HISTORIANS AT THE GATE: ACCOMMODATING EXPERT HISTORICAL TESTIMONY IN FEDERAL COURTS

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Expert testimony is said to be reliable only when based upon sound method. Historians are often called upon to give expert testimony at trial to help the jury understand the subject matter of the dispute in historical context. Just as scientists must adhere to the scientific method, historians must conform their testimony to the historical method, requiring them to respect the pastness of the past by grappling with the complexity and inconsistency of the historical record and dealing appropriately with contrary evidence. Failure to adhere to the historical method results in unreliable testimony wherein the historian becomes advocate instead of advisor. Unfortunately, the adversarial nature of the courtroom can make historians stray from historical method. In this Note, Jonathan Martin explores the problem of expert historical testimony in federal courts and suggests that the public-law nature of most cases employing historical testimony, as well as a concern for intellectual due process, should prompt federal judges to overcome their traditional reluctance to appoint neutral experts under Rule 706 of the Federal Rules of Evidence. When appointed by the court, Martin argues, historians will serve less as advocates and more as advisors.

INTRODUCTION

In early 1994, Stephen Ambrose, the celebrated historian and biographer, took the witness stand in a Louisiana federal district court. He had been called as an expert historical witness by lawyers for the tobacco industry. The lawyers, defending their clients against claims by a lifelong smoker, hoped to establish that when warning labels first appeared on packs of cigarettes in 1966, Americans already understood that smoking posed health risks. "When the warning went on the labels," Ambrose obligingly averred, "you would have to of [sic] been deaf and blind not to have known that already in the United States."[1] Ambrose's testimony had all the nuance and complexity of a knockout punch. The jury found for the tobacco companies.

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[1] Trial Transcript at 48, Covert v. Liggett Group, Inc., 750 F. Supp. 1303 (M.D. La. 1994) (No. 87-131), available at http://tobaccodocuments.org (requires registration) (on file with the *New York University Law Review*) [hereinafter *Covert* Trial Transcript].

Ambrose's role in the case was not unusual. Historians are increasingly being called to testify as expert witnesses.[2] They appear in cases adjudicating a vast array of matters, including Native American rights,[3] gay rights,[4] voting rights,[5] water rights,[6] border disputes,[7] trademark disputes,[8] gender discrimination,[9] employment discrimination,[10] establishment clause violations,[11] toxic tort and product lia-

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[2] See Brian W. Martin, Working with Lawyers: A Historian's Perspective, OAH Newsl. (Org. of Am. Historians, Bloomington, Ind.), May 2002, at 1, 1 (noting that over last twenty years lawyers have increasingly sought out professional historians).

[3] See, e.g., Cayuga Indian Nation v. Pataki, 165 F. Supp. 2d 266, 300 (N.D.N.Y. 2001) (providing testimony on historical context of disputed purchase of Cayuga land by State of New York at turn of nineteenth century); Mille Lacs Band of Chippewa Indians v. Minnesota, 861 F. Supp. 784, 790-91 (D. Minn. 1994) (providing testimony on negotiation and contemporary interpretations of 1837 and 1855 treaties, under which plaintiffs claimed ongoing hunting, fishing, and gathering privileges on land ceded to United States). See generally Helen Hornbeck Tanner, History vs. The Law: Processing Indians in the American Legal System, 76 U. Det. Mercy L. Rev. 693 (1999) (reflecting on more than thirty-five years of experience as expert historical witness in Indian rights cases).

[4] See generally John Finnis, "Shameless Acts" in Colorado: Abuse of Scholarship in Constitutional Cases, Acad. Questions, Fall 1994, at 10 (discussing expert testimony on ancient Greeks' stance toward homosexual relationships); Martha C. Nussbaum, Platonic Love and Colorado Law: The Relevance of Ancient Greek Norms to Modern Sexual Controversies, 80 Va. L. Rev. 1515 (1994) (same).

[5] See, e.g., NAACP v. City of Niagara Falls, 65 F.3d 1002, 1020 (2d Cir. 1995) (noting historical testimony on discriminatory intent of laws and practices that allegedly infringe right to vote); Irby v. Fitz-Hugh, 693 F. Supp. 424, 427 (E.D. Va. 1988) (same); Dillard v. Crenshaw County, 640 F. Supp. 1347, 1356 (M.D. Ala. 1986) (same). See generally Peyton McCrary, Yes, But What Have They Done to Black People Lately? The Role of Historical Evidence in the Virginia School Board Case, 70 Chi.-Kent L. Rev. 1275 (1995) (examining historical evidence of discriminatory intent provided by plaintiffs in Virginia school board case); Peyton McCrary & J. Gerald Hebert, Keeping the Courts Honest: The Role of Historians as Expert Witnesses in Southern Voting Rights Cases, 16 S.U. L. Rev. 101 (1989) (surveying testimony provided by historians in voting rights cases).

[6] See, e.g., Denson v. Stack, 997 F.2d 1356, 1363-68 (11th Cir. 1993) (Clark, J., dissenting) (discussing historical testimony on navigability of Florida's Waccasassa River in 1845); Miami Valley Conservancy Dist. v. Alexander, 507 F. Supp. 924, 926-29 (S.D. Ohio 1981) (noting testimony on navigability of Great Miami River in early nineteenth century). See generally Carl M. Becker, Professor for the Plaintiff: Classroom to Courtroom, Pub. Historian, Summer 1982, at 69 (reflecting on role as expert in *Miami Valley*); Leland R. Johnson, Public Historian for the Defendant, Pub. Historian, Summer 1983, at 65 (same).

[7] See, e.g., Richard B. Morris, An Academic Historian's Effect on Public History, 16 Hist. Tchr. 53, 60 (1982) (discussing role as expert witness in dispute between United States and Canada over fishery and drilling rights off Georges Bank).

[8] See, e.g., Harjo v. Pro-Football, Inc., 50 U.S.P.Q.2d (BNA) 1705, 1717-18 (1999) (noting testimony on historical connotations of word "redskin" in dispute over validity of trademarks held by Washington Redskins).

[9] See, e.g., United States v. Virginia, 852 F. Supp. 471, 486-87 (W.D. Va. 1994) (noting testimony by historian on such topics as history of higher education for American women).

[10] See, e.g., EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264, 1314-15 (N.D. Ill. 1986) (noting competing testimony on history of American women's alleged lack of interest in nontraditional jobs such as commission sales). See generally Thomas Haskell & Sanford Levinson, Academic Freedom and Expert Witnessing: Historians and the *Sears* Case, 66

bility,[12] tobacco litigation,[13] and the deportation of alleged Holocaust participants,[14] among others.[15] Depending on their needs, lawyers can turn to popular historians like Ambrose, to the ranks of academia, or to for-profit firms devoted entirely to historical research and litigation support.[16]

As currently deployed, historians' expert testimony—exemplified by Ambrose's—poses a problem for the legal system. Expert testimony admitted under Rule 702 of the Federal Rules of Evidence must be reliable, which the Supreme Court has interpreted to mean that the testimony rests on a sound epistemological basis—that is, on a sound

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Tex. L. Rev. 1629 (1988) (presenting *Sears* as illustrative of tensions between disinterested scholarship and courtroom advocacy).

[11] See, e.g., Bob Johnson, Historian Says Commandments Just One Source of Law, Associated Press Newswires, Oct. 22, 2002 (reporting historian's testimony in lawsuit filed to remove Ten Commandments monument from Alabama courthouse). See generally S. Charles Bolton, The Historian as Expert Witness: Creationism in Arkansas, Pub. Historian, Summer 1982, at 59 (recounting experience as expert witness in Arkansas creationism case); Michael Ruse, The Academic as Expert Witness, 11 Sci. Tech. & Hum. Values, Spring 1986, at 68 (same).

[12] See, e.g., Foster v. United States, 130 F. Supp. 2d 68, 72 & n.6 (D.D.C. 2001) (referring to historical testimony about James Creek in suit brought under Comprehensive Environmental Response, Compensation, and Liability Act). See generally H. Edward Dunkelberger III, Historians in the Courtroom, Metro. Corp. Couns., Sept. 1999, at 58 (providing advice to practitioners on hiring expert historians in toxic tort and product liability cases).

[13] See, e.g., Laura Maggi, Bearing Witness for Tobacco, 11 Am. Prospect, Mar. 27, 2000, available at http://www.prospect.org/print-friendly/print/V11/10/maggi-l.html (profiling historians who have provided historical expert testimony); see also infra notes 129-46 and accompanying text.

[14] See, e.g., Naujalis v. INS, 240 F.3d 642, 645 n.7 (7th Cir. 2001) (noting historian's testimony on deportee's links to Nazi regime); United States v. Szehinskyj, 104 F. Supp. 2d 480, 482-83 (E.D. Pa. 2000) (same); United States v. Dailide, 953 F. Supp. 192, 196 n.4 (N.D. Ohio 1997) (same).

[15] As this list indicates, historians frequently testify in cases that fit a public-law litigation model. In such cases, rather than resolving private, bipolar disputes, courts endeavor "to deal with grievances over the administration of some public or quasi-public program and to vindicate the public policies embodied in the governing statutes or constitutional provisions." Abram Chayes, The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court, 96 Harv. L. Rev. 4, 4 (1982) [hereinafter Chayes, Burger Court]. The public-law litigation model has forced judges and legal scholars to rethink the role of the judge in the legal process, usually in the context of procedure. See generally Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976) (introducing public-law model and its challenge to traditional conception of dispute resolution). One argument of this Note is that the same concerns should prompt judges and scholars to consider changes in evidence law as well.

[16] Two examples of the latter are History Associates Incorporated, and Historical Research Associates, Inc. See History Associates Incorporated: Historical Research for Litigation, at http://www.historyassociates.com/services/lit_index.htm (last visited Aug. 31, 2003); Historical Research Associates, Inc.: Litigation Support, at http://www.hrassoc.com/pages_market/litsupport.htm (last visited Aug. 31, 2003).

method.[17] Just as scientific testimony must adhere to the scientific method, so too must historical testimony adhere to the historical method. Unfortunately, historians often neglect the conventional methods of their craft when offering expert testimony. Outside the courtroom, historians generally expect one another to formulate complex, nuanced, and balanced arguments that take into account all available evidence, including any countervailing evidence. At trial, however, the pressures of the adversary system routinely push historians toward interpretations of the past that are compressed and categorical—toward something akin to Ambrose's "deaf and blind" testimony. As a result, historians now frequently offer unreliable evidence.

There is more at stake in spurious historical testimony than formal conflict with the Supreme Court's expert-witness jurisprudence. Professor Scott Brewer contends that "[o]ne of the most important overall decisions legal systems must make is how, if at all, to regulate the descriptive claims about the world—claims, that is, about how the world is, was, or will be—that enter into the legal system."[18] These decisions, regulated doctrinally by the rules of evidence and procedure, are justified only if they afford, in Brewer's words, "intellectual due process"—a heady phrase that masks the simplicity of this emerging and important rule-of-law norm.[19] Brewer explains that "this norm places important *epistemic* constraints on the reasoning process by which legal decisionmakers apply laws to individual litigants," which requires "that the decisionmaking process not be arbitrary from an epistemic point of view."[20] Brewer is fundamentally concerned with shoring up the reasoning processes of nonexpert judges and juries who encounter scientific testimony, but the principles of intellectual due process apply equally well to the testimony of experts themselves. When experts derogate from the accepted cognitive aims and methods of their disciplines, decisionmakers then inevitably "yield only *epistemically arbitrary* judgments . . . [which are] *not justified from a legal point of view.*"[21] Intellectual due process requires that the entire evidentiary process, from the admission of evidence to its application to specific facts, is epistemically sound.[22]

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[17] See infra notes 90-96 and accompanying text.

[18] Scott Brewer, Scientific Expert Testimony and Intellectual Due Process, 107 Yale L.J. 1535, 1540 (1998).

[19] See id. at 1539.

[20] Id.

[21] Id.

[22] See id. at 1676 (noting belief among leading jurists that "factfinding, including factfinding regarding matters that are the special epistemic province of expert scientists, must be conducted in a coherent and rational manner in order that this epistemic process

This Note argues that in order to ensure intellectual due process, historians should be appointed by the court rather than called by the parties when cases require expert historical testimony.[23] District court judges—the gatekeepers of expert testimony—have the power to appoint experts under Rule 706 of the Federal Rules of Evidence.[24] This approach will remove historians from the adversary process, the foremost culprit in tempting historians to stray from the principles of their craft.[25] As groundwork for this argument, Part I explores the inescapable tension between history and law, especially with respect

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meet the normative requirements of a legal system that operates to grant or deprive people of life, liberty, and property").

[23] Problems with expert historical testimony arguably could be solved through a more stringent application of the requirements of Rule 702. See Wendie Ellen Schneider, Case Note, Past Imperfect, 110 Yale L.J. 1531, 1535-45 (2001) (finding Rule 702 requires use of "conscientious historian" standard to evaluate historical testimony). This Note argues, however, that such an approach would be insufficient in neutralizing the oppressive influence of adversarialism on expert historians. For the reasons laid out below, Rule 706 offers a superior doctrinal entry point for expert historical witnesses.

[24] The full text of Rule 706 is as follows:

> Rule 706. Court Appointed Experts
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> (a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.
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> (b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.
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> (c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.
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> (d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

Fed. R. Evid. 706.

[25] Several scholars have argued that all expert witnesses should be appointed by the court. See infra note 169. Because that argument has largely fallen on deaf ears in federal courts, this Note attempts to demonstrate precisely why court appointment is necessary for expert historical testimony. Similar close analysis can and should be applied to experts in other fields.

to the virtues of advocacy. Part II reveals how this tension is most extreme when adversarialism is at its height—in the courtroom, when historians serve as expert witnesses. Part III argues that Rule 706 can best accommodate the conflicting logics and methods of history and law, allowing the legal system to continue to take advantage of useful and useable historical testimony.[26]

I
THE ANTAGONISM OF LAW AND HISTORY

In many ways, the disciplines of law and history have a natural affinity. They share a common outlook and similar articles of faith. As Judge Richard A. Posner observes, "Law is the most historically oriented, or if you like the most backward-looking, the most 'past-dependent,' of the professions. It venerates tradition, precedent, pedigree, ritual, custom, ancient practices, ancient texts, archaic terminology, maturity, wisdom, seniority, gerontocracy, and interpretation conceived of as a method of recovering history."[27] The common law doctrine of stare decisis, the obligation to apply settled precedents to new facts, involves courts in a distinctly historical task.[28] Courts act even more like historians when they elucidate the legal or social circumstances that generated a particular precedent or statute.[29] Because the legal system derives its authority from the past and because every case has its own factual history, it is unsurprising that history and law converge both in spirit and in practice.[30]

This close relationship between history and law is nonetheless suffused with tension.[31] Lawyers and historians are in many respects

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[26] History is too important to the legal process to omit altogether. See Charles E. Wyzanski, Jr., History and Law, 26 U. Chi. L. Rev. 237, 244 (1959) ("I . . . urge that there is in history a meaning, and a meaning that has value for law, as it has for the spirit of man in many another aspect. . . . [H]istory gives us another perspective or value against which to measure law. History teaches us the nature of legitimate authority.").

[27] Richard A. Posner, Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship, 67 U. Chi. L. Rev. 573, 573 (2000).

[28] See Robert W. Gordon, The Past as Authority and as Social Critic: Stabilizing and Destabilizing Functions of History in Legal Argument, in The Historic Turn in the Human Sciences 339, 340 (Terence J. McDonald ed., 1996) ("The common law method of adjudication . . . is inescapably to some extent backward-looking.").

[29] See Alfred H. Kelly, Clio and the Court: An Illicit Love Affair, 1965 Sup. Ct. Rev. 119, 121 (observing that when courts decide to "inquire into the circumstances surrounding earlier judicial expositions of the law, [they get] still deeper into the writing of history").

[30] See Peter Charles Hoffer, "Blind to History": The Use of History in Affirmative Action Suits: Another Look at City of Richmond v. J.A. Croson Co., 23 Rutgers L.J. 271, 275 (1992) ("[C]ourts must engage in historical analysis because *cases* are historical events—each case has its own past.").

[31] See Michal R. Belknap, Introduction to Bicentennial Constitutional and Legal History Symposium, 24 Cal. W. L. Rev. 221, 222 (1988) ("[T]he nature of [the] relationship

odd bedfellows. As an initial matter, history and law operate on different time frames. History is inherently a process of refinement;[32] law, in the interest of finality, cannot afford that luxury.[33] For this reason, "[t]he uncertainty, debatability, and indefinite revisability of 'historical truth'—the slow, contended truth of scholarship—sits uncomfortably enough next to 'trial truth'—the near-conclusive artifact of rule-bound case resolution enjoying the power of the state to back it up."[34]

Added tension results from the adversarial nature of the legal system. The adversary process requires lawyers to spin the law and facts to serve their clients; lawyers are not expected, or even permitted, to be balanced or impartial. Historians, by contrast, should be open to all evidence they might encounter, and they accentuate the very ambiguities, contradictions, and inconsistencies that lawyers work doggedly within ethical bounds to hide or to smooth over.[35]

The differences between history and law can make the two disciplines not just odd bedfellows but perfect strangers. Historians and lawyers both go to the past for evidence, but "there the similarity largely ends," John Phillip Reid insists.[36] History and law have "different logics,"[37] he contends, and the differences "are so basic that they make the ways that the two professions interpret the past almost incompatible. In discovering the past, the historian weighs every bit of evidence that comes to hand. The lawyer, by contrast, is after the single authority that will settle the case at bar."[38] While historians' logic of evidence acknowledges complexity, nuance, and contingency,

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[between history and law] is debatable and the issue of what it ought to be is a matter of considerable controversy."); Gordon, supra note 28, at 339 (describing historians and lawyers in "a relationship of intimate antagonism").

32 See Marc Bloch, The Historian's Craft 58 (Peter Putnam trans., 1962) ("[T]he knowledge of the past is something progressive which is constantly transforming and perfecting itself.").

33 See Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 597 (1993) (noting that in courtrooms law must achieve "a quick, final, and binding legal judgment . . . about a particular set of events in the past").

34 David Abraham, Where Hannah Arendt Went Wrong, 18 L. & Hist. Rev. 607, 609 (2000).

35 See Kelly, supra note 29, at 155 (emphasizing "radical difference in theory and process between the traditional Anglo-American system of advocacy and equally time-honored techniques of the scholar-historian").

36 John Phillip Reid, Law and History, 27 Loy. L.A. L. Rev. 193, 195 (1993).

37 Id. (quotations omitted).

38 Id. at 195-96. See also Deborah Lipstadt, Perspectives from a British Courtroom: My Struggle with Deception, Lies, and David Irving, in 1 Remembering for the Future: The Holocaust in an Age of Genocide 769, 769 (John K. Roth & Elisabeth Maxwell eds., 2001) ("History and forensic methodology are frequently not just incompatible. They can actually operate at cross purposes.").

lawyers' logic of authority prizes determinative evidence—the knockout punch.

The contradictions are even more apparent inside the courtroom. One historian who spent thirty-five years as an expert witness in Native American rights cases claims that history and law are natural, ever-warring enemies. "My experience has taught me that the law is opposed to history," Helen Hornbeck Tanner writes, "that history and the law are in a state of perpetual warfare in the courts of law."[39] She, too, locates the fundamental incompatibility of history and law in the latter's predisposition to reject the complexity and nuance that are central to the craft of history. Historical data and interpretations, she insists, "are often too subtle to be processed by a rigid 'right or wrong' system of decision-making."[40]

The antagonism between law and history runs deep, to the core logics and methods of the two disciplines. Acknowledging that incompatibility is the first step in salvaging the relationship between history and law. To understand why history is so troublesome in the legal sphere, it is useful to examine, first, occasions when a lawyer assumes the role of historian and, second, occasions when a historian assumes the role of advocate.

A. Lawyers as Historians

Much has been written about the use of history by lawyers and judges.[41] A common theme emerging from that literature is historians' frequent complaint that lawyers just can't seem to get it right.

Consider, for example, the debates over originalism. This constitutional theory has a long tradition, but it flourished with new vigor in the 1980s. Originalists claim that history *should* be determinative of constitutional interpretation and that it *can* be, by revealing the intent of the framers and ratifiers of the Constitution.[42]

Many historians have denounced originalism as bad history. They have criticized originalism's tendentious selection and interpretation of historical data, alleging that originalists had merely comman-

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[39] Tanner, supra note 3, at 694.

[40] Id. at 698.

[41] See, e.g., Charles A. Miller, The Supreme Court and the Uses of History (1969); Martin S. Flaherty, History "Lite" in Modern American Constitutionalism, 95 Colum. L. Rev. 523, 526 (1995) (criticizing poor historical methods of most constitutional theorists).

[42] See Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in A Matter of Interpretation: Federal Courts and the Law 3, 45 (Amy Gutmann ed., 1997) ("[T]he originalist at least knows what he is looking for: the original meaning of the text. Often—indeed, I dare say usually—that is easy to discern and simple to apply.").

deered the historical record in service of a constitutional offensive.[43] Because the history generated by originalists is utilitarian and overdetermined, it fails to respect the pastness of the past—it fails, that is, "to understand the past on its own terms and maintain a respect for its integrity."[44] "With its pressing need to find determinate meanings at a fixed historical moment," Jack Rakove has written, "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."[45] Historians also emphasized the inherent indeterminacy of the available evidence: James Hutson showed that the documentary record of the founding period was simply too fragmentary to supply the objective historical facts originalists hoped would anchor their constitutional theory.[46] In these ways, originalism violated principles of historical method. It ignored the distinctiveness of the past, the complexity of the evidence, and the ultimate contingency and indeterminacy of the question posed.[47]

Liberal legal scholars also derided originalism, but they, too, enlisted history in an attempt to beat originalists at their own game. Led by Cass Sunstein and Bruce Ackerman,[48] liberal legal scholars exploited the renewed interest among historians in the nation's republican roots.[49] Historians were demonstrating that founding-era republicanism—predicated on community, civic virtue, and the public good—was a distinct check on the Lockean liberal values of competi-

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[43] See Richard B. Bernstein, Charting the Bicentennial, 87 Colum. L. Rev. 1565, 1602-07 (describing scholarship casting a "bleak light" on the "possibility of an identifiable, clear, and applicable intent of the Framers about the meaning of constitutional provisions") (1987).

[44] Id. at 1568.

[45] Jack N. Rakove, Parchment Barriers and the Politics of Rights, in A Culture of Rights: The Bill of Rights in Philosophy, Politics, and Law—1791 and 1991, at 98, 100-01 (Michael J. Lacey & Knud Haakonssen eds., 1991).

[46] James H. Hutson, The Creation of the Constitution: The Integrity of the Documentary Record, 65 Tex. L. Rev. 1, 38-39 (1986) (finding that defects in documentary records produced during drafting of U.S. Constitution make it impossible to determine Framers' intentions).

[47] See Gordon S. Wood, Ideology and the Origins of Liberal America, 44 Wm. & Mary Q. 628, 632-33 (1987) ("It may be a necessary fiction for lawyers and jurists to believe in a 'correct' or 'true' interpretation of the Constitution in order to carry on their business, but we historians have different obligations and aims.").

[48] See Laura Kalman, Border Patrol: Reflections on the Turn to History in Legal Scholarship, 66 Fordham L. Rev. 87, 97-98 (1997) (noting trailblazing works of Ackerman and Sunstein on republicanism).

[49] See Linda R. Kerber, Making Republicanism Useful, 97 Yale L.J. 1663, 1663-64 (1988) (describing "revisionist" portrayals of founding-era republicanism).

tive individualism and self-interest.[50] Many law professors hoped republicanism would sanction the path taken earlier in the century by the Warren Court and solve countermajoritarian difficulties.[51]

Historians were as critical of legal scholars' "republican revival" as they were of the originalist theory to which it responded. Historians were bemused by the quaint version of republicanism that appeared in legal scholarship. Lawyers' republicanism turned a blind eye to the idea's strong authoritarian streak, especially its emphasis on militarism, elitism, and patriarchy.[52] It was a rosier and more simplistic version of the republicanism that historians were charting in the American past. In no uncertain terms, historians informed the republican revivalists that their poor methods could not permit them to lay claim to historical knowledge.[53]

Historians saw in both originalism and the republican revival the dangers of "roaming through history looking for one's friends."[54] Liberals and conservatives had appropriated history as prescriptive authority for a political mission in the present. The result was woefully flat and tendentious history. Noting that "persuasive historical procedure dictates genuine concern for facts, sources, and context," one historian concluded that "[a]biding by just these standards is hard and time-consuming work, often too hard and time-consuming to meet the imperatives of legal scholarship."[55] Historians dismissively used the term "law-office history" to characterize "the selection of data favorable to the position being offered without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered."[56]

B. Historians as Advocates

History is not always smuggled into the legal process by lawyers and jurists. Historians themselves introduce the findings and perspectives of their field, usually in the form of amicus briefs. The role of historians as amici curiae began in earnest with the landmark case of *Brown v. Board of Education*.[57] Their experience in that case and later cases reveals that historians often have as much difficulty

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50 See id.

51 See Kalman, supra note 48, at 101-02.

52 See Kerber, supra note 49, at 1668-70.

53 See Laura Kalman, The Strange Career of Legal Liberalism 175 (1996) (describing historians' criticism of republican revival).

54 Morton J. Horwitz, Republican Origins of Constitutionalism, in Toward a Usable Past 148 (Paul Finkelman & Stephen E. Gottlieb eds., 1991).

55 Flaherty, supra note 41, at 554.

56 Kelly, supra note 29, at 122 n.13.

57 347 U.S. 483 (1954).

meeting the standards of their craft as do the lawyers they so often criticize. Historians, too, can be guilty of "law-office history."

Historians played a significant role in the NAACP's efforts in *Brown*.[58] Even as they agreed to assist the NAACP legal team, historians expressed qualms about being drawn into the vortex of advocacy. As C. Vann Woodward, a prominent historian of the late nineteenth-century South, insisted when he was approached by the legal team headed by Thurgood Marshall,

> I should feel constrained by the limitations of my craft. . . . I would stick to what happened and account for it as intelligently as I could. . . . You see, I do not want to be in a position of delivering a gratuitous history lecture to the Court. And at the same time I do not want to get out of my role as historian.[59]

For some historians, however, the vortex's pull was too strong to resist. They grimly reported to Marshall that it was unlikely that the framers and ratifiers of the Fourteenth Amendment had anticipated desegregating the nation's public schools.[60] Undeterred, however, the historians incorporated the encouraging facts they could find respecting the Amendment's intent into a story the NAACP could take to the Supreme Court.[61]

At least one of those historians later questioned whether he and the rest of the historians on the team had been overwhelmed by the pressures of advocacy. Alfred H. Kelly, chairman of the history department at Detroit's Wayne State University, worried that his alacrity had led him to exceed the limitations of his craft:

> I am very much afraid that . . . I ceased to function as an historian and instead took up the practice of law without a license. The problem we faced was not the historian's discovery of the truth, the whole truth, and nothing but the truth; the problem instead was the formulation of an adequate gloss on the fateful events of 1866 sufficient to convince the Court that we had something of an historical case. . . . It is not that we were engaged in formulating lies; there was nothing as crude and naive as that. But we were using facts, emphasizing facts, bearing down on facts, sliding off facts in a way to do what Marshall said we had to do—"get by those boys down there."[62]

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[58] See John Hope Franklin, The Historian and the Public Policy, in Race and History 309, 312 (1989) (noting that historical questions posed by Court in *Brown* sent NAACP legal counsel "scurrying not to the history books but to the historians").

[59] Richard Kluger, Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality 623 (1975).

[60] Id. at 634-35.

[61] Id. at 640-41.

[62] Id. at 640.

Whether it was the adversary system or the compelling presence of Thurgood Marshall, the historians in *Brown* found themselves acting not much like historians. Rather than accommodating all of the available evidence in a complex argument, Kelly and others found that advocacy required them to ignore countervailing evidence and mold facts into a desired shape.

Since *Brown*, historians have submitted briefs as amici curiae in other Fourteenth Amendment cases where intent was a prominent issue. Several historians joined together to submit a brief in *Patterson v. McLean Credit Union*, a case that in part addressed whether Congress intended for the Civil Rights Act of 1866 to apply to private actors as well as government.[63] The historians' brief claimed in no uncertain terms that "it is indisputable that the Act was intended to reach private as well as official conduct."[64] The brief promised to "conclusively demonstrate that the Act was intended by its framers . . . to protect the civil rights of both blacks and whites, notwithstanding whether the source of a civil rights violation was a private individual, a state official or a discriminatory state statute or local ordinance."[65]

Eric Foner, a historian who signed the brief, wrote the definitive work on the Reconstruction, during which time the Civil Rights Act of 1866 was enacted. In that book, *Reconstruction: America's Unfinished Revolution 1863-1877*, Foner addresses precisely the issue presented in *Patterson*, and he does so in a way that accentuates the complexity of the Act's ideological and political context. He ultimately concludes that "despite its intriguing reference to 'customs' that deprived blacks of legal equality, the Civil Rights Bill was primarily directed against public, not private, acts of injustice."[66] Foner's conclusion, tinged with regret, runs directly counter to the brief he signed in *Patterson*, which claimed to prove "conclusively"[67] that private conduct was an "indisputable"[68] target of the Civil Rights Act of 1866. As Randall Kennedy observed in a book review of *Reconstruction*, "Foner's ambivalent, nuanced, and tentative treatment of the

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63 See Patterson v. McLean Credit Union, 491 U.S. 164, 171-72 (1989).

64 Brief of Amici Curiae Eric Foner et al. at 10, Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (No. 87-107). The brief was also signed by John H. Franklin, Louis R. Harlan, Stanley N. Katz, Leon F. Litwack, C. Vann Woodward, and Mary Frances Berry. Id. at 1.

65 Id. at 3.

66 Eric Foner, Reconstruction: America's Unfinished Revolution 1863-1877, at 245 (1988).

67 Brief of Amici Curiae at 3.

68 Id. at 10.

issue in his scholarly work stands in sharp contrast to the unambiguous assertions advanced in the amicus curiae brief that he signed."[69]

The contrast between historians' scholarship and advocacy was equally stark in a brief filed in *Webster v. Reproductive Health Services*.[70] The case had the potential to undermine the rights established by *Roe v. Wade*, and prochoice advocates filed more amicus briefs in *Webster* than had ever before been filed in the Supreme Court.[71] One of these was a brief signed by over 400 professional historians.[72] The historians had been mobilized by Sylvia Law, a professor at New York University School of Law, along with attorneys Clyde Spillenger and Jane E. Larson, in order to lay out the long tradition of open and legal abortion practice in the United States.[73]

The history of abortion in the United States, however, is a complicated subject. As Estelle B. Freedman, a leading women's historian and a signer of the brief, observed, "the history of abortion practice in America is characterized more by change than by continuity, even though it is true that there have always been women who have attempted to abort."[74] In truth, she conceded, "there is just too little historical work on the subject to be conclusive."[75] James C. Mohr, whose book *Abortion in America* was used by both sides in the case, was especially torn. He acknowledged that "[t]he history of abortion policy in the United States is full of complexity, paradox, nuance, and ambiguity," and that "[t]here is material for the government's case, at least in limited amounts, in my work."[76] But he ultimately concluded that he could lend his name to the conclusions, however blunt, arrayed in the brief. Mohr and Friedman were not alone. Other historians were equally disconcerted by the fact that the brief represented "a departure from the tentativeness and even-handedness they believed should characterize historical scholarship."[77]

Professor Law admitted that the brief obscured the complexity and ambiguity that historians insisted were the hallmarks of abortion's

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69 Randall Kennedy, Reconstruction and the Politics of Scholarship, 98 Yale L.J. 521, 538 n.70 (1989).

70 492 U.S. 490 (1989).

71 Sylvia A. Law, Conversations Between Historians and the Constitution, Pub. Historian, Spring 1983, at 11, 11.

72 Id.

73 Id. at 11-12.

74 Estelle B. Freedman, Historical Interpretation and Legal Advocacy: Rethinking the *Webster* Amicus Brief, Pub. Historian, Summer 1990, at 27, 30.

75 Id. at 31.

76 James C. Mohr, Historically Based Legal Briefs: Observations of a Participant in the *Webster* Process, Pub. Historian, Summer 1990, at 19, 24.

77 Jane E. Larson & Clyde Spillenger, "That's Not History": The Boundaries of Advocacy and Scholarship, Pub. Historian, Summer 1990, at 33, 40.

history. "Our most serious deficiencies as truth-tellers," she noted, "were failures of flatness."[78] She identified two major factors that "constrained our ability to 'tell the truth.'"[79] First was the impossibility of capturing the complex history of abortion in thirty pages, and second was an inherent "tension between truth-telling and advocacy."[80] For example, several of the historians pointed out that most nineteenth-century feminists had actually supported abortion restrictions.[81] While the brief highlighted the misogyny of the American Medical Association and of the state legislatures that adopted such restrictions, it elided reference to feminist support. Law conceded that "the silence is distorting."[82]

Professor Law explained the brief's distorting omission by observing that "the document is constructed to make an argumentative point rather than to tell the truth."[83] She had written much of the brief, and she was playing the advocate's role that the system expected. A few historians, however, were "fastidious about the way in which . . . ambiguous issues were treated," and they refused to sign the brief because its final draft was "not sufficiently nuanced."[84] They concluded that it was impossible to be at once historians and advocates if the price would be a sacrifice of historical complexity. And even those who signed the brief questioned whether the final product could appropriately be labeled history. Mohr admitted that he did not "ultimately consider the brief to be history, as I understand that craft. It was instead legal argument based on historical evidence."[85] Mohr wrote that he signed the brief as a citizen as well as a historian, and that the brief met his political standards even as it failed his historical ones.[86]

Historians, then, are also susceptible to confusing the logics of law and history. As amici curiae, they have smoothed over complexity, ignored countervailing evidence, and contradicted their own scholarship—all in the name of advocacy. Highlighting those aspects of the historical record their side required to prevail, they have written "law-office history."

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78 Law, supra note 71, at 14.

79 Id.

80 Id.

81 Id. at 15.

82 Id.

83 Id. at 16.

84 Larson & Spillenger, supra note 77, at 42.

85 Mohr, supra note 76, at 25.

86 Id. Mohr did not sign a similar brief submitted by historians, and drafted by Professor Law, in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), another important abortion rights case. See Kalman, supra note 53, at 200.

II
HISTORY ON THE WITNESS STAND

The discussion above suggests in broad outline the fundamental incompatibility of history and advocacy. Rather than providing textured and conditioned explanations, historian-advocates serve up certitude and clarity, categorical arguments designed for an adversary system.[87] This Part examines the role of history and historians in the courtroom, where adversarialism reaches its highest pitch. It argues that expert historical testimony often derogates so far from accepted historical standards that norms of intellectual due process are undermined.

Courtrooms are enticing to historians because the legal process affords them prominent opportunities to affect the dominant issues of the day. "The courts are often historians' closest link to practical political power," Randall Kennedy explains. "That link is a source of both temptation and vulnerability: it tempts historians to exercise influence and renders them vulnerable to lawyers and judges who merely deploy historical scholarship as a weapon of persuasion."[88] That temptation and vulnerability are most intense when historians enter courtrooms to serve as expert witnesses. "[I]t is difficult to imagine a forum less tolerant of the nuanced, careful arguments in which historians delight than a courtroom," historian Ruth Milkman observes, "[a]nd rarely are the stakes so high in a scholarly debate."[89] Expert historical testimony displays most glaringly the conflicting principles and methods of history and law.

Like all expert witnesses, historians must satisfy the requirements of Rule 702 of the Federal Rules of Evidence before their testimony can be admitted. In *Daubert v. Merrell Dow Pharmaceuticals,* the Supreme Court laid out a nonexclusive list of factors judges should use in determining admissibility under Rule 702.[90] At bottom, those factors are designed to ensure that expert testimony is epistemically sound.[91] Rule 702 permits opinion testimony by those who have sci-

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[87] See Reuel E. Schiller, The Strawhorsemen of the Apocalypse: Relativism and the Historian as Expert Witness, 49 Hastings L.J. 1169, 1175 (1998) ("As long as advocates exist, so will warped history.")

[88] Kennedy, supra note 69, at 538.

[89] Ruth Milkman, Women's History and the Sears Case, 12 Feminist Stud. 375, 376 (1986).

[90] The factors include whether the theory underlying the testimony can be (and has been) tested, whether it has been subjected to peer review and publication, its known or potential rate of error, and its general acceptance in the field. Daubert v. Merrell Dow Pharm., 509 U.S. 579, 593-94 (1993).

[91] See id. at 595 ("The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.").

entific, technical, or other specialized *knowledge*. As the Court makes clear, "[T]he word 'knowledge' connotes more than subjective belief or unsupported speculation."[92] The word presumes a sound methodological foundation: "Proposed testimony must be supported by appropriate validation—i.e., 'good grounds,' based on what is known. In short, the requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability."[93] In *Kumho Tire Co. v. Carmichael*, the Court held that the *Daubert* standard applies to all experts, not just scientific experts.[94] It also reaffirmed that the judge's gatekeeping role "is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[95] An expert's fidelity to method is at the heart of intellectual due process.[96]

A. Historical Method

Under *Daubert* and *Kumho*, therefore, a federal judge faced with a proffer of expert historical testimony must determine whether the underlying knowledge was indeed generated by accepted historical methods. That is a difficult task because historians are extraordinarily reticent on the subject of method.[97] Historians generally resist exposing the nuts and bolts of their profession. "We work within a variety of styles," historian John Lewis Gaddis observes, "but we prefer in all of them that form conceal function."[98] The judge's task is made yet more difficult by the fact, as Gaddis suggests, that historians have numerous approaches to their craft, not all of them overlapping. Indeed, as Thomas Bender writes, history comprises a number of dis-

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92 Id. at 590.

93 Id.

94 Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999).

95 Id. at 152.

96 See Brewer, supra note 18, at 1539 (noting that intellectual due process requires that nonexpert judges and juries gain an understanding of experts' method).

97 See Peter Karsten & John Modell, Introduction to Theory, Method, and Practice in Social and Cultural History 1, 3 (Peter Karsten & John Modell eds., 1992) ("[H]istorical method is, in effect, generally taught 'by osmosis': contact with senior historians acting like historians, analysis of historical monographs, writing, and rewriting."); Joan C. Williams, Clio Meets Portia: Objectivity in the Courtroom and the Classroom, in Ethics and Public History: An Anthology 45, 47 (Theodore J. Karamanski ed., 1990) ("Historians' methodological norms are primarily an oral tradition, passed on to successive generations of students in graduate seminars . . . .").

98 John Lewis Gaddis, The Landscape of History: How Historians Map the Past, at xi (2002).

crete subfields, each "studied in its own terms, each with its own scholarly network and discourse."[99]

Nevertheless, there are methodological principles and norms on which historians agree.[100] These commonalities give coherence to the field—they are what make history a "craft." Most important is respecting the pastness of the past: "[T]he foundation on which traditional history rests is the identification of some previously unknown way in which the past differed from the present."[101] Historians respect the integrity and isolation of historical moments even as they map transitions from one to the next. In accounting for change over time, historians follow two interrelated cardinal rules: first, accommodating the complexity and inconsistency in the historical record and, second, reckoning with contrary evidence.[102]

These methodological rules have a certain synergy because the obligation to incorporate all available evidence into a historical interpretation necessarily results in increased complexity, nuance, and ambiguity. E.H. Carr, author of a respected exposition on historical method, insisted that a historian "must seek to bring into the picture all known or knowable facts relevant, in one sense or another, to the theme on which he is engaged and to the interpretation proposed."[103] Doing so keeps the historian hewing toward a complex interpretation that accounts for all of the facts. Carr writes that

> the historian is engaged on a continuous process of moulding his facts to his interpretation and his interpretation to his facts. . . . As he works, both the interpretation and the selection and ordering of facts undergo subtle and perhaps partly unconscious changes through the reciprocal action of one or the other.[104]

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[99] Thomas Bender, Wholes and Parts: The Need for Synthesis in American History, 73 J. Am. Hist. 120, 128 (1986).

[100] See, e.g., Robert F. Berkhofer, Jr., Beyond the Great Story: History as Text and Discourse 45 (1995) ("Although historians cannot agree on the single right or best interpretation of any given past . . . , they still seek criteria for limiting the profusion of narratives and arguments about any given past.").

[101] William Nelson, An Exchange Between Robert W. Gordon and William Nelson, 6 L. & Hist. Rev. 139, 160 (1988).

[102] An exhaustive discussion of historical method is beyond the scope of this Note. These two methodological rules are, however, especially susceptible to corruption by adversary procedure. See Williams, supra note 97, at 47 ("The norms that present the greatest problems for historians acting as expert witnesses are those concerning treatment of supporting evidence and of counterevidence.").

[103] Edward Hallett Carr, What is History? 32 (1961).

[104] Id. at 34-35.

Historical explanations accentuate rather than smooth over complexity, working their way toward ever more subtle, often ambiguous, interpretations of the available evidence.[105]

For these reasons, historical arguments are rarely categorical. There are some subjects on which historians claim certainty, but these are few.[106] As H. Jefferson Powell maintains, "Complex historical assertions are always probabilistic in character," involving "greater and lesser likelihoods that they are correctly describing past reality."[107] Historians are suspicious of explanations that explain too much, for reductive simplicity is the incriminating imprint left by a historian's overbearing hand. "The criticism 'it's more complicated than that' is almost invariably a safe one in historical circles," historian Joan Williams observes, "while overly aggressive bonding of materials into a seamless thematic whole can easily raise eyebrows."[108] The complexity of the past, the indeterminacy of the historical record, and the contingency of human experience push historians toward a method that produces knowledge that is necessarily multivalent, subtle, and revisable.[109]

Historical method prizes complexity and nuance because the discipline understands human experience to arise from multiple perspectives. Historians assume that the same basic set of facts can support

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[105] Cf. Ernest R. May, "Lessons" of the Past: The Use and Misuse of History in American Foreign Policy 189 (1973) ("[H]istory is not easily condensed. . . . Moreover, most historians by training and perhaps temperament tend to err on the side of giving too much detail and introducing too many qualifications.").

[106] One historian acknowledges:

> It is true, of course, that many simple historical statements are either correct by definition or supported by such overwhelming evidence that we can assume their accuracy. An example of the former is "The British monarch whose authority the American revolutionaries denounced was King George III"; "George III" is the label we give to whomever the revolutionaries rejected and by itself tells you nothing about its subject. An example of the second type of statement is "The convention that drafted the present federal Constitution met in Philadelphia in 1787." The evidence for the framing convention's location and date is enormous and uncontested.

H. Jefferson Powell, Rules for Originalists, 73 Va. L. Rev. 659, 678-79 (1987).

[107] Id.

[108] Williams, supra note 97, at 47.

[109] Raymond Aron notes that

> [h]istorical extrapolations are most often hazardous because they bear on a limited area without cognizance of the complexity of historical reality, and without noting forces contrary to those which move in the extrapolated direction. In the place of a history which tends always toward one meaning, one should put the presentation of a struggle between relatively autonomous forces whose outcome is not decided in advance.

Raymond Aron, Evidence and Inference in History, in Evidence and Inference: The Hayden Colloquium on Scientific Concept and Method 19, 43-44 (Daniel Lerner ed., 1959).

and be approached from several points of view.[110] Those points of view produce multiple stories that together can be marshaled into a complicated picture of the past. History is refined by adding complexity, not by reaching a singular truth, for "the quest for a single best or right interpretation denies multiple voices and viewpoints."[111] Law, by contrast, rests on the belief that there can and must be a triumphant perspective on a certain set of facts.

B. Historians on the Stand

Not infrequently, lawyers enlist historians to promote their clients' perspectives.[112] Despite the stress courtroom testimony places on their professional standards, historians routinely oblige. As historian John Hope Franklin points out, "In virtually every area where evidence from the past is needed to support the validity of a given proposition, an historian can be found who will provide the evidence that is needed."[113] This section examines two instances in which historians served as expert witnesses. These instances reveal the problems faced by all historians who are called to the witness stand, where the temptation is strong to compromise the methodological rigor expected outside the courtroom.

In 1979, the Equal Employment Opportunity Commission (EEOC) brought a Title VII sex discrimination suit against Sears, Roebuck & Co., alleging that Sears discriminated against women in hiring and promotion for commission sales jobs.[114] These jobs offered less certainty and regularity in income, but they tended to be among the better paying jobs at Sears. The EEOC rested its case entirely on statistical evidence showing clearly that women were underrepresented in the commission sales force.[115] Sears did not dispute the statistical underrepresentation of women in those jobs, but it insisted that any inference of discrimination rested on an assumption that women were as interested as men in nontraditional jobs like commission sales, an assumption the EEOC had not proved.[116] Sears accounted for the statistical disparity by arguing that many women

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[110] See Joyce Appleby et al., Telling the Truth About History 256 (1994) ("Historians' interpretations can be mutually exclusive, but their differing perspectives are not. If one sees an event from a slave's point of view, that rendering does not obliterate the perspective of the slaveholder; it only complicates the task of interpretation.").

[111] Berkhofer, supra note 100, at 53.

[112] See supra notes 2-16 and accompanying text.

[113] Franklin, supra note 58, at 310.

[114] EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264, 1278 (N.D. Ill. 1986), aff'd, 839 F.2d 302 (7th Cir. 1988).

[115] See id. at 1285.

[116] See id. at 1305.

disliked the competitive atmosphere of commission sales jobs, feared nonacceptance by customers in sales of traditionally male-oriented product lines, and found the uncertainty of commission sales not worth the potential for better pay.[117]

One member of Sears's legal team had formerly been married to a historian, and he knew that recent scholarship in women's history supported their legal argument that women's interests and priorities could not be assumed to be identical to those of men. Sears hired his ex-wife, Rosalind Rosenberg of Barnard College, as an expert witness.[118] Rosenberg testified that the "EEOC assumption that women and men have identical interests and aspirations regarding work is incorrect." She explained that "[h]istorically, men and women have had different interests, goals, and aspirations regarding work. These differences in interests and attitudes, though in many instances diminishing, have persisted into the present."[119] In her offer of proof, Rosenberg cited heavily from current scholarship in women's history in order to undermine the EEOC's underlying assumption that men and women have the same views of work: "The overwhelming weight of modern scholarship in women's history and related fields supports the view . . . that disparities in the sexual composition of an employer's workforce . . . are consistent with an absence of discrimination on the part of the employer."[120]

One of the women's historians on whom Rosenberg relied was Alice Kessler-Harris of Hofstra University. Worried that her work was being put to uses that would have unfortunate political consequences, Kessler-Harris signed on as an expert witness for the EEOC.[121] Kessler-Harris directly contradicted Rosenberg's testimony. "History does not sustain the notion that women have, in the past, chosen not to take nontraditional jobs," she claimed.[122] Rather,

> History's evidence clearly indicates that substantial numbers of women have been available for jobs at good pay in whatever field those jobs are offered, and no matter what the hours. Failure to

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117 See Milkman, supra note 89, at 384-85 (citing posttrial brief of Sears, Roebuck & Co.).

118 See Peter Novick, That Noble Dream: The "Objectivity Question" and the American Historical Profession 503 (1988).

119 Offer of Proof Concerning the Testimony of Dr. Rosalind Rosenberg, *Sears* (No. 79-C-4373), reprinted in Jacquelyn Dowd Hall, Women's History Goes to Trial: EEOC v. Sears, Roebuck and Company, 11 Signs 751, 757 (1986).

120 Written Rebuttal Testimony of Dr. Rosalind Rosenberg, *Sears* (No. 79-C-4373), quoted in Milkman, supra note 89, at 387.

121 See Alice Kessler-Harris, Equal Opportunity Employment Commission v. Sears, Roebuck and Company: A Personal Account, 35 Radical Hist. Rev. 57 (1986).

122 Written Testimony of Alice Kessler-Harris, *Sears* (No. 79-C-4373), reprinted in Hall, supra note 119, at 767.

> find women in so-called nontraditional jobs can thus only be interpreted as a consequence of employers' unexamined attitudes or preferences, which phenomenon is the essence of discrimination.[123]

Both Rosenberg and Kessler-Harris were excellent and well-respected historians. Both had won prestigious prizes for their contributions to women's history.[124] But both historians derogated from their customarily high standards for history when they appeared on the stand.[125] Kessler-Harris later admitted that the pressures of the adversary system had caused her to exaggerate her claims. "To refute Rosenberg's argument," she recounted, "I found myself constructing a rebuttal in which subtlety and nuance were omitted, and in which evidence was marshaled to make a point while complexities and exceptions vanished from sight."[126] Kessler-Harris was especially criticized by the judge for her assertion that discrimination by employers was the "only" historical explanation for the underrepresentation of women in nontraditional jobs. The judge pointedly observed that "[s]he offered no evidence to support this bald assertion."[127] But at the same time, Rosenberg offered a historical view of women's attraction to nontraditional jobs that was overly universalistic. She too elided contrary evidence in order to provide a more streamlined argument than historical evidence permitted.[128]

Similar problems are evident when historians are called to serve as experts in tobacco litigation. A frequent line of defense for tobacco companies is that Americans have long been aware that smoking posed health risks, even before warnings to that effect appeared on cigarette packs in 1966. By proving that the health risks of smoking were common knowledge, tobacco companies both undermine plaintiffs' claims that the companies had a duty to warn smokers before 1966 and make a showing that smokers had assumed any potential risks.

Tobacco companies learned that such testimony could be determinative in the minds of jurors.[129] They put significant resources into

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123 Id. at 779.

124 Haskell & Levinson, supra note 10, at 1630.

125 Both historians distorted their historical approaches under the pressure of the adversary process, but there is some dispute over who sinned less. Compare Williams, supra note 97, at 50 ("Presumably under pressure from their lawyers, both historians—although Rosenberg far more than Kessler-Harris—violated historical norms concerning treatment of counterevidence and inclusion of adequate qualifications."), with Haskell & Levinson, supra note 10, at 1652-53 ("Rosenberg's testimony is a faithful summary of mainstream professional opinion on the historical matters relevant to the case.").

126 Kessler-Harris, supra note 121, at 74.

127 EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264, 1314 n.63 (N.D. Ill. 1986).

128 See Williams, supra note 97, at 50-52.

129 See infra notes 145-46 and accompanying text.

finding historians who could convincingly and cogently testify that Americans throughout the twentieth century, and even earlier, understood that smoking could cause health problems, including cancer. Stephen Ambrose was one of these historians. One of the most popular historians of recent decades, Ambrose has been described by the *New York Times* as "the most prolific, the most commercially successful and the most academically accomplished of a new group of blockbuster historians."[130] In Ambrose, the tobacco companies secured a credentialed and popular historian who could tell their story in a way that was simple and believable. Ambrose bluntly declared that "[w]hen the warning went on the labels, you would have to of [sic] been deaf and blind not to have known" that smoking posed health risks.[131] If it is evident why Ambrose was selected by the tobacco companies, Ambrose made equally clear why he participated in the trials. Asked in a 1997 deposition why he was testifying for the tobacco industry, Ambrose forthrightly replied, "For compensation."[132] "So the reason you have agreed to provide the services is for the money?" the attorney persisted. "Yes," Ambrose answered.[133]

But Ambrose's testimony was suspect not so much because it was bought as because it strayed from historical methods (although there may be a connection between the two). His "deaf and blind" testimony skated over a complicated historical question. It stripped complexity and nuance away to produce an unequivocal historical assertion.

Consider as an example the tobacco industry's use of a 1954 Gallup poll as one piece of historical evidence. The poll had asked respondents whether they had "heard or read anything recently to the effect that cigarette smoking may be a cause of cancer of the lung."[134] A remarkable 89.9% of the respondents answered affirmatively.[135] Ambrose was asked whether the figure was of any significance to him. "As a historian, yes," he told the court and the jury, "it's absolutely astonishing. I can't think of hardly anything else that 89.9 percent of the American people would know. I would be ready to bet that 89.9 percent of the people of the United States don't know the name of the President."[136] In his answer, Ambrose cleverly used the word "know"

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130 David D. Kirkpatrick, As Historian's Fame Grows, So Do Questions on Methods, N.Y. Times, Jan. 11, 2002, at A1.

131 *Covert* Trial Transcript, supra note 1.

132 Maggi, supra note 13.

133 Id.

134 See Milo Geyelin, Gallup Accuses Big Tobacco of Misusing Poll in Court, Wall St. J., June 26, 1998, at B1.

135 Id. (rounding up to ninety percent).

136 *Covert* Trial Transcript, supra note 1, at 67.

rather than "had heard," thus leaving an impression that the poll indicated that virtually all Americans knew that cigarettes caused lung cancer. Ambrose was not the only historian to provide such testimony. In a separate case, Lacy K. Ford, a highly respected historian from the University of South Carolina, testified on the basis of the same poll that "[t]here were few facts that Americans knew better than the fact that cigarette smoking might cause lung cancer."[137]

The Gallup Organization was outraged by this use of its polling data. Gallup's managing editor told the *Wall Street Journal* that although the organization customarily affords "broad latitude in interpreting" its polling data, the historians' testimony "really crossed the line in terms of being an unacceptable and inaccurate interpretation that really could not be tolerated."[138] Gallup's editor-in-chief wrote Ford to request "that when you use Gallup Poll data to characterize public opinion on the risks of smoking in the future that you present the full range of measures that were asked and that you provide more careful interpretation of their meaning."[139] The Gallup Organization even threatened to send its own researchers to serve as expert witnesses for plaintiffs should the historians continue to distort the poll results.[140]

The historians' testimony had indeed violated several principles of historical method. Perhaps most important, the historians had failed to respect the pastness of the past. They had neglected to consider other Gallup polls that more fully tested Americans' views about the harms of smoking. In particular, the Gallup Organization demonstrated that in numerous polls Americans considered smoking "harmful" in that it caused coughing and other "vague, non-health related effects."[141] The historians' testimony thus exemplified "the problem of 'present-mindedness' which can interfere with modern interpretations of historical events and facts."[142] Ambrose and Ford, in their respective cases, had committed the cardinal sin of anachronism, and they had done so through their failure to account for countervailing evidence. Gallup criticized Ford for emphasizing "questions which are not representative of all the available questions dealing with

137 Geyelin, supra note 134 (quoting Ford).

138 Id.

139 Id.

140 Id.

141 Lydia Saad & Steve O'Brien, The Tobacco Industry Summons Polls to the Witness Stand: A Review of Public Opinion on the Risks of Smoking, paper presented at the annual meeting of the American Association for Public Opinion Research (May 15, 1998), at 11 (on file with *New York University Law Review*).

142 Id.

the general public's attitudes about the risks of smoking."[143] As a whole, the polling data "suggests that cancer did not loom very large in the public's consciousness about the health risks associated with smoking and that, in general, the perceived risks of smoking were much less serious than what we would expect from the public today."[144]

The historians' testimony had the effect desired by the tobacco companies. According to a *Wall Street Journal* report, "Jurors said that Mr. Ford's testimony about the Gallup poll strongly influenced them when they found in favor of Reynolds."[145] Likewise, the *Florida Times-Union* quoted one juror as saying, "I don't know how you dispute Gallup polls."[146] The jurors of course could not know that the Gallup Organization itself had demonstrated how to dispute the 1954 poll. Had the historians stayed true to historical methods, they too could have assimilated the countervailing evidence into a more complicated picture of Americans' midcentury awareness of smoking's health risks. The testimony would have been more ambiguous—and perhaps less appealing to the lawyers—but it would have been more historically accurate.

One might ask why the legal system should object to the streamlined history served up in court. The formal response is that the testimony violates the rules for admissibility of expert testimony laid out in *Daubert* and *Kumho*. But more significantly, this testimony violates the norms of intellectual due process. Spurious historical testimony is arbitrary in a fundamental sense, for it is unanchored to the very methods that support any historian's claim to "knowledge" about the past. Because the testimony is epistemically arbitrary, decisions by judges or juries that are based upon it are not legally justified.[147] When historians distort what actually can be "known" historically, and when factfinders rely upon that testimony, the results are epistemically arbitrary and represent a failure of intellectual due process.

C. *Problems of Adversary Procedure*

The source of the problems with historical testimony is not difficult to locate. The adversary system exerts a powerful force on all

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143 Id. at 15.

144 Id. at 12.

145 Geyelin, supra note 134.

146 June D. Bell, Disapproving Jurors: We Let Reynolds Off the Hook, Florida Times-Union, May 8, 1997, at A1, http://www.jacksonville.com/tu-online/stories/050897/2a1juror.html.

147 See Brewer, supra note 18, at 1677 ("A reasoning process that is *epistemically* arbitrary is incapable of producing a *legitimate* decision, for such a reasoning process is 'indistinguishable from arbitrary and unprincipled decisionmaking.'" (citation omitted)).

trial participants, and it compels historians to generate uncharacteristically categorical and unequivocal assertions. That influence is felt from the moment historians begin to meet with the lawyers who hire them. As historian Paul Soifer observes,

> During conferences or informal discussions, historians are constantly reminded of the stakes involved and what the facts are expected to prove. Such pressure is a new experience for historians, and they can become infected with the lawyer's zeal to win. . . . As a rule, the longer and more intimately involved historians are in a case, the greater the possibility that they may begin unconsciously tailoring the research to fit a predetermined conclusion.[148]

As Soifer suggests, expert historical witnesses usually do more than testify. They participate with lawyers in the development of facts and legal arguments, a process that inevitably imbues them with the adversary spirit and convinces them of the correctness of the team's arguments.[149] "Expert witnesses do not merely give opinions," J. Morgan Kousser acknowledges, "they join a company."[150]

The adversary system leads lawyers to want every piece of evidence to be determinative of the issue or issues before the court. For this reason, they pressure historians to compress their testimony into unequivocal historical assertions that might settle contested issues. In essence, lawyers urge historians to isolate independent variables in the historical record, something akin to the independent variables that social scientists look for in their research. Historians, however, reject a view of human experience that can be reduced to single, determinative variables.[151] While historians might rank the relative significance of historical variables, Gaddis notes, "we'd think it irresponsible to seek to isolate—or 'tease out'—single causes for complex events. We see history as proceeding instead from multiple causes and their intersections. Interconnections matter more to us than does the enshrine-

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[148] Paul Soifer, The Litigation Historian: Objectivity, Responsibility, and Sources, Pub. Historian, Spring 1983, at 47, 50.

[149] Historians are not the only scholars susceptible to such influence. One social scientist recalls:

> As I prepared our attorney for his appearance in the case, my sense of indignation and my resolve in the wisdom of our own arguments grew. Yet at some point along the way I found myself asking how I, who had no field experience in the area, could be so sure that our own interpretations were correct. . . . As an anthropologist, I was less certain that I was right about many of the arguments I was, as a lawyer-to-be, encouraging our counsel to make.

Lawrence Rosen, The Anthropologist as Expert Witness, 79 Am. Anthropologist 555, 566 (1977).

[150] J. Morgan Kousser, Are Expert Witnesses Whores? Reflections on Objectivity in Scholarship and Expert Witnessing, Pub. Historian, Winter 1984, at 5, 17.

[151] See supra notes 110-11 and accompanying text.

ment of particular variables."[152] History that is true to historical method simply cannot produce the testimony that lawyers desire, such as that women throughout American history have or have not sought out nontraditional jobs on par with men, or that the health risks of smoking have or have not always been common knowledge in the United States. One legal historian has memorably concluded that "historians and lawyers have different . . . methodologies. To apply the lawyer's methodology to an issue of historical interpretation is as inappropriate as to put chocolate sauce on a pastrami sandwich."[153]

One potential response to the criticism of expert historical testimony is that while the adversary system is the very source of the problem, it can also provide the remedy. After all, the Supreme Court has indicated that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[154] Cross-examination arguably provides a sufficient check on spurious history because "lawyers put historians' testimony through a crucible that uncovers biases, flawed data, laughable interpretations, and outright deceit."[155]

The argument for cross-examination, however, does not solve the problems raised by historical expert testimony. Much of that testimony deviates so far from historical method that it should not even be admissible in the first place. And as the Court's conclusion in *Daubert* makes clear, cross-examination is useful only in attacking "shaky *but admissible* evidence."[156] Under Rule 702, expert testimony must be reliable before it is delivered, not after it has been cross-examined.

Cross-examination also does not answer the intellectual due process concerns raised by historical testimony. Historian J. Morgan Kousser, who has testified in numerous voting rights cases, offers two reasons why cross-examination may fail to ensure that a full historical picture is presented to the court. First, the virtue of cross-examination rests on the skills of the cross-examiner, and Kousser encountered several situations in which he could not be sure "that the other side would recognize evidence for their cases if it jumped off the page at them."[157] Second, cross-examination may in fact make scholars more

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152 Gaddis, supra note 98, at 65.

153 Posting of Richard B. Bernstein, richard_b_bernstein@yahoo.com, to H-SHEAR, repub@mail.h-net.msu.edu (June 4, 2001) (copy on file with *New York University Law Review*).

154 Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 596 (1993).

155 Schiller, supra note 87, at 1176.

156 *Daubert*, 509 U.S. at 596 (emphasis added).

157 Kousser, supra note 150, at 15.

rigid in their testimony, not more balanced. He notes that "there is a natural contrary tendency for a witness to stick to his guns when challenged, to consider cross-questioning a combat, and therefore to disregard evidence offered at this time against his case. No one wants to look foolish or contradictory, or to conclude that he wasted his time."[158] It is no surprise that cross-examination has been famously criticized as "a frail and fitful palliative"[159] that is "frequently truth-defeating or ineffectual, . . . tedious, repetitive, time-wasting, and insulting."[160] Cross-examination is not a panacea.

III
HISTORIANS FOR THE COURTS

Parts I and II above suggest the ways that advocacy and adversarialism distort and degrade historical method. The history that appears in legal scholarship, in amicus briefs, and, of paramount concern here, in expert testimony, derogates in troubling ways from the standards that historians customarily set for themselves. As a result, "the crossing of history with law" has been "a mixture containing more snares than rewards."[161] This Part presents an approach that will allow history and law to converge in a way that maintains history's crucial role in the legal process and better satisfies the demands of intellectual due process.

Rule 706 of the Federal Rules of Evidence offers a procedure to neutralize the effect of advocacy and adversarialism on history and historians.[162] Rule 706 permits the court, on its own motion or on the motion of either party, to enter an order to show cause why an expert should not be appointed by the court. The court may request the parties to submit nominations, but the court can ultimately appoint an expert of its own choosing. Once they are appointed, expert witnesses are then informed of their duties by the court in a writing filed with the clerk of the court or at a conference with all parties present. The witnesses may be called to testify by any party or by the court, and each party has a right to cross-examine them.[163] Nothing in the rule

158 Id. at 16.

159 John H. Langbein, The German Advantage in Civil Procedure, 52 U. Chi. L. Rev. 823, 833 (1985).

160 Id. at 833 n.31.

161 Reid, supra note 36, at 193 (1993).

162 This assessment arguably applies to all expert witnesses. See Tahirih V. Lee, Comment, Court-Appointed Experts and Judicial Reluctance: A Proposal to Amend Rule 706 of the Federal Rules of Evidence, 6 Yale L. & Pol'y Rev. 480, 480 (1988) ("It is desirable . . . that the problems associated with expert testimony be solved not by decreasing its use but by deemphasizing or supplementing its partisan aspects.").

163 Fed. R. Evid. 706(a).

limits the rights of the parties to call their own experts.[164] The court may, at its discretion, inform the jury that the expert was appointed by the court.[165] Expert witnesses are compensated in the amount determined by the court, and, depending on the proceeding, the compensation is paid either from funds "provided by law" or "by the parties in such proportion and at such time as the court directs."[166]

Rule 706 is distinctly nonadversarial. As such, it offers an important exception to the American legal system's presumption that judgments are both more just and more reliable when they are based on evidence adduced by opposing parties. The procedure enables the court to hear evidence and opinions that might not otherwise be presented and thus "promotes rational decisionmaking and accurate decisions, although it does so at the expense of the control the parties traditionally exercise over the presentation of evidence."[167] Court appointments have long been viewed as a solution to the disturbing partisanship of ostensibly objective expert witnesses,[168] and the procedure has been urged on the courts by a number of evidence scholars.[169] As one judge has noted of Rule 706, "[F]rankly,

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164 Fed. R. Evid. 706(d). Rule 706 thus preserves each party's separate right to call its own expert witness under Rule 702. For a number of reasons, parties are not very likely to exercise this right. Parties will no doubt understand that the Rule 706 witness will have the imprimatur of the court and that opponents will profitably exploit any divergence between the testimony of the party witness and that of the court-appointed witness. Moreover, any historical witness called by the parties would have to survive a *Daubert* challenge in which the court could be assisted by the Rule 706 witness in ensuring that the proposed witness actually abided by established historical methods. Even when parties do call their own expert historians, court-appointed experts "can have 'a great tranquilizing effect' on the parties' experts, reducing adversariness and potentially clarifying and narrowing disputed issues." Manual for Complex Litigation (Third) § 21.51 (1995) (citation omitted).

165 Fed. R. Evid. 706(c).

166 Fed. R. Evid. 706(b).

167 Ellen E. Deason, Court-Appointed Expert Witnesses: Scientific Positivism Meets Bias and Deference, 77 Or. L. Rev. 59, 82 (1998).

168 See id. at 64-74 (providing history of efforts to reform expert witness system through court appointment).

169 See 2 John Henry Wigmore, Evidence in Trials at Common Law § 563, at 762-63 (James H. Chadbourn rev., 1979) (urging court appointments as cure for abuses in expert testimony); Deason, supra note 167, at 81-98 (discussing benefits of court-appointed experts); Samuel R. Gross, Expert Evidence, 1991 Wis. L. Rev. 1113, 1220-30 (advocating changes in Rule 706 procedure to make it more appealing to judges); Richard A. Posner, An Economic Approach to the Law of Evidence, 51 Stan. L. Rev. 1477, 1539 (1999) (suggesting "more frequent appointment of court-appointed experts"); Pamela Louise Johnston, Comment, Court-Appointed Scientific Expert Witnesses: Unfettering Expertise, 2 High Tech. L.J. 249, 267-78 (1988) (introducing two legislative and judicial proposals to increase court appointments of expert witnesses); Lee, supra note 162 (advocating amendments to, and increased use of, Rule 706); Justin P. Murphy, Note, Expert Witnesses at Trial: Where Are the Ethics?, 14 Geo. J. Legal Ethics 217, 236-39 (2000) (proposing Rule 706 as solution to ethical dilemmas of expert witnessing).

it's coming, and it's going to happen sooner, rather than later."[170]

But there is lingering judicial resistance. Despite the fact that appointing experts is unquestionably within their power, and despite the urging of evidence scholars, federal courts rarely employ the procedure outlined in Rule 706. A 1993 study by the Federal Judicial Center found that "[j]udges view the appointment of an expert as an extraordinary activity that is appropriate only in rare instances in which the traditional adversarial process has failed to permit an informed assessment of the facts."[171] One reason for their reluctance may be that many federal judges themselves cut their teeth as lawyers in the adversary system. They no doubt also recoil from the more activist role that Rule 706 requires them to take in the litigation before them.

Two fundamental reasons should prompt judges to overcome their reluctance to invoke Rule 706 when confronted with expert historical testimony. The first reason relates to the structure of litigation in which historians commonly appear. History and historians surface in such cases as employment discrimination, voting rights, Native American rights, and mass torts—all of which fall under the rubric of public-law litigation.[172] Public-law litigation is characterized by its "far-reaching effects on myriads of persons not individually before the Court and on political, economic, and institutional structures."[173] In these cases, determinations rest "more-or-less directly on considerations of public policy," and courts must therefore "articulate and enforce the public values and policies [they find] in the governing constitutional or statutory provisions."[174] Because the articulation of policies and values is often informed by historical testimony, courts must hear methodologically sound history—history untainted by the partisanship of the adversary system. Rule 706 fits naturally with public-law litigation, where, according to Abram Chayes, "courts are inevitably cast in an affirmative, political—activist, if you must—role, a role that contrasts with the passive umpireship we are taught to expect."[175]

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170 Timothy Hillman, Using Court-Appointed Experts, 36 New Eng. L. Rev. 587, 587 (2002).

171 Joe S. Cecil & Thomas E. Willging, Court-Appointed Experts: Defining the Role of Experts Under Federal Rule of Evidence 706, at 5 (1993).

172 See supra notes 3-15 and accompanying text.

173 Chayes, Burger Court, supra note 15, at 58.

174 Id.

175 Id. at 4.

But even in cases that do not fit the public-law litigation model, concerns for intellectual due process should prompt courts to overcome their reluctance to use Rule 706. Historical testimony as it currently appears in federal courts is highly suspect. The adversary system deprives that testimony of the balance, complexity, and nuance that are the hallmarks of historical method. The requirement that expert testimony be tied to a sound method is essentially a safeguard against the admission of spurious evidence, reliance upon which would result in arbitrary and legally unjustified judgments.[176] As Scott Brewer has suggested, the rules of evidence "comprise what we may call the 'law's epistemology'—the set of rules and institutions that determine what, from a legal point of view, can be believed with sufficient justification for the purposes of the legal system."[177] Historical testimony is corrupted by the adversary system with enough frequency that, in a normative sense, there is insufficient justification for presuming its reliability. But historical evidence is simply too important for this deficiency in the legal process to go unredressed.[178] Rule 706 offers a promising remedy.

The provisions of Rule 706 would induce historians to adhere more faithfully to their profession's standards. Appointed by the court, historians would serve less as advocates and more as advisors, a role that facilitates explanation rather than argument. Explanations would flow from questions needing answers, not from prepared answers requiring historical support. Freed from the restraints of the adversary system and from a natural psychological stake in the outcome of cases, historians could accentuate the complexity, ambiguity, and tentativeness of historical knowledge. It would then be left to the lawyers to use cross-examination to characterize that ambiguity in a way that enhances their clients' positions.[179] That process would closely model argumentation using historical methods, by which historians weigh the evidence and stand by interpretations even as they acknowledge the imprecision and revisability of their claims.

Judges can be comforted by the fact that a procedure resembling Rule 706 has been endorsed by historians. Two historians who observed the Clinton impeachment process emerged convinced that the historical profession needed to devise a way to produce "service-

176 Cf. Brewer, supra note 18, at 1539 (arguing that epistemically unsound evidentiary procedures cannot produce legally justified results).

177 Id. at 1540-41.

178 See supra note 26.

179 Rule 706 guarantees to each party the right to cross-examination. Fed. R. Evid. 706(a).

able history."[180] The proposal that these historians devised was similar to that envisioned by Rule 706. They suggested that congressional committees requiring historical testimony should appoint panels of historians to meet in camera and "thrash out their differences."[181] The historians' findings would ideally "offer a variety of interpretations or suggest the variety of possible readings of key events and pieces of evidence."[182] The salutary result would be the production of "findings capturing the complexity, ambiguity, and irony that historians always find in past events."[183] The procedure would permit historians to "again act the role of disinterested scholars."[184]

A common criticism of Rule 706, however, is that the ability of experts to "act the role of disinterested scholars" is a myth. Indeed, critics of the use of court-appointed experts claim that "such a procedure would not lessen bias since the expert would represent only his own point of view or that of a single school of thought, and would be cloaked in a false air of neutrality."[185] The criticism suggests that any expert will necessarily have an individual perspective that colors his or her research and testimony, and that this perspective will be obscured by the expert's "false air of neutrality." For reasons discussed below, the criticism should not be worrisome and certainly does not override the benefits gained from court-appointed historical witnesses.

For the most part, historians have long abandoned the notion that objectivity means neutrality.[186] Good and sound history presents explanations and interpretations that necessarily reflect the historian's point of view. That kind of subjective inflection to a historian's work should not be worrisome to the legal system, for it is part and parcel of historical methods. Of real concern is expert historians' tendency to stray from *methodological* objectivity. As Joan Williams notes, "The norms that present the greatest problems for historians acting as expert witnesses are those concerning treatment of supporting evidence and of counterevidence."[187] And concerns over methodological objectivity can in fact be measurably improved through the use of

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[180] See N.E.H. Hull & Peter Charles Hoffer, Historians and the Impeachment Imbroglio: In Search of a Serviceable History, 31 Rutgers L.J. 473, 474 (2000).

[181] See id. at 490.

[182] Id.

[183] Id.

[184] Id.

[185] Rosen, supra note 149, at 570.

[186] See Appleby et al., supra note 110, at 254 ("Our version of objectivity concedes the impossibility of any research being neutral . . . and accepts the fact that knowledge-seeking involves a lively, contentious struggle among diverse groups of truth-seekers."); see generally Thomas L. Haskell, Objectivity is Not Neutrality: Explanatory Schemes in History (2000).

[187] Williams, supra note 97, at 47.

Rule 706 because historians will be extricated from their contact with lawyers, contacts which have caused historians' testimony to derogate from the standards of their craft. With the focus appropriately placed on methodological objectivity—rather than on trying to eliminate subjectivity—it is clear that Rule 706 can in fact produce more "neutral" experts.

This neutrality could be enhanced by well-tailored selection procedures. The parties would likely be satisfied of a historian's neutrality if the expert were chosen in the same method used to select arbitrators. In that situation, each party chooses its own arbitrator and the two then choose a third, neutral arbitrator. In a similar way, the parties could agree on a historian who would be appointed by the court.[188] It would be wise as well to follow the suggestion of the Manual for Complex Litigation that the court should "call on professional organizations and academic groups to provide a list of qualified and available persons."[189] Such a list would aid the lawyers in their effort to agree upon and select a neutral historian. But perhaps more importantly, such a list could serve to enlist the historical profession in the effort to ensure methodological objectivity. Historical associations could inform those on the list of the professional standards expected when serving as an appointed witness and could adopt other safeguards as well.[190]

CONCLUSION

With increasing regularity, historians are appearing on witness stands across the country. They offer historical testimony on subjects ranging from eighteenth-century treaty conventions in Native American rights cases to modern site histories in toxic tort cases. The evidence they provide is often crucial and, as it was in tobacco litigation, sometimes determinative. Because historical testimony is so important to the legal process, it must be reliable. Unfortunately, much expert historical testimony now deviates from accepted historical standards. In order to tether that testimony more tightly to historical methods—the source of the testimony's claim to "knowledge"—it must be relieved of the pressures of adversarialism. Rule 706 offers a way to effect that. Though little used to date, court appointment of expert witnesses can go a long way toward making historical testimony more reliable and thus ensure intellectual due process.

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188 See Posner, supra note 169, at 1539.

189 Manual for Complex Litigation (Third) § 21.51 (1995).

190 Cf. Rosen, supra note 149, at 572 (arguing that it would be "valuable for anthropological associations to formulate standards that will help to guide those serving as expert witnesses").