* note 18.

21 Emphasis added. The text of the statement and the entire list of signatories appear in *Background & History of Impeachment, supra* note 15, at 334-40. The impeachment clause is in Article II, Section IV, of the Constitution.

22 Martin Flaherty, *The Most Dangerous Branch*, 105 Yale L.J. 1725, 1812 (1996).

23 *Id.* at 1813.

the Reagan Administration;[24] Robert Bork;[25] Justice Scalia;[26] and Michael McConnell.[27] It is what Cass Sunstein describes as "hard originalism," or asking "how those who ratified the relevant provision would have answered very specific questions."[28] But "originalism" also refers to other interpretive strategies as well, such as Akhil Amar's "Neo-Federalism";[29] Bruce Ackerman's "synthesis" of "constitutional moments";[30] and Lawrence Lessig's "translation" (which Sunstein employs on occasion).[31] Further, it includes the "soft originalism" Sunstein himself also advocates, which cares greatly about "what history shows; but the soft originalist will take the Framers' understanding at a certain level of abstraction or generality."[32] Sunstein contends, for example, that a "conception of the Equal Protection Clause that takes from the history a ban on second-class citizenship in the United States provides ... a desirable interpretive strategy."[33] The historians' statement represented "hard" originalism, a confident assertion about the Framers' specific intent.

And as Peter Onuf recalls, historians had spent the 1987 Bicentennial "defending 'history' against alien disciplines," most notably lawyers who espoused hard originalism.[34] "As custodians of the documentary record,

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24 *See, e.g.*, Edwin Meese, *Construing the Constitution*, 19 U.C. Davis L. Rev. 22 (1985).

25 *See, e.g.*, Robert Bork, The Tempting of America: The Political Seduction of Law (1990).

26 Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989).

27 *See, e.g.*, Michael McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995).

28 Cass Sunstein, *Five Theses on Originalism*, 19 Harv. J.L. & Pub. Pol'y. 311, 312-13 (1996); Legal Reasoning and Political Conflict 173 (1996).

29 *See, e.g.*, Akhil Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 Colum. L. Rev. 457 (1994).

30 *See, e.g.*, Bruce Ackerman, We the People: Foundations (1991); Bruce Ackerman, We the People: Transformations (1998).

31 *See, e.g.*, Lawrence Lessig, *Fidelity in Translation*, 71 Tex. L. Rev. 1165 (1993); Lawrence Lessig & Cass Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1 (1994).

32 Sunstein, *supra* note 28, at 313. According to Sunstein, "Soft originalism ... does not run afoul of the problems faced by hard originalism, and it is much better for rule of law reasons and for democratic reasons than nonoriginalist alternatives of the sort defended by Ronald Dworkin and practiced on occasion by the Warren Court." *Id.*; *see also* Sunstein, *supra* note 28, at 173-75.

33 Sunstein, *supra* note 28, at 313.

34 Peter Onuf, *Reflections on the Founding: Constitutional Historiography in Bicentennial Perspective*, 46 Wm. & Mary Q. 341, 342-43 (1989).

historians found themselves compelled to demonstrate that the Founders' original intentions rarely could be definitely established, and certainly not on questions the Founders did not even anticipate."[35] Jack Rakove agreed that

> [w]ith its pressing need to find determinate meetings at a fixed historical moment, the strict theory of originalism cannot capture everything that was dynamic and creative — and thus uncertain and problematic — in Revolutionary constitutionalism; nor can it easily accommodate the diversity of views that, after all, best explains why the debates of this era were so lively.[36]

Historians such as Onuf and Rakove protested that law professors' "cottage industry of original intent and analysis" diverted scholarly attention from "exploring the history of the Founding Period on its own terms" and understanding the gulf between the Founders' world and their own.[37] Hard originalism seemed an especially bad example of the "law office history" historians had long gotten their kicks out of disparaging[38] as "inept and perverted" research aimed at adorning work with "the trappings of scholarship and seeming roots in the past."[39]

Historians turned to originalism to fight impeachment at the same time that many law professors also concerned themselves with the President's future. The historians' anti-impeachment statement was published about a month after thirteen constitutional law experts publicized their letter to the House saying that the President's behavior had not crossed the threshold of impeachable conduct. It appeared about a week before 430 law professors signed on to the constitutional experts' letter and released it anew.[40]

The reaction to these e-mail-generated statements and letters was immediate. In explaining why he could not have committed a high crime and misdemeanor, President Clinton pointed to the fact that "nearly 900 constitutional experts" had said "that they strongly felt that this matter

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35 *Id.* at 343.

36 Jack Rakove, *Parchment Barriers and the Politics of Rights, in* A Culture of Rights: The Bill of Rights in Philosophy, Politics and Law 98, 100, 101 (Michael Lacey & Knud Haakonssen eds., 1991).

37 Richard Bernstein, *Charting the Bicentennial*, 87 Colum. L. Rev. 1565, 1605 (1987).

38 Alfred Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 Sup. Ct. Rev. 119, 122-23 (1965).

39 Charles Miller, The Supreme Court and the Uses of History 6 (1989).

40 The October 2, 1998, and November 6, 1998, letters of the law professors are reprinted, with signatories appended, in *Background & History of Impeachment, supra* note 15, at 374-85.

was not the subject of impeachment."[41] His attorneys entitled one section of their submission to the House Judiciary Committee "Recent Statements by Historians and Constitutional Scholars Confirm that No Impeachable Offense is Present Here."[42] Predictably, Democrats took to the floor of Congress to maintain that "scholarly support" for President Clinton was "overwhelming and cannot be ignored."[43]

Equally predictably, Republicans maintained that the historians' and law professors' letters represented political opinion, not analysis.[44] Meanwhile ninety lawyers, law professors, political scientists, and historians, many identifiable as political conservatives, signed a letter drafted in reaction condemning the "anti-impeachment historians" and contending it was "essential that the impeachment inquiry go forward and, if the record stands as it does now, that a bill of impeachment be voted by the House of Representatives."[45] The left-leaning *Nation* was not complimentary, either.[46] At the annual meeting of the American Historical Association, historians on the left would circulate a petition to "Impeach Bill Clinton for the Right Reasons: Not for Lewinsky, but Rather for the Illegal Bombing of Iraq, Afghanistan and Sudan," ultimately signed by more than 240 historians, social scientists, and others.[47]

I am hesitant to criticize the more than four-hundred fellow-historians who signed the statement opposing impeachment. First, it seems churlish: such letters, drafted hastily by several people who must develop — and, on some occasions, cloud — their reasoning in the interest of attracting the largest number of signatories possible, are bound to be problematic. (Indeed I would be intrigued to see future letters take a bottom line instead: e.g., "We the undersigned academics, believe that the misconduct alleged in the report of the Independent Counsel does not cross the threshold

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41 Quoted in Neal Devins, *Bearing False Witness: The Clinton Impeachment and the Future of Academic Freedom*, 148 U. Pa. L. Rev. 165 (1999).

42 *Id.* at 166.

43 *Id.*

44 *Id.*

45 *Impeachment Inquiry: William Jefferson Clinton, President of the United States: Presentation on Behalf of the President: Hearing Before the House Comm. on the Judiciary*, 105th Cong., 2d Sess. 510, 510-16 (Dec. 8-9, 1998) (An Open Letter to the Members of the United States House of Representatives and the United States Senate) [hereinafter *Impeachment Inquiry*]; David Greenberg, *All the President's Men*, Lingua Franca, Apr. 1989, at 4, 4-5.

46 Christopher Hitchens, *Jefferson-Clinton*, The Nation, Nov. 30, 1998, at 8.

47 Hentoff, *supra* note 19. The petition was reprinted in The Nation, Feb. 22, 1999, at 2.

of impeachable behavior," with each signatory appending a two-hundred word statement indicating his or her particular reasoning.) Further, I am especially hesitant to criticize more than four-hundred fellow-historians, when the group includes someone who has been my friend since my first day of graduate school, a colleague I often describe as my adopted older brother, and my beloved dissertation adviser. Nor do I agree with Forrest McDonald, who disapprovingly told the House Subcommittee investigating impeachment that "historians have no more qualifications for advising statesmen on current issues than do, say, plumbers or radiologists."[48]

True, I did not sign the historians' anti-impeachment statement when it came my way on the Internet. At the time, I justified my decision not to do so on the grounds that I did not know enough about the history of impeachment to possess an informed, scholarly opinion. I do not know whether that was the "real" reason for my refusal. Perhaps as a citizen who had voted for Clinton, I was so angry with him that I could not bring myself to defend him.[49] Nevertheless, unlike McDonald, I applaud the activist instincts that led many historians to sign the statement. In this particular case, given the rareness of presidential impeachments, they were among the few citizens to possess any understanding about the topic. Assuming that public intellectuals can ever significantly influence public opinion,[50] it seems eminently suitable for historians to communicate their specialized knowledge to the public through advertisements, open letters, testimony before Congress, and television appearances.[51]

Yet I think the historians' statement could have been better. Its weakness becomes apparent when the historians' statement opposing impeachment is compared with the law professors' statement against impeachment. More generally, I believe the historians' statement deserves exploration in view of their excursions into what Richard Nixon liked to call "the arena."[52] Those

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48 *Background & History of Impeachment, supra* note 15, at 211.

49 Another possibility that comes to mind is that perhaps I was too busy worrying that the release of Monica Lewinsky's grand jury testimony on the first day of Rosh Hashanah reflected anti-Semitism.

50 Some doubt that possibility. *See* Posner, *supra* note 3, at 21, 147-64.

51 *Id.* at 44.

52 Richard Nixon, In the Arena: A Memoir of Victory, Defeat and Renewal (1990). Of course historians have been "in the arena" for years. *See, e.g.*, William E. Leuchtenburg, *The Historian and the Public Realm*, 97 Am. Hist. Rev. 1 (1992); *A Roundtable: What Has Changed and Not Changed in American Historical Practice?*, 76 J. Am. Hist. 399 (1989) [hereinafter *Roundtable*]; Jesse Lemisch, On Active Service in War and Peace: Politics and Ideology in the American History Profession (1975). But beginning in the late 1970s, the forms of involvement increased as historians' interest in public history and serving as expert witnesses, amici curiae,

forays have become more frequent since the 1980s. Small wonder: "History is hot."[53] The "historic turn" of the human sciences;[54] the Reagan Administration officials' warnings that erosion of "historical consciousness" would wreck the Republic;[55] the original intent controversy;[56] the Bicentennial;[57] "the controversies, criticisms, and contretemps over history" that have beset Americans since the mid-1980s, culminating in political conservatives' attack on the National History Standards and the debate over the Enola Gay exhibit;[58]

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and resources for policymakers grew. *See, e.g.*, J. Morgan Kousser, *Are Expert Witnesses Whores? Reflections on Objectivity in Scholarship and Expert Witnessing*, 6 Pub. Hist. 5 (1985); Richard Neustadt & Ernest May, Thinking in Time: The Uses of History for Decision-Makers (1986); Thomas Haskell & Sanford Levinson, *Academic Freedom and Expert Witnessing: Historians and the Sears Case*, 66 Tex. L. Rev. 1629 (1988); Randall Kennedy, *Reconstructing Reconstruction: Reconstruction and the Politics of Scholarship*, 98 Yale L.J. 521 (1989); *Roundtable: Historians and the Webster Case*, 12 Pub. Hist. 9 (1990). So, too, historians seemed to become more self-conscious about whether they had embraced activism as scholars or citizens or as scholars and citizens.

53 Gary Nash et al., History on Trial: Culture Wars and the Teaching of the Past 7 (2000).

54 The Historic Turn in the Human Sciences (Terence McDonald ed., 1996).

55 Harvey Kaye, The Powers of the Past 116-17 (1991).

56 *See, e.g., Construing the Constitution*, 19 Davis L. Rev. 1 (1985) (reprinting addresses by Justices William Brennan and John Paul Stevens and by former Attorney-General Edwin Meese).

57 Bernstein, *supra* note 37, at 1565.

58 Nash et al., *supra* note 53, at 6.

> Was Columbus not an intrepid explorer but the world's greatest genocidist? Was Cleopatra black, the pride of Africa, rather than a heroine of Western civilization? Should the New York legislature stipulate that every schoolchild study the Irish potato famine of the 1840s? What other famines in history should legislatures mandate? Should one of Virginia's most hallowed Civil War battlefields be obliged to share space with a megatheme park where American families could learn versions of history produced in Disney's imagineering laboratory? Did the curators of "The West as America" exhibit at the National Museum of American Art in Washington become part of the "embarrassed-to-be American crowd" when they suggested that the stunning paintings by Bierstadt, Remington, Catlin, and others might be looked at in many ways — as reflections of imperialism and racism as much as Arcadian depictions of the frontier? Why was Colonial Williamsburg staging an eighteenth-century slave auction, heartrending but allegedly degrading, even if the producer was a talented young black woman who wanted people to understand the brutality of slavery? Were the Smithsonian Institution's curators and consulting historians really "hijacking history," practicing "political correctness," and demonstrating "anti-Americanism," when they planned an exhibit on Enola Gay, the B-52 that dropped the first atom bomb on Japan a half-century ago? Why did San Francisco's Art Commission agree to move an 800-ton monument showing a

the uncertainty about national identity in the aftermath of the end of the Cold War;[59] the spread of historians from classrooms into museums, theme parks, op-ed pages, film, and TV; historians' appearances on *The Sopranos*,"[60] even cartoons;[61] and the fact that the past has just seemed "to matter more and more" to the public[62] — have all made many increasingly interested in what historians have to say about history. The visibility of historians as public intellectuals means that they have a chance to make their interpretations count outside the profession. It is therefore in their interest to choose their words carefully.

II. ORIGINALISM AND IMPEACHMENT

Many aspects of the historians' anti-impeachment statement that have distressed others do not disturb me. It does not bother me, for example, that the liberal pressure group People for the American Way subsidized the cost of the historians' statement when it first appeared as an advertisement in *The New York Times*.[63] Historians are too rarely rich.

Nor do I object to the originalist strategy of the historians' statement per se, as some scholars would. An antioriginalist, or nonoriginalist, constitutional theorist, such as Sanford Levinson, for example, insists that the Framers have nothing interesting to say to us about impeachment. He does so because he generally is skeptical of using originalism to analyze contemporary constitutional questions: Why should past politics

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Spanish friar, with finger pointing to heaven, standing over a supine Indian while a *vaquero* raised his hand in triumph? All of these — a historical figure, a monument, a site, an event — became lightning rods for sulphurous debates over historical heritage and group sensibility.

Nash et al., *supra* note 53, at 6-7. *See also* Edward Linenthal & Tom Engelhardt, History Wars: The Enola Gay and Other Battles for the American Past (1996).

59 *See* Nash et al., *supra* note 53, at 7. Linenthal and Engelhardt observe, "The act of challenging sacred historical narratives is a thankless task at any time, but especially so in periods of great uncertainty." Linenthal & Engelhardt, *supra* note 58, at 6.

60 History News Network Staff, *The Sopranos and Howard Zinn*, History Grapevine: News About Historians, Oct. 2, 2002, *at* http://hnn.us/articles/288.html (reporting on Tony and Carmela Soprano's issues with Howard Zinn's portrayal of Columbus).

61 *We the People* (Episode 140, http://pbskids.org/liberty's kids) (featuring a character with the visage of Jack Rakove).

62 David Lowenthal, The Past is a Foreign Country 365 (1985); Michael Kammen, Mystic Chords of Memory 657 (1991); Roy Rosenzweig & David Thelen, The Presence of the Past (1998).

63 Hentoff, *supra* note 19.

determine the outcome of present disputes?[64] He also takes this position because he believes that with respect to impeachment, especially, the Framers have nothing useful to say to us, given the chasm that separates our political world from theirs. Among other things, he points out that the Framers rejected the existence of political parties; could not have envisioned the strong presidency that emerged between World War II and Watergate; and might well have regarded the current system of campaign finance in which presidential and congressional candidates make promises about their future behavior in exchange for votes, and, implicitly, voters' contributions, as falling within the category of "bribery." He contends that if Clinton had made a disastrous, indefensible political decision with respect to an important issue, as opposed to having shown a stunning lack of virtue and common sense, impeachment would have made sense, even though impeachment in that instance would presumably violate the Framers' intention. In other words, the Framers' intent about impeachment is irrelevant: impeachment is justifiable for a President who has demonstrated basic incompetence.[65]

And interestingly, in the impeachment instance, Levinson had company. In the past, lawyers and law professors had tended toward the harder varieties of originalism (with some notable exceptions, such as Levinson).[66] Historians, on the other hand, as we have seen, had decried the relevance of any originalism in 1987. But the letter signed by 430 law professors opposing Clinton's impeachment displayed no Framers-envy. That may be part of the beginning of a larger trend in which some historians and law professors are trading places, with some historians entering the public realm as originalists and some law professors displaying an interest in contextualizing, or historicizing, the past in context.[67]

In any event, the law professors' letter decrying impeachment made a legal argument that what Clinton did just does not meet the constitutional

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64 *See, e.g.*, Sanford Levinson & Steven Mailloux, Interpreting Law and Literature: A Hermeneutic Reader (1988).

65 E-mail from Sanford Levinson to Laura Kalman (Mar. 28, 2000): "I personally endorse much of what Judge Richard Posner says in his own recent book on the impeachment, which is a) that Clinton could indeed be properly impeached and convinced but b) that there is no necessity to do either and that prudence counseled against it." *See* Richard Posner, An Affair of State: The Investigation, Impeachment, and Trial of President Clinton 235 (1999).

66 I address the unwillingness of most of originalism's most vehement critics to abandon it because of its strategic value as a mode of constitutional argumentation in Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 Fordham L. Rev. 87 (1997).

67 Kalman, *supra* note 5, at 216-29.

standard for impeachment, about which, the letter noted, reasonable people could disagree. It also made a political argument that the question was not so much legal as prudential; that prudence suggests that the threshold for impeachment of an elected President, of whom there is one, is higher than that for appointed judges, of whom there are many;[68] and that even if impeachment is constitutionally permissible, it was not mandatory and should not occur, given the fact that the American people did not believe that Clinton's behavior warranted impeachment. It said little about the Framers' intent.[69]

Generally, I would agree with Levinson about the perils of originalism. I find it sad to see anyone, especially historians, appealing to the Framers[70] and deplore Americans' obsession with their intent. That implies a willingness to be ruled by the dead hand of the past, which historians usually find odious — and which, one journalist stressed during Clinton's travails, many of the signatories of the historians' statement had elsewhere declared deplorable.[71] Historians appreciate the pastness of the past. We think that an understanding of the pastness of public law should — by impressing upon us how different the present is from the past — free us to pursue the appropriate course in the present. To quote Herbert Gutman:

> The central value of historical understanding is that it transforms historical givens into historical contingencies. It enables us to see the

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68 Prior to the Clinton impeachment, the House of Representatives had impeached sixteen individuals since the adoption of the Constitution. All seven of the sixteen individuals who were convicted and removed from office by the Senate after impeachment were federal judges (Pickering, Humphreys, Archbald, Ritter, Claiborne, Hastings, and Nixon). *Id.* at 52-53 (Statement of Michael Gerhardt). *See* Cass Sunstein, *Impeaching the President*, 147 U. Pa. L. Rev. 279, 304 (1998) (arguing that there is properly "a broader congressional power to impeach judges than presidents," or "a lower threshold for judges than for presidents. The theory is partly that judges cannot otherwise be removed from office. It is partly that it is uniquely destabilizing if presidents are too freely subject to removal from office. To remove a federal judge is an important act, but by itself it does not paralyze the nation, or place in some doubt the continued stability of domestic and international policy.").

69 *Background & History of Impeachment, supra* note 15, at 374-76.

70 At times, I think Israel is lucky not to have a constitution.

71 I recognize some of the signers of the ad as expert chroniclers of the framing of the Constitution. Reading them through the years, I had learned that one cannot know with certainty what precisely the Framers meant by "high crimes and misdemeanors." Yet in that ad, these schools instructed us unequivocally that they did indeed know the real meaning of those crucial words.

Hentoff, *supra* note 19.

> structures in which we live and the inequality people experience as only one among many other possible experiences. By doing that, you free people for creative and critical (or radical) thought.[72]

Pressed about our dislike for originalism, we inevitably quote Founding Father Thomas Jefferson:

> Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did, to be beyond amendment. I knew that age well; I belonged to it, and labored with it. It deserved well of its country ... . Laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed,

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72 Herbert Gutman, *Interview, in* Visions of History 187, 203 (Marho ed., 1983). The part of the historians' statement I most like is future-oriented, discussing the "ominous" implications impeachment could have "for the future of our political institutions." Wilentz's statement before Congress stressing the damage to the presidency impeachment could bring, however, was not well received:

> It is no exaggeration to say that upon this impeachment inquiry, as upon all presidential impeachment inquiries, hinges the fate of our American political institutions. It is that important. As a historian, it is clear to me that the impeachment of President Clinton would do great damage to those institutions and to the rule of law, much greater damage than the crimes of which President Clinton has been accused. More important, it is clear to me that any Representative who votes in favor of impeachment, but who is not absolutely convinced that the president may have committed impeachable offenses — not merely crimes or misdemeanors, but high crimes or misdemeanors — will be fairly accused of gross dereliction of duty and earn the condemnation of history ... . [I]f you decide to do this, you will have done far more to subvert respect for the framers, for representative government, and for the rule of law than any crime that has been alleged against President Clinton, and your reputations will be darkened for as long as there are Americans who can tell the difference between law and politics.

Impeachment Inquiry, supra note 45, at 20, 23. Whether reactions were negative (*see, e.g., id.* at 55) because Congress expected Wilentz as an historian to look to the past, because it was offended by his badgering tone, or because it disliked his overconfidence is unclear. Perhaps Wilentz intended not to provoke but to be more accessible than some of the scholars who had testified on the background and history of impeachment, whose testimony Wilentz considered to be of "mind-numbing length." *Id.* at 20. In any event, and like most historians, Wilentz did not predict the future correctly. "Soon afterwards, Clinton was impeached and the sky did not fall." Posner, *supra* note 3, at 236.

> and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.[73]

Where lawyers focus on text and continuity in order to prescribe, we concern ourselves with context and change over time with an eye to explaining. (We reserve prescription for occasional pieces, such as this one!) The suggestion that we should value continuity over change generally leaves us cold. We tend to be especially vehement on this point in constitutional law, since originalism does not seem to have been the original understanding, and the surviving record is too fragmentary to permit definitive conclusions about the Framers' intent anyway.[74]

Still, in the impeachment case, some inquiry into the Framers' original intent may prove useful. After all, as Jack Rakove reminds us, the impeachment clause was hastily revised at the last minute, *and* it did not develop into "a common, often invoked element of our constitutional system." We have no doctrine of impeachment. As Rakove says, the twin presidential precedents of Johnson and Nixon "set a century apart do not a doctrine make."[75] Why not, then, look at how "high crimes and misdemeanors" was inserted into the Constitution; how the impeachment clause narrowed, expanded, and narrowed again during the Constitutional Convention;[76] and

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73 Quoted in Kalman, *supra* note 5, at 188.

74 *See, e.g.*, H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885 (1986); James Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 Tex. L. Rev. 12 (1986).

75 *Background & History of Impeachment, supra* note 15, at 246. Nor has the House often used impeachment as a remedy for other officials. And its use has become less frequent as time has passed. Prior to the Clinton impeachment, the House of Representatives had impeached only sixteen individuals since the adoption of the Constitution.

76 As was rehearsed endlessly during the impeachment hearings, the original language proposed by Hugh Williamson and William Davie used the operative language "malpractice and the neglect of duty." The committee of style replaced that language with "treason, bribery or corruption." The committee on postponed parts deleted corruption. George Mason then proposed to broaden the language by adding "maladministration." Madison objected, arguing that Mason was opening a Pandora's box — and a vague one — that would "be the equivalent to tenure during pleasure of the Senate." Mason thus proposed substituting "other high Crimes and Misdemeanors against the State." Worried this language was still overbroad, Madison tried to delete "misdemeanor." The Convention changed "against the State" to "against the United States," but the committee on style deleted "against the United States," apparently on the grounds of redundancy. "Mason's amendment obviously enlarged the scope of impeachment beyond where it rested at that point, but Madison's creativity led to its being narrowed again ... . 'Other high crimes and misdemeanors' will always

how the impeachment clause fit within "the larger framework of constitutional government the framers were erecting," specifically, its relationship to their efforts to create the presidency?[77] There is not much else to examine.

Further, whatever we maintain about originalism in theory, originalist arguments can be strategically and politically useful in an arena such as Congress. Unlike the law professors opposing impeachment, the historians and law professors who testified for the Republicans in favor of impeachment after publication of the 400-plus historians' statement largely rested their arguments for impeachment on originalist grounds.[78] (As Michael McConnell has observed,[79] however, impeachment advocates such as Gary McDowell,[80] John McGinnis,[81] Stephen Presser,[82] and Jonathan Turley[83] made less specific and didactic originalist arguments, stressing that the Constitution left the House broad discretion with which to carry out its impeachment job.[84]) Who can blame the Democrats for anticipating fire and wanting to fight it with fire breathed by historians trying to make themselves useful to a cause they support?

One counterargument is that Democratic statement-signers and witnesses who opposed impeachment and conviction, such as Jack Rakove, do not often embrace originalism. Republican witnesses McDowell, McGinnis, Presser, and Turley, however, more consistently advocate originalism in other contexts besides impeachment. By this line of reasoning, the scholars speaking on behalf of the Republicans in Congress had more of a right to appeal to originalism than those inconsistent scholars who spoke for the Democrats.

But sometime-originalism does not trouble me. *Pace* Neil Devins,[85]

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defy precise definition, but it is still less ambiguous or subjective than 'malpractice' or 'maladministration.'" *Id.* at 244, 247-48.

77 *Id.* at 247.

78 *An Open Letter to the Members of the United States Representatives and the United States Senate, reprinted in Impeachment Inquiry, supra* note 45, at 510-16.

79 Michael McConnell, *Impeachment Stuff*, Apr. 11, 2000, e-mail posting to H-Law.

80 *Background & History of Impeachment, supra* note 15, at 44.

81 *Id.* at 111.

82 *Id.* at 127.

83 *Id.* at 255.

84 As Turley pointed out repeatedly, in criticizing the "astonishing ... sweeping originalist claims" of the historians' letter. *Id.* at 272, 255.

85 Devins, *supra* note 41, at 170 n.24.

Jonathan Turley,[86] Nat Hentoff,[87] and Philip Elman[88] (a disparate group!), I can understand why scholars who would argue against originalism in some instances, such as the Bork nomination hearings, would resort to hard originalism in others when it supports their politics. While I dislike all forms of originalism, I support the right to abortion. As an historian, I understand that abortion was legal at common law and that although the Constitution said nothing about it, many eighteenth- and nineteenth-century Americans accepted abortion.[89] Consequently, I can see why pro-choice historians would have submitted a brief maintaining that the Constitution's Framers did not intend to prohibit abortion in *Webster* and *Casey*.[90]

Perhaps it should bother me that historians employ originalist arguments when they intervene in some controversies and evade them in others. It does trouble me that some of the feminist historians who have so brilliantly challenged the public/private distinction in their scholarship signed a statement opposing impeachment that reasserted it (though, as Mary Beth Norton notes, the public/private distinction *is* defensible on originalist grounds as something the Framers, in contradistinction to the colonists, intended.[91]) Thus perhaps on grounds of consistency, I should argue for more constancy with respect to originalism. Few of us believe in originalism: Perhaps historians should seize upon all instances in which the public's attention is focused on the Constitution's creation to oppose originalist arguments. Perhaps subordinating our anxiety about

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86 Jonathan Turley, *Congress As Grand Jury: The Role of the House of Representatives in the Impeachment of an American President*, 67 Geo. Wash. L. Rev. 735, 739 n.27 (1999).

87 Hentoff, *supra* note 19.

88 Philip Elman, *Shame on the Partisan Professors*, Legal Times, Nov. 16, 1998, at 21.

89 James Mohr, Abortion in America: The Origins and Evolution of National Policy, 1800-1900 (1978).

90 Webster v. Reproductive Health Services, 492 U.S. 490 (1989); *Roundtable: Historians and the Webster Case, supra* note 52; Brief of 250 American Historians as Amici Curiae in Support of Planned Parenthood of Southeastern Pennsylvania, Planned Parenthood v. Casey, U.S. (1991) (No. 91-744, 91-902), *reprinted in Roundtable, supra* note 52, at 57; Planned Parenthood v. Casey, 505 U.S. 833 (1992). Though historians might have developed the argument with greater finesse had they been writing about abortion as scholars than they could in submitting a brief (for example, they could have explained why nineteenth-century feminists opposed abortion), their argument in the *Webster* and *Casey* briefs was intellectually credible. *See generally* James Mohr, *Historically Based Legal Briefs: Observations of a Participant in the Webster Process, in Roundtable, supra* note 52, at 24.

91 Mary Beth Norton, Founding Mothers & Fathers: Gendered Power and the Forming of American Society 404-05, 419 n.56 (1996); *see also id.* at 20-24.

surrendering to the dead hand of the past to our interest in finding an effective strategy is too transparently inconsistent to make sometime-originalism ever an effective strategy. Perhaps it is unwise to ally ourselves with Jack Rakove in saying that "I happen to like originalist arguments when they serve political purposes I endorse."[92] In an ideal world, it does seem as if one's "sound bites" would be compatible with one's scholarship. But given the weight that originalist arguments currently possess in constitutional discourse, I am largely persuaded that occasional recourse to such arguments for instrumental purposes is useful.

On this occasion, hard originalism could have helped Clinton. Of course, we can identify problems with the originalist argument. We can point out that there was little discussion at the Constitutional Convention of impeachment; what the Senate trial of an impeachment should look like; or whether alternative sanctions such as censure or findings of fact were permissible.[93] We can say it is dangerous to fixate on the statement in *Federalist 65* that the subjects of impeachment are "political," involving "the abuse or violation of some public trust," since Hamilton was not in Philadelphia when the principal impeachment debate occurred and was more concerned with addressing the Senate's role in impeachment proceedings in *Federalist 65* than the nature of impeachable offenses.[94]

Nevertheless, with respect to impeachment, I find some of the counterarguments that it is possible to ascertain the Framers' intent more persuasive. The longer the Framers talked about the presidency in Philadelphia, the more determined they became to protect its independence from legislative power. Thus the presidency emerged from the Convention in much stronger form. It seems reasonable to extrapolate that the Framers intended the impeachment clause to be read prudentially and restrictively. To quote Rakove, "an expansive reading of 'other high Crimes and Misdemeanors' simply cannot be squared with the Framers' desire to insulate the Presidency as much as possible from the danger of domination by the legislature."[95]

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92 Jack Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution at xv (1996).

93 Michael Klarman, *Constitutional Fetishism and the Clinton Impeachment Debate*, 85 Va. L. Rev. 631, 641 (1999).

94 *Id.* at 642.

95 Jack Rakove, *Statement on the Background and History of Impeachment*, 67 Geo. Wash. L. Rev. 682, 688 (1999). *But see* Turley, *supra* note 86, at 762 (arguing that the Framers intended impeachment as "an active check on presidential conduct" and therefore the language should be read broadly).

And one need not rely only on this structural line of originalist reasoning. One can also turn to text. The testimony of the only impeachment expert witness acceptable to both congressional Democrats and Republicans is telling.[96] According to Michael Gerhardt, "in choosing to make 'other high crimes or misdemeanors' the basis for impeachable offenses, the founders deliberately chose terms of art that referred to a general category of offenses — political crimes — the specific contents of which have to be worked out over time on a case-by-case-basis."[97]

Either Gerhardt's or Rakove's originalist lines of reasoning, then, would support the conclusion that Clinton's behavior in this case was nonimpeachable. Originalist arguments serve the anti-impeachment cause well in this instance. If the historians who signed the statement that appeared in *The New York Times* advertisement hoped to thwart Republicans, originalism seems a reasonable weapon. And I believe the historians did fight impeachment for political, as well as historical, reasons: despite Wilentz's insistence that the historians were speaking "as historians,"[98] the historians put it more accurately when they said in their statement that they were acting as "historians and citizens." One need not be a statistician to recognize that historians in the United States "*are* overwhelmingly liberal":[99] surely most of the historian-signatories had concluded Clinton *should* not be impeached.

Thus I do not find fault with the originalist strategy of the statements' drafters. Nor do I argue that there is an irreconcilable tension between advocacy and scholarship; professionalism and partisanship; engagement and expertise; citizens and historians. In my view, these oppositions are false and easily deconstructed. It is a truism, for example, to say that much "good" legal scholarship is really "sheer advocacy." So, too, historians often adopt the posture of advocates in promoting their particular interpretations: few still believe in the possibility of objective historical scholarship.[100] And experts are the last individuals we should expect to be disinterested. They know enough about a subject to care about it.

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96 Devins, *supra* note 41, at 169 n.23.

97 *Background & History of Impeachment, supra* note 15, at 45, 49.

98 Broder, *supra* note 18.

99 History News Network Staff, *Finding: Historians are Liberal*, History Grapevine: News About Historians, Oct. 2, 2002, *at* http://hnn.us/articles/288.html (reporting on a study by David Horo for the Center for the Study of Popular Culture and the American Enterprise Institute).

100 Peter Novick, That Noble Dream: The "Objectivity Question" and the American Historical Profession (1988).

III. WHAT'S WRONG WITH THE HISTORIANS' STATEMENT?

Yet while American law professors and lawyers shift comfortably between their roles as scholars and citizens, scholars and activists, American historians are more likely to feel nervous about doing so. As Rakove would say, historians are less "hard-wired" for activism than most academic lawyers:[101] we must, after all, "begin by accepting the givenness of the past,"[102] where law professors can always hope, no matter how unrealistically,[103] that their work will influence the course of the future. Despite my appreciation of the value of originalist analysis with respect to Clinton's impeachment, I am still concerned about the historians' statement in *The New York Times*.

For starters, the originalism of the historians is simply too hard. It displays absolute certainty that the Framers would not have wanted Clinton impeached. It is, indeed, what we condemned in 1987 as "lawyers' history," written "to generate data and interpretations that are of use in resolving modern legal controversies," as opposed to "historians' legal history," produced "to provide and support new and interesting interpretations and bodies of data to advance exploration of the past."[104] The historians were quite obviously searching the past to find an answer to the current issue of impeachment instead of making the complex and often ambiguous explanations that professional historians generally offer. As Arthur Schlesinger said on another occasion, history "cannot answer questions with confidence or certainty at short range."[105] Richard Posner goes too far when he contends, "No historian who had bothered to examine the history of impeachment in the United States could have written or signed the statement."[106] But C. Vann Woodward was right when, at his news conference with Wilentz and Schlesinger, he conceded that "there can be honest disagreement" about what the Framers meant when they said that

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101 E-mail from Jack Rakove to Laura Kalman (Oct. 3, 2002).

102 *Id.*

103 Kalman, *supra* note 5, at 242-44.

104 Bernstein, *supra* note 37, at 1578 (quoting William E. Nelson). *See* William E. Nelson, *1980, in* The Literature of American Legal History 265 (William Nelson & John Reid eds., 1985) (Supplement to The Annual Survey of American Law 1983).

105 Quoted in Leuchtenberg, *supra* note 52, at 9.

106 Posner, *supra* note 65, at 235.

impeachment should be reserved for "treason, bribery and other high crimes and misdemeanors."[107]

My objection may seem trivial to anyone but an historian. It is this: one could provide the public a better sense of the complexity of history by softening the originalist analysis here. In the instance of impeachment, one can improve the public sense of how historians generally work by saying that "we cannot generally know exactly what the Framers intended, but the overwhelming weight of the evidence indicates they did not intend to cover dissembling about private behavior in an extramarital affair," as opposed to saying that the Framers "explicitly" intended to restrict impeachment to certain kinds of conduct, as the historians did in their statement. The former does not take that many more words. It can still make a good newspaper advertisement; it is close enough to hard originalism to be persuasive; and it is truer to what historians do in emphasizing the multiplicity of possible interpretations.

Then the historians' statement suffered also from narrowness. The historians should have addressed the possibility that some private acts, such as murder, are impeachable, as the law professors did in their letter to Congress[108] (and as Wilentz and Schlesinger did in their testimony before Congress[109]). To be sure, as Peter Hoffer and Natalie Hull would stress, the Framers were not thinking in terms of common law crimes, such as murder. Their concern was that the Executive might make secret agreements with a foreign power or engage in self-dealing.[110] Madison maintained that there must be presidential impeachment lest the Chief Executive "pervert his

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107 Broder, *supra* note 18.

108 The law professors defined impeachable presidential behavior as "grossly derelict exercise of official power (or in the case of bribery to obtain or retain office, gross criminality in the pursuit of official power)" or the commitment of "private" crimes of sufficiently "unspeakable heinousness" as to lead Congress "responsibly to take the position that an individual who by the law of the land cannot be permitted to remain at large, need not be permitted to remain President." *Background & History of Impeachment, supra* note 15, at 375.

109 *Id.* at 101 (statement of Schlesinger suggesting murder, rape, and child molestation would be impeachable); *Impeachment Inquiry, supra* note 45, at 21 (statement of Wilentz that he hoped "that any President accused of murder, even in the most private circumstances, would be impeached and removed from office." Would that apply to a President, who was accused, but acquitted?).

110 Peter Hoffer & N.E.H. Hull, Impeachment in America, 1635-1805, at 101 (1984); *see also id.* at xiii, 78, 87, 100-06, 116-21, 267-69.

administration into a scheme of peculation and oppression" or "betray his trust to foreign powers."[111]

Still, Michael Gerhardt seems compelling when he observes that the category of impeachable offenses the Framers had in mind could include misconduct so outrageous that "it is plainly incompatible with" the officials' status or "renders them so ineffective that Congress has no choice" but to impeach and remove them. A President who committed murder appropriately faces impeachment.[112] By failing to address the possibility of impeachment for the commission of crimes, no matter how serious, the anti-impeachment historians opened themselves up to attack from lovers of lawyers' hypotheticals. Admittedly, impeachment for commission of common law crimes is a rare occurrence.[113] Still, upon examining the historians' *New*

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111 Michael Gerhardt, The Federal Impeachment Process: A Constitutional and Historical Analysis 8 (1996).

112 *Id.* at 56. This is similar to the conclusion of Charles Black, Impeachment: A Handbook (1974), that impeachable offenses must be very serious, corrupt, or subvert the political and governmental process and be just plain wrong. Willful murder and other serious common crimes would be impeachable because they "would so stain a president as to make his continuance in office dangerous to public order." *Id.* at 39. In the words of Laurence Tribe, "private improprieties can justify impeachment when ... [they render] the individual fundamentally unable to carry out his or her official duties." *Background & History of Impeachment, supra* note 15, at 220.

113 Only four of the seventeen individuals impeached to date have been found guilty for what were, at the time of the impeachments, indictable federal offenses. Thus when Richard Nixon's chief defense counsel contended that the President could only be impeached for an indictable crime, Raoul Berger accused him of writing "'lawyers' history,' a pastiche of selected snippets and half-truths, exhibiting a resolutely disregard of adverse facts, and simply designed to serve the best interest of a client rather than faithfully to represent history as it actually was." Raoul Berger, Impeachment: The Constitutional Problems 331 (1974). So, too, Laurence Tribe told the House during the Clinton impeachment proceedings:

> [I]t appears to be all but universally agreed that an offense need not be a violation of criminal law in order for it to be impeachable as a high crime or misdemeanor. A President who completely neglects his duties by showing up at work intoxicated every day, or by lounging on the beach, rather than signing bills or delivering a State of the Union address, would be guilty of no crime but would have certainly committed an impeachable offense. Similarly, a president who had oral sex with his or her spouse in the Lincoln Bedroom prior to May 23, 1995 (the date on which D.C. Code Ann. 22-3502 was repealed) or in a hotel room in Georgia, Louisiana, or Virginia at any time, would be guilty of a felony but surely would have committed no impeachable offense ... . [C]riminal acts are neither necessary nor sufficient for impeachment.

Background & History of Impeachment, supra note 15, at 225, 218 (statement of

York Times statement, such naysayers rightfully sarcastically asked whether the historians meant that a President could commit murder or molestation without facing impeachment.[114] "Integrity under law is simply not divisible into private and public spheres," McGinnis maintained.[115]

The historians' statement was flawed in another respect. Implicit in it and explicit in the testimony of both Schlesinger and Wilentz before Congress was the argument that the impeachment of Andrew Johnson was wrong and that it had had the effect of crippling the presidency in the late nineteenth century.[116] According to Wilentz, the Johnson impeachment "is the reason why very few of us can remember the names of all those presidents between Ulysses S. Grant and Theodore Roosevelt."[117] The Republicans, the historians warned, should avoid making the same mistake a second time. In fact, Clinton's impeachment bore few parallels to Johnson's.[118]

Nor are the "lessons" of the Johnson impeachment so clear: While defenders of a strong presidency from the New Deal through the Great Society liked to say Andrew Johnson's impeachment helped weaken the late nineteenth-century presidency,[119] how many would have argued during the post-Imperial presidency (before Clinton's troubles, anyway) that the

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Laurence Tribe). Most seem to agree, however, that at least one federal crime, bribery, is impeachable even when the official was not acting in his or her official capacity simply because the Constitution specifies "bribery" as an impeachable offense and "because the person who bribes is a full partner in a grave corruption and abuse of governmental power." *Id.* at 218; *see also* Gerhardt, *supra* note 113, at 106.

114 *See, e.g., Background & History of Impeachment, supra* note 15, at 273; Turley, *supra* note 86, at 749.

115 *Background & History of Impeachment, supra* note 15, at 108.

116 While the House was considering Clinton's impeachment, Eric Foner published a piece in *The Nation* contending that while "[t]oday, few historians have a good word to say for Andrew Johnson, ... most consider his impeachment to have been a mistake." Eric Foner, *The Other Impeachment*, The Nation, Jan. 4, 1999, at 5.

117 *Impeachment Inquiry, supra* note 45, at 22; *see also Background & History of Impeachment, supra* note 15, at 99 (statement of Arthur Schlesinger, Jr.). Sunstein makes this argument in Sunstein, *supra* note 68, at 295.

118 Keith Whittington, *Bill Clinton Was No Andrew Johnson: Comparing Two Impeachments*, 2 U. Pa. J. Const. L. 422 (2000).

119 Keith Whittington, *"High Crimes" After Clinton: Deciding What's Impeachable*, 99 Pol'y Rev. 27 (2000). As late as 1974, Raoul Berger agreed with the Democratic defenders of expanded presidential power that Johnson's impeachment and trial represented "a gross abuse of the impeachment process, an attempt to punish the President for differing with and obstructing the policy of Congress ... and constituted a long stride toward the very 'legislative tyranny' feared and fenced in by the Founders." Berger, *supra* note 113, at 308.

impeachment of Johnson had been a mistake? As Watergate loomed, Michael Les Benedict contended that Congress had reasonably impeached Johnson and that impeachment protected "Reconstruction from presidential obstruction."[120] After all, Johnson's attorney privately promised Senate Republicans that the President would cease thwarting the implementation of Reconstruction in the South were he acquitted.[121] A quarter-century later, Bruce Ackerman went further than Benedict, contending that impeachment had forced Johnson into the "switch in time" that gave us the venerated Fourteenth Amendment.[122] Thus the pro-Clinton historians participated in "the systematic erasure of the constitutional history of 1861-68" and helped to create an atmosphere in which "the majority of the current Supreme Court believes that one can discuss American federalism entirely from the writings of 1787-88."[123]

Further, the historians' statement might have been more powerful had some of those who signed it not done so. In a recent article, Neal Devins observes that "most of the historians who signed the letter were not constitutional specialists. Among the law professors, only one-third of the signatories teach constitutional law."[124] There is an old adage that every law professor has two specialties — his or her own and constitutional law. The law professors do not worry me: perhaps wrongly, I believe most had enough expertise to hold a sufficiently informed opinion for the purpose of signing a statement. Consequently, I disagree with Ward Farnsworth, who builds on Devins' position to suggest that "when academics offer opinions in their professional capacities, they should use the same care and have the same expertise called for in their published professional work, or should disclose that they are adhering to a lesser standard."[125] In my view, academics would

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120 Michael Les Benedict, The Impeachment and Trial of Andrew Johnson 139 (1973); *cf.* Hans Trefousse, Impeachment of a President: Andrew Johnson, the Blacks, and Reconstruction 188 (1999) (Johnson's acquittal boosted the morale of Southern conservatives and helped doom Reconstruction).

121 Eric Foner, Reconstruction: America's Unfinished Revolution 1863-1877, at 336 (1988).

122 Bruce Ackerman, We The People 2: Transformations 228-29 (1998).

123 E-mail from Levinson to Laura Kalman, *supra* note 65.

124 Devins, *supra* note 41, at 170; *see also* Neil Devins, *Standards for Academics Advising Courts and Legislatures: More Tales Misunderstood*, 82 B.U. L. Rev. 293, 294 n.4 (2002).

125 Ward Farnsworth, *Talking Out of School: Notes on the Transmission of Intellectual Capital From the Legal Academy to Public Tribunals*, 81 B.U. L. Rev. 13, 16 (2001). For a thoughtful rebuttal to Farnsworth, see Stephen Griffin, *Scholars and Politics: A Reply to Devins and Farnsworth*, 82 B.U. L. Rev. 227, 231 (2002) (arguing that "the sort of expertise needed before one can sign such statements

sacrifice so much credibility in explicitly admitting they were adhering to a lesser standard that the "kibitzers" would censor themselves and remain silent.[126] Acceptance of Farnsworth's standard would entail the loss of too much academic bloviation,[127] some of which is illuminating.

Nor do I accept Devins' implication that a historian must be a constitutional specialist to have sufficient expertise to opine on impeachment.[128] I also disagree with him that "academics can ill afford another nail to be placed in the coffin of the dispassionate academic experts."[129] In my

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is not special prior expertise, but rather the ability, common among constitutional scholars, to create and evaluate constitutional arguments." I would suggest that nonconstitutional scholars have the same ability, but that is the argument of an outsider. In any event, my focus is on historians here, not on law professors, whom I address simply when the comparison to historians proves useful.).

126 As Farnsworth observes, "Everyone is a kibitzer some of the time; there is such a thing as good and very useful kibitzing; and all academics have colleagues whose thoughtful kibitzing they may regard as more enlightening than the serious scholarship of others." Farnsworth, *supra* note 125, at 18.

127 Of course, as Farnsworth, points out, even though "good punditry," for example, would be lost, along with the bad, "there are non-academic pundits who generally can pick up the slack — for by definition we are speaking here of subjects amenable to kibitzing." Where the situation involved a current public controversy about which no law professor possessed sufficient expertise, it should be noted, Farnsworth believes "the norm might sensibly be modified." *Id.* at 51.

128 Devins has since argued that his "principal concern about the anti-impeachment letter ... was the willingness of letter writers to seek out the signatures of any and all legal academics, regardless of whether those legal academics knew anything about the constitutional standards governing impeachment." Devins, *supra* note 124, at 281 n.4.

129 Devins, *supra* note 41, at 166. In contending that "letter-writing campaigns have become an increasingly important mechanism for academics to send a message to Congress," Devins asks,

> Why ... do people pay attention to these letters? Why treat these letters with more deference than, say, a petition from the ACLU or the NRA? The answer, of course, is that academics have a reputation for placing the search for truth ahead of partisanship. Unlike movie stars, interest groups, or the person on the street, the credibility of academics [and the justification for academic freedom] is tied to their purported willingness to speak "[t]ruth to [p]ower."

Id. at 167-68.

> Politicians feed off of these letters because of the so-called academic ethic, that is the notion that the "first obligation of the university teacher is to the truth." Academics, likewise, feed off of this reputation in justifying these letter-writing campaigns. "We law professors are free from a client's interest, free from a place in a hierarchy [!?], free to say exactly what we think," explained Barbara Babcock.

Id. at 181.

view, that coffin was long ago nailed shut. I believe that the historians' letter would have been more effective and persuasive had it been signed only by people who knew enough about impeachment to feel comfortable to defend the statement publicly. Here, less might have proven more.

Yet perhaps more names were desirable. The historians, law professors, and other scholars who had testified for the Democrats and Republicans on the background and history of impeachment had been fairly evenly divided on the appropriateness and desirability of impeachment. That may have created the impression that the academic community was split down the middle on the impeachment issue. In this situation, perhaps it was useful for the President to be able to say that "nearly 900 constitutional experts" had weighed in publicly against impeachment. In terms of sheer numbers, that is more impressive than the ninety signatures the pro-impeachment side mustered in its reply, and the pro-impeachment side did not limit itself to constitutional scholars either. (As the pro-impeachment side pointed out, however, at least "most" of the signatories had "made careers studying the Constitution or litigating its provisions."[130])

And perhaps I am too finicky in wanting only people who are identifiable as experts to sign it. So what if at least three specialists in European history and one in Asian history signed the statement?[131] The bulk of the signatories were identifiable as Americanists, if not necessarily as specialists on either the early Republic or constitutional history. A friend who writes in those fields who signed the historians' statement insists that any American historian who could not develop a more informed opinion about impeachment than Forrest McDonald's plumber should be stripped of her degree. Perhaps saying only

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Perhaps that is the reason academics' letters are accorded more deference, but I do not believe it is the reason they should be. I think academics' letters are accorded more deference because we expect academics to possess special knowledge about the topic. Historically, experts have rarely been dispassionate, and scholarship and partisanship have not been antithetical. We may still believe Progressivism and the New Deal witnessed the heyday of the expert, but would we still contend that expert was neutral? To take another example, few knew more about evidence and civil procedure than Edmund M. Morgan, but few more eloquently made the case that Sacco and Vanzetti had been denied a fair trial. G. Louis Joughlin & Edmund M. Morgan, The Legacy of Sacco & Vanzetti (1948). Yet I do not believe Morgan's passion made his critique of the trial unfair.

130 *Impeachment Inquiry, supra* note 45, at 510.

131 I do not mean to suggest that a Europeanist or Asianist would not possess the interpretive skills to make an inquiry into the intent of the Constitution's framers. However, it might require additional time for that individual to bring him or herself up to speed.

narrowly defined specialists should make public claims limits our scholarly expertise so much as to make it useless. Surely, as historians, we have a sense of the perspective provided by history, as well as a command of our specific fields. Certainly, we have a right to make our opinions known. That is why 184 historians could sign a 1967 antiwar petition/advertisement in *The New York Times* entitled "Mr. President: Stop the Bombing!"[132] just as the Physicians for Social Responsibility could sign petitions against the war in Vietnam.

But academic disputes should never be decided — though they probably sometimes are — on the basis of pure numbers. So what if nearly nine-hundred scholars support X, while only ninety favor Y? That does not make X the superior position, though admittedly, it may enable X to attract more media attention than Y.

And there is a difference between the historian-Ph.D. in the impeachment context, the historian-Ph.D. in the case of the Vietnam War instance, and the medical doctors in the Vietnam instance. When the doctors and historians signed petitions against the War, they were joining together as members of high-status professions. When more than four-hundred historians signed the statement against impeachment, they banded together as members of a profession. But the signatories did something more: they did not just express their right as citizens to make their opinions known, but also implicitly suggested their opinion was somehow informed — that it was a scholarly, or expert, opinion.[133] And when people who sign such statements do not possess opinions grounded in scholarship or expertise, that provides grist for the mills of those who complain that such statements just show the "herd" mentality of academics[134] or represent a "tenured trashing of Congress."[135]

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Why are such allegations problematic, and what risk accompanies carelessness about the enlistment of scholarship in support of politics? First, unless there is good reason to do so, it is imprudent to contribute to nonacademics' suspicion that knee-jerk liberals, left-liberals, and leftists

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132 Leuchtenburg, *supra* note 52, at 3; Everett Ladd, *American University Teachers and the Opposition to the Vietnam War*, 8 Minerva 545 (1970).

133 That may not necessarily mean it is dispassionate. But the opinion may be better informed too.

134 Posner, *supra* note 65, at 242.

135 Broder, *supra* note 18.

dominate the university.[136] Indiscriminate statement, brief, petition, or letter-signing possesses the potential to jeopardize academic freedom by doing just that.[137]

Professors tend to speak less about academic freedom today than they did in the past. In our postmodern times,[138] academics are more likely to problematize the likelihood that we act "as individuals trained for, and dedicated to, the quest for truth," and historically, that is the very likelihood that justifies academic freedom.[139] Further, since the First Amendment rights of everyone are so much broader than they were when the American Association of University Professors first called for freedom of academics within the university to express their views, the First Amendment and academic freedom sometimes seem to have become "fungible."[140]

But in some instances, courts have held that academic freedom can provide greater protection for professors to express an unpopular idea than the First Amendment does for other individuals.[141] Academic freedom under the First Amendment, for example, arguably gives professors at state institutions greater leeway to engage in one of their favorite activities — criticizing their colleagues and administrators — than the First Amendment gives an individual.[142] Thus academic freedom under the First Amendment retains its usefulness for scholars. Assume, for example, that a legislature enacts a statute prohibiting state employees from accessing sexually explicit material on state-owned computers. A professor who is studying the impact of pornography on violence against women would challenge such a statute

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136 *See, e.g.*, Roger Kimball, Tenured Radicals: How Politics Has Corrupted Our Higher Education (1998).

137 Devins, *supra* note 41, at 165.

138 David Rabban, *Can Academic Freedom Survive Postmodernism?*, 86 Cal. L. Rev. 1377 (1998).

139 *General Report of the Committee on Academic Freedom and Academic Tenure (1915)*, 53 Law & Contemp. Probs. 393, 396 (1990).

140 William Van Alstyne, Academic Freedom and Civil Liberty, *reprinted in* The Concept of Academic Freedom 59, 67 (Edmund Pincoffs ed., 1972); William Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 Law & Contemp. Probs. 79 (1990); David Rabban, *A Functional and Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, 53 Law & Contemp. Probs. 227 (1990); J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 Yale L.J. 251 (1989).

141 Piarowski v. Illinois Community College, 759 F.2d 625, 629-631 (7th Cir. 1985) (professors may express ideas in places on campus that are not public forums and from which members of the general public may be excluded).

142 Rabban, *supra* note 138, at 245, 296 n.33.

on the grounds that it violates all state employees' First Amendment rights. She would argue, in the alternative, that even if the court holds it does not, it violates her academic freedom to do research and teach. We know that she would not win in all circuits,[143] but she might carry the day in some.

Second, historians who engage in this kind of activism chance being "caught." They can make whatever historical claims suit their politics in statements, petitions, briefs, and letters. But someone may point out that the claims are not credible. In that case, the effort backfires, and historians damage the very politics they want to support.

Third, historians do not simply risk harming a political cause through indiscriminately affixing their names to documents: they also risk embarrassing themselves. That is why I do not understand why any historian would want to sign one unless he or she could contemplate defending it publicly on scholarly grounds — the standard that, for all its vagueness, I believe should guide us.[144] Surely Eric Foner could not have been pleased when Randall Kennedy took to the pages of the *Yale Law Journal* to point out that the historians' brief Foner had signed in *Patterson v. McLean* had taken a position on the 1866 Civil Rights Act at odds with that Foner had taken in his masterful book on Reconstruction.[145]

For another example, I recently discussed gun control with an eminent historian, who writes about neither law nor the Constitution. He told me that he had signed a petition circulated among historians defending gun control on originalist grounds. Then, he asked, "Which amendment relates to guns — the second?"

Leave aside his disingenuousness in signing a petition about gun control and the extent to which a petition with his name on it misleads the

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143 *But see* Urofsky v. Gilmore, 216 F.3d 401 (4th Cir. 2000) (upholding a similar statute against claims of state university professors that it is invalid as to all state employees on First Amendment grounds and interferes with professors' academic freedom to research and teach).

144 That is the standard urged by Devins, *supra* note 41, at 189. For Farnsworth's criticism of its vagueness, see Farnsworth, *supra* note 125, at 15. For Devins' acknowledgment of its vagueness, see Devins, *supra* note 124, at 298 n.37. Some assume academics become involved in such instances as the Bork nomination or the Clinton impeachment trials in part because they like to see their names in print. Posner, *supra* note 65, at 242; Posner, *supra* note 3, *passim*; Devins, *supra* note 41, at 171; George Kannar, *Citizenship and Scholarship*, 90 Colum. L. Rev. 2017, 2064-65 (1990). It seems to me that their sense to express their outrage over some perceived injustice is far more important.

145 Foner, *supra* note 121, at 243-45; Kennedy, *supra* note 52, at 537-39; Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

public. (That worries me too: perhaps instead of, or in addition to, identifying themselves by their university affiliation, historians signing documents originally circulated on the Internet should consider listing one representative piece of their scholarship after their signature on such statements/petitions/advertisements, as some of the ninety pro-impeachment historians did.[146] They might choose an item that they had written that they thought most clearly establishes their bona fides to speak out as "historians and citizens" on the topic at issue. That might deter some of them from signing petitions that deal with matters about which they know little. If X, for example, faced the prospect of signing the historians' statement against impeachment not just as "X, Y University," but as "X, Y University, Author, *Governing the Ottoman Empire*, she might not sign it.[147]) Would that scholar have wanted to be queried about his signature by a reporter? Undercut our integrity sufficiently by our statements as citizen-scholars and who will believe our historical scholarship still possesses credibility?[148]

One might reply that as long as experts on the constitutional history of the Second Amendment are willing to lend their names to such a petition, nonexperts are justified in signing it. As historians, we frequently rely on secondary sources. Why should we act any differently when signing petitions, statements, letters, and briefs? Thus Devins observes of the historians' and law professors' letters against impeachment: "The fact that the academy's 'A' team signed onto these letters made it easier to join the chorus. After all, if Arthur Schlesinger, Laurence Tribe, and others are willing to put their stamps of approval on these letters, there is reason to think that the letter's argument is at least plausible."[149] Even if this is true, and I am not certain it is,[150] I think a scholar would be foolish to sign a petition

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146 *Impeachment Inquiry, supra* note 45, at 512-16.

147 Of course this implies that a historian needs to have written about a subject to qualify as an expert in it, when teaching it may well be enough. Someone who had not written about impeachment, but who had taught it, might consider signing such a document "X, Y university, author, ... and teacher (or former teacher) of impeachment."

148 As I recall, even at the height of the media blitz about the revelation that Joe Ellis, the Pulitzer-Prize winning historian of the early republic, had fabricated stories about his life, including Vietnam service, which he repeated in his American history courses at Mount Holyoke, no aspersions were cast on his scholarship. I wondered, however, after reading the stories, whether he had also fabricated any of his scholarship. I do not say that he did so — apparently, he did not — simply that the news about him led me to question his credibility as a scholar, which I otherwise would not have done.

149 Devins, *supra* note 41, at 171.

150 At the very least, when I rely on secondary sources that involve primary sources

drafted by two such well-known scholars, public intellectuals, and political personages as Schlesinger and Tribe, without checking for herself whether they were speaking as scholars and citizens or whether there was a tension between the two roles.

Whatever the verdict on the historians' statement about impeachment, it clearly had some impact. At the most, it brought the Framers' feelings about impeachment to center stage. As David Greenberg observes, though the historians' "argument has by now become quite familiar, back in October [1998] few were making it."[151] For his part, Wilentz says, "We made the intellectual case for what most of the American people knew instinctively — that these were not impeachable offenses." He maintains that together with the statement signed by the law professors, the historians "altered the debate — and forced the Republicans to argue, as they eventually did, that Clinton's misdeeds amounted to crimes against the state."[152] If Wilentz is correct, Clinton really owes academics because the "crimes against the state" argument was too farfetched for some of the President's most ardent antagonists on the right. Wilentz may claim too much, of course. At the least, though, the historians' statement functioned as a useful supporting citation for those already determined to vote for acquittal. In that case, it may not have convinced anyone to alter a preexisting position, and historians may have used greater professional capital on the statement than it deserved. Yet even then, the statement provided fodder for those who challenged the impeachment proceedings. If that was the historians' intent, they succeeded.

IV. CODA: HISTORIANS ON *BUSH V. GORE*

Can that much be said about the historians' statement about Clinton's successor? Almost as soon as the Supreme Court assured George Bush the Oval Office over Vice-President Al Gore on Tuesday, December 12, 2000, many of us opened our e-mail to find another "Dear Colleague" letter from Lizabeth Cohen of the Harvard History Department, Todd Gitlin of NYU's Journalism and Sociology Department, and David Greenberg of the Columbia History Department, asking us to sign and circulate the "Historians' Statement on Bush v. Gore."

I have not seen, I generally make an independent check of the credibility of the authors of those secondary sources by reading reviews of their work and doing some reading in the field myself.

151 Greenberg, *supra* note 45, at 4.

152 Quoted in *id.* at 6.

According to the statement, democracy had expanded "against formidable obstacles" since 1787. "We opened up the right to vote, securing the popular election of U.S. Senators and presidential electors, securing voting rights for the poor, women, and blacks." Then the historian-signatories lowered the boom:

> Now, in an act no less reprehensible than the partisan resolution of the election of 1876, a narrow majority of the Supreme Court has pulled the nation backward. Its decision to halt the full and accurate counting of Florida's legal votes prevents the American people from selecting the next President of the United States.
>
> The narrow majority has simultaneously cast doubt upon its own motives and undermined the legitimacy of the next chief executive. There is, justifiably, a widespread impression that this narrow majority acted as it did in order to install a Republican president and to expand its political position on the Court.

Of course, the historians conceded, not all the "facts and evidence" about the election of 2000 had emerged. "But there are already strong reasons to believe that the candidate who, on Nov. 7, won enough votes to carry the Electoral College is the one who will not become president. We are outraged and saddened at this wound inflicted upon American democracy." The signatories called upon all "our fellow citizens," regardless of party affiliation, "to join us in dedicating ourselves to reform the electoral system so that the democratic will of the people is never again violated."

The signatories of the statement "hope[d] to release it to the press the morning of Dec. 15, so time is, once again of the essence. With apologies — we are, after all, among other things, writers who care about words — we must add that it is not practical, at this juncture, to modify the statement." After indicating the e-mail address to which signatures and affiliations should be sent,[153] they concluded: "We shall overcome."[154]

By Friday, December 15, of course, Vice-President Gore had conceded the election,[155] and the urgency was gone. Further, the historians lacked the money to take out an advertisement.[156] Undaunted, they continued collecting signatures; renamed the statement "Historians on the Inauguration of George W. Bush"; and released it to the press as a "letter to the editors" of *The New*

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153 historians__2000@hotmail.com.

154 E-mail from Lizabeth Cohen, Todd Gitlin, and David Greenberg to "Dear Colleague."

155 Gore conceded the election on December 13.

156 E-mail from Lizabeth Cohen to Laura Kalman (Jan. 17, 2001).

York Review of Books, headed *The Election Mess*[157] and signed by "Lizabeth Cohen, Harvard; Todd Gitlin, New York University; David Greenberg, Columbia; David Brion Davis, Yale; George M. Frederickson, Stanford; Michael Kammen, Cornell; Mary P. Ryan, University of California at Berkeley; Sean Wilentz, Princeton; Garry Wills, Northwestern; and more than 450 other historians."[158]

Once again, then, we see historians navigating between professional and civic identities. Though most of the statement suggests they are acting in their capacity as historians, they call upon "our fellow citizens." This time, they use the device of a "letter to the editor" signed by nine eminences and "450 other historians." How does this letter compare to the anti-impeachment advertisement? The letter seems a plausible way of trying to win publicity for a position on the cheap.

We might ask who pays attention to such letters. We might argue that David Greenberg, one of the authors of the statement, did far more good for Gore than the 450-odd historians in a *Los Angeles Times* op-ed piece. There, Greenberg, a cultural and political historian of the Nixon era, observed that contrary to what Nixon had said in his memoirs and the Republicans and the media were saying now, the Vice-President did not go gently into that good night in 1960: "[W]hile Nixon publicly pooh-poohed a challenge, his allies aggressively pursued one."[159] The Republican National Committee mounted challenges to the election in eleven states.[160] *There* was valuable historical ammunition for the Democrats.

We might also object that while Cohen, Greenberg, and Gitlin appropriately signed the letter, given the fact they had originated it, adding the signatures of six "superstars" while relegating the mass to "and 450 other historians" needlessly reinforces professional hierarchies. But if *The New York Review of Books* would not allow all signatories to be listed, perhaps this made sense. Greenberg, a former managing editor at *The New Republic*,

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157 I imagine that *The New York Review of Books*, rather than the historians, chose the title.

158 *The New York Review of Books*, Feb. 8, 2001, at 48. I am grateful to David Greenberg for giving me a complete list of signatories.

159 David Greenberg, *It's a Myth That Nixon Acquiesced in 1960*, L.A. Times, Nov. 11, 2000; *see also* David Greenberg, *Gracious Loser? Hardly*, Brill's Content, Feb. 2001, at 106; Hendrik Hertzberg, *Pieties: He's Back. Again*, New Yorker, Nov. 27, 2000, at 72. Anthony Lewis dispelled the analogy between the 1960 and 1996 elections on different grounds in *Where Do We Go?*, N.Y. Times, Nov. 11, 2000, at A19.

160 Greenberg, *supra* note 162.

is currently a graduate student; Gitlin is a journalist and sociologist, as well as historian. To use a word the presidential election of 2000 made popular, those six signatures added "gravitas."

And in this instance, the immediate crisis of the election had ended and the incentive to beat the streets to raise thousands of dollars for an advertisement including everyone's name had dwindled. By December 15, it was clear that no advertisements or statements, including those taken out by the Emergency Committee of Concerned Citizens 2000 within a week of the election — a group of luminaries including Gitlin, Wilentz, Bruce Ackerman, Cass Sunstein, Bianca Jagger, Rosie O'Donnell, Robert DeNiro, and Toni Morrison[161] — and by 554 law professors the day after the Supreme Court's decision,[162] were going to accomplish what their authors hoped. At

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161 *The Election Crisis*, N.Y. Times, Nov. 10, 2000, at A31. The advertisement suggesting that Gore had "apparently" been the clear winner of Florida's popular vote and twenty-five electoral votes warned of an impending "constitutional crisis" that would threaten "the dignity and legitimacy of American democracy" if "any hint of inaccuracy in the final result" remained; suggested that perhaps ultimately "a bipartisan National electoral commission of the Congress and the Supreme Court will have to settle the matter, based on the precedent set in resolving the disputed election of 1876"; but maintained that in the meantime, "Florida officials can help ensure that the outcome is beyond reproach or suspicion. We therefore call upon the Florida election commission to explore every option, including scheduling and supervising new elections in Palm Beach County, as soon as possible. Nothing less, we believe, can preserve the faith of the people upon which our entire political system rests." For criticism focusing on academic participation in the Emergency Committee's impeachment battle (along the lines of "Now they're at it again"), see Peter Berkowitz, *Intellectuals Whiff on the Recount*, The New Republic, Nov. 27, 2000, at 11. For criticism concentrating on the entertainers' participation, see John Tierny, *Stars Propose a Happy End to the Voting*, N.Y. Times, Nov. 14, 2000, at B1: "They didn't specifically nominate themselves for the job ... . But at a time of national crisis, who could better reassure America than the Solons of the entertainment industry? ... Never mind weeks of recounts. A talk over dinner should take care of things." Gitlin protested that most of the signatories were "not stars ... . We simply supported, in the ad's words, 'removing any hint of inaccuracy in the final result.'" *Citizens, Not Stars*, N.Y. Times, Nov. 16, 2000. Tierny's article might have been even stronger had he discussed the phenomenon not just of the entertainment superstar, but of the academic superstar as well.

162 *554 Law Professors Say: By Stopping the Vote Count in Florida, the U.S. Supreme Court Used Its Power to Act as Political Partisans, Not Judges of a Court of Law*, N.Y. Times, Jan. 13, 2001, at A7. "We are Professors of law at 120 American law schools, from every part of our country, of different political beliefs," the signatories began,

> But we all agree that when a bare majority of the United States Supreme Court halted the recounting of ballots under Florida law, the five justices were acting

the same time, the historians had collected a large number of signatures. Why not put the effort to some use, such as reconsecrating the future?

I also admire the historians for "using" the past to stress the need for change. The allusion to 1876 and the undoing of Reconstruction is useful. But the historians' letter to *The New York Review of Books* is not really about 1876. Rather, appealing to a deeply rooted image of "democracy" in America's history, the historians open the statement striking a pose reminiscent of that taken by Brandeis in *Whitney v. California*.[163] We

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as political proponents for candidate Bush, not as judges. *It is Not the Job of a Federal Court to Stop Votes From Being Counted.*

The five justices who had done so "acted to suppress the facts." Citing Justice Scalia's remark prior to submission of the briefs by the Bush team that the Court must intervene "because the recount might 'cast a cloud' upon what [Bush] claims to be the legitimacy of his election," they accused conservative justices of moving "to avoid the 'threat' Americans might learn that in the recount, Gore got more votes than Bush." That would indeed cause "irreparable harm" because permitting the recount to conclude and the truth to come out would make it impossible to

> obscure the facts. But it is not the job of the courts to polish the legitimacy of the Bush presidency by preventing disturbing facts from being confirmed. Suppressing the facts to make the government seem more legitimate is the job of propagandists not judges. By taking power from the voters, the Supreme Court has tarnished its own legitimacy. *As teachers whose lives have been dedicated to the rule of law, we protest.*

For criticism of the signatories for engaging in "a gesture of solidarity masquerading as a statement of expertise," see Richard Posner, Breaking the Deadlock: The 2000 Election, the Constitution and the Courts 212 (2001). "How many law professors who subscribed publicly to the Democratic position that the Republicans 'stole' the 2000 election through an act of judicial usurpation had studied these issues in sufficient depth to have a responsible opinion?" Posner asked. Posner believed that the liberal and left law professors who dominate the legal academy were motivated by their desire for a president who would appoint liberal justices. *Id.* In contrast, he maintained, "the tiny conservative legal professoriate" proved "measured, indeed ... diffident, in its defense of the Court" because *Bush v. Gore* was an "activist decision." *Id.* at 217.

163 Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the expense of liberty. To courageous and self-reliant men, with confidence in the power of free and fearless reasoning applied through the process of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by process of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule, if authority is to be reconciled with freedom.

Whitney v. California, 274 U.S. 357, 377 (1925).

might quibble that their image is romanticized, but it is not entirely unrealistic and may possess heuristic value. (It is also one about which any American historian can be expected to possess an interpretation, which neatly sidesteps the expertise issue.) Where Brandeis appealed to the great men, the Founding Fathers, the historians' statement reflects the impact of social history by giving "us" agency: "We opened up the right to vote." And, the historians suggest in their conclusion, we can find it in us to keep faith with America's history, to renew our hope for democracy by working for change, and to remove the pall they believe the resolution of the election cast on democracy. Here, the past is used to inspire, rather than for the originalist purpose of imposing a straitjacket on the present.

What troubles me is the sense that the historians ignored a fundamental feature of American history. For all my dislike of the hard originalism of the historians' statement against impeachment and my disagreement with it on other grounds, at bottom, I considered it a largely plausible interpretation of the past. But in their suggestion that the Court had transgressed the bounds by becoming a "political actor," something the statement implies rarely, if ever, had occurred, the historians who spoke out on the Bush inauguration showed little concern for constitutional history.

To be sure, as President Bush or another Texan might say, "I have a dog in this fight." I have always taken an "externalist," "behaviorist," or "realistic" approach to constitutional history, which emphasizes — to some, overemphasizes — the extent to which "constitutional doctrine is entirely superstructural, indeed downright disingenuous, little more than a beard for what are at bottom judicial evaluations of the wisdom of legislative policy."[164] But is it so rare that a narrow majority of the Court *is perceived* to have taken a "political" position (whether in fact, it has done so)? Think of *Miranda*,[165] *Bakke*,[166] or *Casey*,[167] for example, three cases that relieved the left and liberals as much as *Bush v. Gore* repelled us.

Granted, one has to travel a ways to find cases in which many can feel so

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164 Barry Cushman, Rethinking the New Deal Court: The Structure of a Constitutional Revolution 33 (1998). For a more biting indictment of the externalists, see Barry Cushman, *Rethinking the New Deal Court*, 80 U. Va. L. Rev. 201, 260-61 (1994); G. Edward White, The Constitution and the New Deal 29-31 (2000). I have tried, as White rightly observes, "through a strategy of confession and avoidance, to buttress the conventional [externalist] account in the face of revisionist criticism" in Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 Yale L.J. 101 (1999).

165 384 U.S. 436 (1966).

166 438 U.S. 265 (1978).

167 505 U.S. 833 (1992).

comfortable in characterizing constitutional interpretation as a function of partisan political preferences, as opposed to political ideology, as they did in *Bush v. Gore*.[168] Thus in his dissent, Justice Stevens rued that the results in *Bush v. Gore* ensured that the true "loser" of the election was "the Nation's confidence in the judge as an impartial guardian of the rule of law," while Justice Breyer condemned the Court for inflicting "on itself a self-inflicted wound — a wound that may harm not just the Court, but the nation."[169] But like Bruce Ackerman,[170] neither justice ever implied this was the first occasion on which the Court had acted illegitimately. Go back to earlier voting decisions — *Reynolds v. Sims* or *Baker v. Carr*, for example — and one can hear a minority of justices writing equally despairingly of the Warren Court.[171]

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168 Michael Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 Cal. L. Rev. 1721, 1727 (2001).

169 531 U.S. 98, 129, 158 (2000).

170 This is not the first time in history that the Supreme Court has made a decision that called its fundamental legitimacy into question. But on past occasions, the normal operation of the system provided a remedy. As the wheel of mortality turned and justices were replaced, the Court regained credibility as an independently elected president and Senate appointed new members. But this time, the president has not been independently elected. He is in the White House as a result of an unprincipled judicial decision that brought the electoral contest to a premature end ... . To allow this president to serve as the court's agent is a fundamental violation of the separation of powers. It is one thing for unelected judges to exercise the sovereign power of judicial review; it's quite another for them to insulate themselves yet further from popular control. When sitting justices retire or die, the Senate should refuse to confirm any nominations offered up by President Bush ... . Forty senators should simply make it plain that they will block all Supreme Court nominations until the next presidential election.

Bruce Ackerman, *The Court Packs Itself*, Am. Prospect, Feb. 12, 2000, at 48. *See also* Bruce Ackerman, *Anatomy of a Constitutional Coup*, London Rev. Books, Jan. 24, 2001, at 1.

171 My favorite example is Harlan's dissent in *Reynolds v. Sims*:

Finally, these decisions give support to a current mistaken view of the Constitution and the constitutional function of this Court. That view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional "principle," and that the Court should "take the lead" in promoting reform when other branches of government fail to act. The Constitution is not a panacea for every blot upon the public welfare, nor should this court, ordained as a judicial body, be thought of as a general haven for reform movements. The Constitution is an instrument of government, fundamental to which is the premise that in a diffusion of governmental authority lies the greatest promise that this Nation will realize Liberty for all its citizens. This Court, limited in function, in accordance with that premise, does not serve its high purpose when it exceeds its authority, even to satisfy justified impatience with the

(For that matter, we need only look back at *Shaw v. Reno*,[172] to hear Justice Stevens describing the behavior of the majority in another voting case almost as critically, if less hyperbolically.) Perhaps those of us liberal apologists for the Warren Court (a group in which most of the historians who signed the statement against *Bush v. Gore*, if not Justice Stevens, may well belong) who live by the sword of an "activist" and "political" Supreme Court need not be prepared to die by it. But we need not look like hypocrites either.[173]

Of course, the anti-Bush historians — most of them identifiable as liberals or leaning toward the left — were not alone in ascribing "political" motivations to judges during the last election. Recall James Baker's attack on the Florida Supreme Court after it had ordered the recount must proceed. In an outraged statement (which so angered me in its implication that this was a first-time-ever occurrence that I broke out in hives as I watched him make it), he said, "The Court has changed the rules and has invented a new system for counting the election results. All of this is unfair and unacceptable. It is not fair to change the election laws of Florida by judicial fiat after the election has been held." Asked if he would assign political motives to the Democratic appointees on the Florida Court, Baker disingenuously replied, "I haven't done that ... . I'm not assigning political motives but ... I think that the opinion ... clearly overreaches."[174]

"Demagoging" the judiciary for acting "politically" is a time-tested tactic.

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slow workings of the political process. For when in the name of constitutional interpretation, the Court adds something to the Constitution that was deliberately excluded from it, the Court in reality substitutes its view of what should be for the amendment process.

377 U.S. 533, 624-25 (1964).

172 509 U.S. 630 (1993).

173 In the context of the anti-impeachment letter, Farnsworth advises an academic

> [not to] sign a legal opinion about an issue unless he is ready to commit to signing legal opinions on the same subject in the future, regardless of who it helps politically. If this suggestion sounds unrealistic, note that it already is the apparent implications of the assurance in the anti-impeachment letter that its signers were writing "neither as Democrats nor as Republicans." That assurance, some version of which commonly is included in letters signed by academics, suggests that those who signed the letter would be precisely as willing to stand up for a Republican president, and would do so in the future under analogous circumstances. I have been relying here on a model of the academy that regards impartiality and nonpartisanship as important virtues.

Farnsworth, *supra* note 125, at 55-56. As I have indicated, that is not a model to which I subscribe. But I do consider invulnerability to charges of hypocrisy a good idea.

174 Press Conference, Nov. 21, 2000.

But I do not believe it should be a time-honored one. (That does not mean, by the way, that I am calling for "responsible" criticism of the Court: I simply maintain, while realizing the difficulty of drawing the line between "reasonable" and "unreasonable" or "reasoned" and "unreasoned" criticism, that both the historians and Baker took positions analogous to the "Impeach Earl Warren" stance of many conservatives in the 1960s.) In my opinion, the historians who signed the statement on the inauguration of George W. Bush should have known better than to engage in it and, especially, to imply that the Court's behavior was without precedent.

CONCLUSION

Just as people should speak out as citizens, so I believe they should speak out as scholars. It is appropriate to enlist historical views, for example, in support of political ones. They may or may not have any impact on public discourse. But it is healthy for us all to express our opinions over issues that engage us, to get them "off our chests," and certainly, the Internet makes it easy to find allies. The phenomenon of Internet statements seems likely to grow. Whereas more than four-hundred historians signed the anti-impeachment statement and the statement on Bush's inauguration, more than 1200 American historians signed an e-mail petition urging members of Congress "to assume their Constitutional responsibility to debate and vote on whether or not to declare war on Iraq."[175] I can even countenance an occasional nod to intentionalist originalism for strategic, political purposes in such statements.

But in my view, we should look before we leap. We should be cautious about how we phrase scholarly views, and we should limit ourselves to matters about which we have sufficient professional expertise ourselves so that we can be certain whether we are wearing the hat of the scholar, that of the citizen, or both at once. We should also realize that implausible assertions are unlikely to be lost in cyberspace. Rather, others may well use them to question our professional credibility. And even in the best-case scenario when they suit the politics we promote, such statements still run

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175 Ellen DuBois & Joyce Appleby, *American Historians Speak Out*, Sept. 17, 2002, *at* http://tompaine.com/feature.cfm/ID/6392; History News Network Staff, *Historians' Petition on War with Iraq: Breaking News*, *at* http://hnn.us/articles/966.html.

the risk of misleading the public and policymakers into believing that there is "historical truth" and that the signatories' portrayal of it is correct.[176]

What does this mean in terms of standards historians might apply in deciding whether to become involved in political controversies? I would propose that no historian sign a statement, letter, petition, or brief that she would not be able to imagine (that is, with some research, if she had to do so before a congressional committee or other public forum) defending publicly as scholarship.[177] She need not do *all* the research before signing — simply enough to feel confident that the position is plausible, something that can generally be easily and quickly ascertained from the secondary sources. She should think about appending a citation to the scholarship she has written closest to the topic of the petition too. Whenever possible, historians should, I maintain, also use such controversies to educate the public about the importance of contextualizing the past.

Of course, such a standard also increases the possibility of "presentist," "unobjective" historical scholarship. But in the case of history, presentist and unobjective scholarship is a fact of life. Our obligation as historians is

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176 How best to educate the public about specific historical issues is a different subject from my topic in this essay. I have concentrated on the questions that may arise for the historian who chooses to enter public discourse through the realm of signing statements, briefs, petitions, and advertisements. I am intrigued, however, by Natalie Hull and Peter Hoffer's proposal of a "special masters" model. In cases where the interpretation of historical documents and context is relevant, such as impeachment, Congressional committees or other fact-finding bodies could appoint panels of historians who have excellent credentials on the topic and ask them to report back on that issue. Both parties would cooperate to choose the historians, and the historians would meet privately to resolve differences. Where appropriate, the report that was the end product could stress the multiplicity of interpretations. That would prevent each side from loading up on its historians and mean that findings captured the nuances and ambiguity historians generally find in events. N.E.H. Hull & Peter Hoffer, *Historians and the Impeachment Imbroglio: In Search of a Serviceable History*, 31 Rutgers L.J. 473, 489-90 (2000).

Another issue involves whether historians who seek to influence public discourse might choose better ways of doing so. Arguably, historians have a better chance of influencing debates if they intervene in the fields that are their specialties. Thus historians of the late nineteenth- and twentieth-century American South might help show how black landowners were cheated out of tens of millions of dollars worth of land; historians who write about voting might illuminate the problems with the current campaign finance system; and twentieth-century historians of gender/Japan might address the issue of Japan's use of comfort women during World War II, just as historians of the Asian-American experience during World War II became involved in the movement to pay Japanese-Americans reparations for internment.

177 I thus set the bar lower than Farnsworth, *supra* note 125.

to try to recreate the past as best we can, while realizing that we cannot do it perfectly because our present colors the way we view the past. That is why each generation must write its own history.[178]

178 *See, e.g.*, Arthur Schlesinger, Jr., Robert Kennedy and His Times (1978); C. Vann Woodward, The Strange Career of Jim Crow (1955); Sean Wilentz, Chants Democratic, New York City & the Rise of the American Working Class 1788-1850 (1984).