# An Address: The Constitution and the Dilemma of Historicism

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In thinking about the Constitution, we should keep in mind the commonplaces that lace our thinking. We must keep them in sight at both levels: content and character, commonplace and commonplaceness—else their importance may escape us. Maitland's view that "the history of law must be a history of ideas" is one such commonplace. Another was noticed by Edward Corwin: the "commonplace that every age has its own peculiar categories of thought; its speculations are carried on in a vocabulary which those who would be understood by it must adopt . . . ."[1] These are two of the commonplaces of our time, and if true they suggest two related propositions:

First, any understanding of historic institutions must take account of the permeating ideas, the political and social determinants of thought, and the vocabulary and conceptual apparatus of the age in which the institution was developed. Understanding begins when we can see an institution through the screen of values that were the common coin of the time, the commonplaces which are the "fecal remains"[2] of the age. To put the matter thus leads to the second proposition. If the fecal remains of a time are to be found in its commonplaces those of today must include the commonplaces of which Maitland and Corwin spoke. The commonplaces of our age, theirs included, are the concrete expressions of our own value system, through the screen of which we view our times (and past times as well). Our commonplaces are the intellectual shards and detritus that will survive us. This can be summarized in still a third commonplace, one stated by H. Stuart Hughes: "By now nearly all of us have accepted Croce's dictum that the writing of history necessarily changes with the standpoint of the historian, that *all*

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1. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149-85, 380, 385-409 (1928-29).

2. J. ELLUL, A CRITIQUE OF THE NEW COMMONPLACES 8-13 (1968).

history is contemporary in the sense that its presentation reflects the circumstances and attitudes of those who write it."[3] Our commonplaces, therefore, remind us in their briefest form, that conclusions about history (and law) must take account of value systems of the present, as well as value systems of the past.

Where the impulse is felt to see history "as it was," it must express itself in heeding the requirement to adopt old values, and in the conscious shedding of new ones. When this is done, it is said that history in both its senses is realized. It is created and recreated by a principle of empathy by which Herder, for one, would have us share the sense of history with its actors. This impulse is the spirit of *historicism* which demands a special "understanding" (in Dilthey's sense) through which we feel what it was like to be historic. This spirit has been expressed recently by an historian: "[w]e involve ourselves not simply by reasoned inference from the overt facts of the Athenians' behavior but by an imaginative and emotional grasp of the events."[4] The historicist therefore rejects universals as transitory prejudices, and elevates the *Zeitgeist* as an intellectual tool. This spirit is pervasive today, and its articulated forms are a hallmark of most research into the past. As a wayward example, consider the words of an archeologist, Geoffrey Bibby, in his book *The Testimony of the Spade* (1956). Bibby's dedication is inscribed

> TO VIBEKE
>
> who keeps before me the question without which archeology is meaningless:
>
> "What did it *feel like*—to be prehistoric?"

This impulse is felt in law as well, especially when the focus is on basic documents and the concern is in raising "parchment barriers" against encroachments on freedom. Here we can observe that an implicit distinction is made between measuring motive in legislation and finding meaning in a constitution. There is a natural impulse to look behind doubtful legislation for legislative motive. But an institutional resistance to the impulse is offered by a canon of interpretation which bids us not to look,

3. Hughes, *Is Contemporary History Real History?*, 32 AMERICAN SCHOLAR 516, 518 (1963), "It is a platitude that research in history as in other areas of science selects and abstracts from the concrete occurrences studied, and that however detailed a historical discourse may be it is never an exhaustive account of what actually happened."

4. Arragon, *History's Changing Image*, 33 AMERICAN SCHOLAR 222, 229 (1964).

especially when the legislature's motive is arguably illict. Now it is true that attentiveness to the canon is a sometime thing,[5] but its restraint still holds out an appeal here and abroad.[6] Where doubt touches upon a document more basic than statute, however, the canon is made to yield to argument that state action is unconstitutional or *ultra vires* the document in question. Questions of motive are transformed, and are said to be really questions of meaning behind a charter.[7] In this transformation, questions about the document begin to blur the distinction between meaning and motive; and the spirit of historicism begins to move the undertaking.

The purpose here is to examine, not so much the propriety of such questions, but the utility of the answers, especially answers supplied by historical research into the Constitution and its intellectual roots. It may be asked in this connection whether such research is useful or useless, conclusive or to the contrary, relevant or irrelevant to constitutional inquiry. Historiography *may* be useful, possibly conclusive, yet irrelevant. The purpose here, however, is to examine possibilities rather than relevance—that is, usefulness and conclusiveness.

The impulse to defer to the historian in constitutional interpretation is strong. It owes its strength not merely to a laudable curiosity about a most prized institution, but also to a laudable desire to seek principles of interpretation which are at once authoritative and public, durable and viable. Two distinguished members of the Supreme Court, who knew more history than most, have expressed a variant of this impulse. In a 1914 opinion, Justice Holmes had this to say of constitutional provisions: "Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and their line of growth."[8] In more recent times, Justice Frankfurter made a similar observation:

5. *Compare* O'Brien v. United States, 391 U.S. 367 (1968) *with* Epperson v. Arkansas, 393 U.S. 97 (1968).

6. United States v. Constantine, 296 U.S. 287, 298-99 (1935); Collins v. Minister of Interior, S. Afr. L.R. 552, 565 (App. Div. 1957 (I)); Frankfurter, *Some Reflections on the Reading of Statutes*, 2 RECORD OF N.Y.C.B.A. 213, 230-31 (1947).

7. *Compare* Harris v. Minister of Interior, 1952 (II) S. Afr. L.R. 428 (App. Div.) *with* Collins v. Minister of Interior, S. Afr. L.R. 522, 565 n.6 (App. Div. 1957 (I)) (marking, respectively, the beginning and ending of the South African constitutional crisis).

8. Gompers v. United States, 233 U.S. 604, 610 (1914); *see also* Missouri v. Holland, 252 U.S. 416, 433 (1920).

"The language of the First Amendment is to be read not as barren words found in a dictionary but as symbols of historic significance illumined by the presuppositions of those who employed them."

In the Holmes-Frankfurter view, interpretation is not an hour's consultation with a dictionary; but neither is it an hour with a history book, consulted as a narrative of events that are called upon to speak for themselves. A concern for history of quite a different sort is required, a history that looks backward to "presuppositions" to be sure, but one that also looks forward to a "line of growth." This latter would be a history not of atomic or irreducible events (written say by Ranke or Beveridge), nor of the signal "acts of definite men, or even of a definite man"[10] (say Madison or Jefferson), but a history that is *significant*, and significant not least of all from the standpoint of our conscious convictions and our unconscious presuppositions of social utility. It would be a history written instrumentally, a history written not by some or all historians of the Constitution, but by the Court itself.

To many this is a most unsatisfactory view. What is demanded rather is an *objective* history of the Constitution, free of the prejudices and predelictions of its institutionalized interpreter. What is desired is a definitive history that is wholly extrinsic to temporary arrangements and that supplies principles that are truly neutral. Thus, Justice Sutherland was heard to complain that "[t]he whole aim of construction, as applied to a provision of the Constitution, is to discover the meaning, to ascertain and give effect to the intent, of its framers and the people who adopted it . . . . As nearly as possible *we should place ourselves in the condition of those who framed and adopted it.*"[11] The impetus here is away from the instrumentalism of language and concepts which so characterized the rhetoric of the realist movement. It was an earlier phase of a class of criticism which more recently sees all too much of the Court's work as "result-oriented,"[12] or insufficiently geared to

9. Dennis v. United States, 341 U.S. 494, 523 (1951).

10. POUND, INTERPRETATIONS OF LEGAL HISTORY, 118 (1923).

11. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 453 (1934) (emphasis added).

12. *E.g.*, Griswold, *Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81 (1960).

principles "that in their generality and neutrality transcend any immediate result that is involved."[13] Such reaction wants meaning from the Constitution which is abiding and a set of terms in which we could "discuss the Constitution on the one correct and indubitable level," free "from the parts, passions and fallibilities of man."[14] These terms for discussion, it is urged, are those very ones supplied by the text, and where their meaning is doubtful we seek it in an "original understanding." This seems very simple and straight-forward, but it remains to be shown whether such methodology is either desirable or possible. I suggest, however, that the historical search for meaning can be confronted more directly on its own ground—in terms of its possibility and efficacy.

Let's examine then what is proposed by the textualist-historicists in their quest for meaning. The proposal is to find the original understanding in terms of the meanings and motives of the framers, illumined by their "presuppositions" as we may discover them by placing ourselves in their "condition."[15] Difficulty initially arises from the sheer effect of passage of time on the connotation of words. If, for instance, we are to discover Madison's intentions, we must heed his warning against "errors which have their source in the changed meaning of words and phrases."[16] This, however, does not seem to be an insuperable difficulty, so long as we consider such meaning changes as simply a reshuffling of synonyms in a dictionary.[17]

More troublesome is the recurring doubt that mere realignment of synonyms can really provide a sense of participation in the understanding of the original words or their contemporaneous synonyms. This doubt ensues when we realize that "the meanings of symbols are defined and redefined by socially coordinated actions. The function of words is the

13. Weschler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 17 (1959).

14. BEARD, *Historiography and the Constitution*, in THE CONSTITUTION RECONSIDERED 159 (Morris, rev. ed., 1968).

15. *E.g.*, Miller, *Some Pervasive Myths About the United States Supreme Court*, 10 ST. LOUIS U.L. REV. 153, 165-168 (1965); A. BICKEL, THE LEAST DANGEROUS BRANCH, 98-110 (1962).

16. Corwin, *supra* note 1, at 366.

17. As supplied, for instance, by W. Crosskey, who sets out "to provide the reader with a specialized dictionary of the eighteenth-century word-usages . . . which are needed for a true understanding of the Constitution . . . ." 1 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 5 (1953).

mediation of social behavior, and their meanings are dependent upon this social behavioral function. Semantical changes are surrogates and foci of cultural conflicts and group behavior."[18] A change in meaning, then, is mediated not only directly by the passage of time, but also indirectly through social restructuring. This restructuring both causes and is caused by shifts in the meaning of languages and attaches to a noun "a kind of invisible adjective, and [to] a verb an invisible adverb."[19] "Along with language, we acquire a set of social norms and values. A vocabulary is not merely a string of words; inherent within it are societal textures—institutuional and political coordinates."[20] Thus while we can find for an ancient word a synonym which is not proleptic, there is no guarantee that we can discover the original connotation, or that we can grasp the commonplace character of a chance phrase.

The best of our profession were not blind to such considerations: "What is below the surface of the words and yet fairly a part of them? Words in statutes are not unlike words in a foreign language in that they too have 'associations, echoes, and overtones.'"[21] And Justice Holmes: "The statutes are the outcome of a thousand years of history . . . . They form a system with echoes of different moments, none of which is entitled to prevail over the other."[22]

Our concern at this second level of complexity has been with language and its meaning, but it is also an aspect of still a third and larger dilemma—that of the inherent frailty of any hope of achieving scientific objectivity in the historian's recreation of the past. Such hope is extinguished in the process of self-awareness. We are, after all, what we are; and the conceptual apparatus that

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18. C. WRIGHT MILLS, *Language, Logic and Culture*, in THE COLLECTED ESSAYS OF C. WRIGHT MILLS, 423, 432 (I. Horowitz, ed. 1963).

19. K. BURKE, PERMANENCE AND CHANGE, 244 (1935).

20. Mills, *supra* note 18.

21. Frankfurter, *Some Reflections on the Reading of Statutes*, 2 RECORD OF N.Y.C.B.A. 213, 220-21 (1947).

22. Hoeper v. Tax Commission, 284 U.S. 206, 219 (1931). *See also* Plucknett, *Maitland's View of Law and History*, 67 L.Q. REV. 179, 188 (1951) where F.W. Maitland is quoted as saying:

> A lawyer finds on his table a case about rights of common which sends him to the Statute of Merton. But is it really the law of 1236 that he wants to know? No, it is the ultimate result of the interpretations set on the statute by the judges of twenty generations. That process . . . is from the lawyer's point of view an evolution of the true intent and meaning of the old law: from the

we bring to bear on the history of men is ours not theirs. This conceptual apparatus is shaped wholly by *our* "cultural apparatus."[23] The latter has been variously called our "Weltanschauung," the "climate of opinion," "forms of sensibility and mental categories," and the "existential situation" (e.g., Ernest Nagel).[24] Awareness that our world-view is shaped by our condition, and our vision of the past is shaped by the political and social coordinates of that condition, makes clear the relativism and partiality of our view of the past. The latter is but a segment and function of our world-view. And it especially must be observed that this self-awareness has been, for the last hundred years, a central feature of our world view, overarching all others. Whatever the *Weltanschauung* of the eighteenth century, no such feature was present, for the premises of that century were the premises of rationalism—not particularistic or partial, but universal and atemporal. But it is on this feature that the textualist-historicist's quest for meaning must founder. He concedes that he must recreate an eighteenth century world-view, as portrayed in the "condition" and "presuppositions" of the framers. But he supposes that *Weltanschauung can* be recreated with the intellectual tools which are both available and appropriate: (1) Primary sources extrinsic to the Constitution in the form of publications, letters and diaries of the framers, and (2) a reading of these primary sources as an eighteenth century rationalist would read them. Now from a certain point of view (e.g., rationalism), this is appropriate and sufficient, for as Mannheim observed, "As far as rationalism can see, the global outlook of an age or of a creative individual is wholly contained in their philosophical and theoretical utterances; you need only to collect these utterances and arrange them in a pattern, and you have taken hold of a *Weltanschauung*."[25] But in our terms that certain point of view *is* a narrow one, for it does not take account of all the determinants of the eighteenth century mind, nor does it

historian's point of view it is almost of necessity a process of perversion and misunderstanding.

23. C. WRIGHT MILLS, *The Cultural Apparatus*, in THE COLLECTED ESSAYS OF C. WRIGHT MILLS, 405 (I. Horowitz, ed. 1963) 24 Nagel, *The Logic of Historical Analysis*, 74 THE SCIENTIFIC MONTHLY 162, 167 (1952). (In fairness to Professor Nagel, it should be noted that he also put this overworked expression in quotation marks).

25. K. MANNHEIM, *On the Interpretation of Weltanschauung*, in ESSAYS ON THE SOCIOLOGY OF KNOWLEDGE, 33, 38 (Kecskemeti, ed. 1952).

guarantee that those of the twentieth century have been discarded. From the broader point of view—*our* point of view (whether from some still larger or transcendent view we are "right" or "wrong" makes no difference)—the narrower view is not possible to embrace. And were it in some sense possible, we would still be warranted in asking for certification that the historian had read his primary sources with Ben Franklin's spectacles and not with his own contact lenses. Whether we like it or not, we have been awakened from the dream that such is possible or certifiable. Awakened from the dream of historicism, and awakened to the ineluctible partiality of our conceptual tools, we are thus made alive to the instrumental nature of our concepts. Whether they are fashioned in history-writing or in decision-writing, principles are not neutral; they are policy-oriented; they *are* result-oriented. It cannot be otherwise.

The heritage of historical relativism has its roots in Europe, and especially in the writings of Croce, Dilthey, and Mannheim. But the United States also has had its able spokesmen for this heritage; Carl Becker and Charles Beard, two influential historians. I will return to Beard in a moment, but for the present something should be said of our debt to Carl Becker. If we take it as given that the chasm that divides us from the eighteenth century mind is as wide as that which separates us from the medieval mind, we may thank Becker for showing us how it is so. In *The Heavenly City of the 18th-Century Philosophers* (1932), the urbane and witty Becker makes this point most tellingly, and makes us *feel* the gulf that divides us from the rationalistic spirit which suffused the thought and expression of Jefferson,[26] Madison and others. It has been in the textualist-historicist's failure to bridge that gulf (or their failure to convince us that they have) that their major premise—the premise that the framers' intentions are *ascertainable* in any conclusive way—has foundered. This premise was bottomed in the conviction that our "understanding" (again in Dilthey's special sense) could be made to coincide exactly and at every point with the "original understanding." Behind this conviction lay a hidden but crucial premise: That there is available a compass with which we can measure exactly the degree to which

26. *See also* C. BECKER, THE DECLARATION OF INDEPENDENCE—A STUDY IN THE HISTORY OF POLITICAL IDEAS (1922), on the rationalism of Locke and Newton at work in the writing of Jefferson.

our own angle of vision differs from that of the eighteenth century eye. This compass was to be fashioned in total self-awareness, in an all-comprehensive picture of our own *Weltanschauung*. Indeed, in his later years Charles Beard proposed, by way of retreat from the relativism with which his name had become associated,[27] that objectivity *could* be realized through a systematic account of the interests that motivate an historian, along with a parallel account of those interests of the time of which he writes.[28] To the very end he adhered, I believe, to the notion that these interests were predominantly economic, and that a measure of the economic coordinates of our thought would suffice.

One further but related point can be made from Beard's own thought. In his early writing, Beard argued that the Constitution was counter-revolutionary, and was more than anything else an expression of the framers' need to protect the vested and property interests of their class.[29] This view was quite in vogue—until about 1937 when the constitutional crisis reached a satisfactory culmination. It is a view which very recently has been described as "no longer fashionable," and this "as a result of the closer research conducted by investigators over the past generation."[30] Now we may agree with that "result," but we may still be warranted in questioning the reason offered for it. Other research may have produced other views, but are the latter dictated solely by the "closeness" of the research? Or is it not so, as well, that such other views are simply more congenial to the present climate of opinion regarding the Court and the Constitution? And what warrant is there which assuredly dictates one rather than the other? And finally what assurance do we have that any research—whether the latest or the closest—is the final or definitive word?

So much for the first hidden premise of the textual-historical analysis of the Constitution. There are four other subsidiary premises, all suppressed and all of them dubious: (1)

27. *E.g., see* MANDELBAUM, THE PROBLEM OF HISTORICAL KNOWLEDGE (1938).

28. *E.g.*, Beard, *supra* note 14.

29. C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION (1913).

30. R.B. MORRIS, PREFACE, in THE CONSTITUTION RECONSIDERED IX-X (Morris, ed. 1968). Presumably the "closer research" refers to that of B. Brown (Charles Beard and the Constitution, 1956) and F. McDonald (We the People, 1958). *See* Forkosch, *Who are the "People" in the Preamble of the Constitution?*, 19 W. RES. L. REV. 644, 675 (1968).

the assumption that the framers intended that we should seek to ascertain their intention; (2) the assumption that the words and phrases used by the framers *adequately* expressed their real understanding of the Constitution; (3) the premise that any such understanding was common or uniform, and for that matter (4) that there *was* an understanding, in any acceptable sense, of each and every Constitutional provision. As to the first, one recent study concluded that "[t]he framers apparently did not 'intend' that later generations look for their 'intent'."[31] As to the third and fourth—the premises that there *was* an original understanding and that it was common or uniform—a further remark is in order.

Historical inqury as to some "original understanding" (as that phrase has been employed lately) has centered around the Fourteenth Amendment: Professor Charles Fairman's study of the due process and privileges and immunities clauses,[32] and Professor Alexander Bickel's study of the equal protection clause.[33] Professor Fairman's research, especially, gives the lie to the notion that history will always supply a meaning. As one of the sponsors of the privileges and immunities clause said himself, "Its euphony and indefiniteness of meaning were a charm to him."[34] This is not "understanding" in any sense, original or otherwise.

Consider, too, the first amendment. The closest research into the history of the free-speech-and-press provisions has been that of Zechariah Chafee[35] and Leonard Levy.[36] Levy's is also the latest work, one that has been characterized as "awkward history." It is awkward on several counts. First it shows that our preconceptions about the original understanding differ from the framers' own conceptions and understanding. More to the

31. Baldwin and McLaughlin, *The Reapportionment Cases: A Study in the Constitutional Adjudicative Process*, 17 U. FLA. L. REV. 301, 322 (1964).

32. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949).

33. Bickel, *The Original Understanding and the Desegregation Decision*, 69 HARV. L. REV. 1 (1955).

34. Fairman, *supra* note 32, at 19. However, Fairman's is by no means the last word: *see* Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations of State Authority*, 22 U. CHI. L. REV. 1 (1954); Avins, *Incorporation of the Bill of Rights: The Crosskey-Fairman Debates*, 6 HARV. J. LEGIS. 1 (1968).

35. Z. CHAFEE, FREE SPEECH IN THE UNITED STATES (1948).

36. L. LEVY, LEGACY OF SUPPRESSION (1960).

point, however, is Levy's conclusion that history is inconclusive—inconclusive, that is, as to what the phrase "the freedom of speech" meant historically, and inconclusive, further, in the suggestion that the framers themselves had little or no understanding of the phrase. This inconclusiveness stems not so much from the scarcity of primary sources, as from the observation that then as now men often give too little thought to what they do or say. But inconclusiveness may stem also—to recur to our original theme—from our incapacity to read the invisible adjectives and adverbs in the primary materials that *are* extant. Professor Levy's conclusions have been roundly criticized,[37] more often than not, I suspect, because they do not square nicely with the climate of opinion. Moreover, much of the criticism reflects the historicist's unhappiness with letting "facts speak for themselves." Where they do not speak for themselves, or where the facts say very little or say it unclearly, the historicist feels the urge to become creative and to inject meaning "by an imaginative and emotional grasp of the events."[38] Thus one reviewer of Levy's work complained that "Levy's view lands us in a solipsism of the present which finds the past always external, formal, and genuinely unreal."[39] To this I would rejoin that a solipsism of this kind is inevitable.

In support of my view that a "solipsism of the present" is inevitable, let me summarize as follows. There *are* uses of history. But it must be a cautious one, one heavily weighted with the needs of our time and our common vision of the time. Beard proposed that history would be in our grasp once the vision of our age became clear. It has been proposed more recently by McLuhan, Brzezinski and other smiling sponsors of the technotronic age that we are about to grasp that total vision. By some electronic leap, we are offered an escape from the political and social determinants of our thought to that "utopian mentality" described by Mannheim[40] and sought for by Beard. Yet it seems that for every door unlocked by a technotronic key, several blinds get pulled down. Thus I confess I am more inclined to the views of C. Wright Mills and Marcuse than the technological and cultural apparatus renders our mentality more

37. *E.g.*, Anastaplo, Book Review, 39 N.Y.U.L. REV. 735 (1964).
38. Arragon, *supra* note 4.
39. Mieklejohn, Book Review, 35 S. CAL. L. REV. 111, 118 (1961).
40. K. MANNHEIM, IDEOLOGY AND UTOPIA, 173 (English ed., 1936).

ideological than utopian, and that in a real sense we have increasingly more trouble invisioning ourselves than we do our ancestors. However that may be, there is truth in the contention that, for *now*, no such total vision of ourselves has been supplied. Our view of the past is seen through a tissue of values that only *seems* transparent. To *see* that screen of values, we must see through and yet with those values. Can any posture be value-free? I suggest not; and I suggest particularly that history-writing is value-ridden. But even to inquire whether it is one or the other is not an inquiry that itself is assuredly value-free. Correspondingly no answer can assuredly be value-free. Any answer, objective or relative, then, is self-refuting. For when Beard or Ernest Nagel argue that historical relativism is self-refuting,[38] they deploy arguments which by their nature are self-refuting. Any attempt to assume a value-free posture regarding history of the Constitution leads inexorably to the conclusion, not simply that the Constitution *should* be the product of our own time, but that it *cannot* be otherwise.

What *our* thinking on the Constitution requires is a set of generative principles which transcend the two in fashion: That the Constitution is *only* what its framers and historians have said it is, or *only* what the courts say it is. The Supreme Court is not an historian; or, has shown itself to be a rather poor one at best.[42] Clio, on the other hand, is a rather elusive witness; she should not be summarily dragged into court to do its work. We began with a commonplace which is ascribed to Maitland. When we talk of law *and* history, it is fitting to conclude with Maitland. "A mixture of legal dogma and legal history is in general an unsatisfactory compound . . . . If we try to make history the handmaid of dogma she will soon cease to be history."[43]

41. C. Beard, *Written History as an Act of Faith*, 39 AMER. HISTORICAL REV. 219, 226 (1934); Nagel, *supra* note 3.

42. A. H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119. 119.

43. *See* material cited note 23 *supra*.