POSTCOLONIAL APPROACHES TO LEGAL HISTORY

Shawn A. Young*

"It is also that, in the constitution of that Other of Europe, great care was taken to obliterate the textual ingredients with which such a subject could cathect, could occupy (invest?) its itinerary—not only by ideological and scientific production, but also by the institution of the law."[1]

Legal history transforms stories into state-backed power. Courts, acting as historical exegete, foreclose possible historical worlds to create law. However, in recent years, the kind of "history and tradition" courts and originalists have been prepared to grace with legal meaning has become myopic. This is so not just because of the limited range of historical subjects on which courts have focused their attention, but also because of the normative questions originalist methodology eschews and the teleology it obscures. However, originalism need not have the final word on legal history.

This Note will argue that one way to move beyond originalism and toward liberatory legal meaning is to embrace a postcolonial approach to American legal history—a postcolonial legal historiography. Certainly, this approach, like postcolonial theory more broadly, seeks to understand the world in relationship to the history of imperialism and colonial rule. But that understanding requires more than just a critique of what history is told. A postcolonial legal historiography requires a radical shift in methods—especially relative to how originalism engages in legal historiography. To illustrate how different a postcolonial historiographical inquiry could be, this Note will discuss the debates engendered by the Subaltern Studies Group, a group of postcolonial historians who raised issues of representation in traditional historiographies of India. While those debates occurred decades ago and are just one facet of postcolonial approaches to telling history, I argue that looking at them afresh might allow advocates to chart a way out of originalism.

This Note will proceed in four parts. Part I will briefly summarize originalism's methodology and justification before moving into an overview of two of its critiques, with an eye toward underscoring what might already be obvious: Originalism prevents liberatory approaches to legal history from emerging. Part II will introduce postcolonial approaches to historiography, focusing on the discourse around

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[1] Gayatri C. Spivak, *Can the Subaltern Speak?*, *in* Marxism and the Interpretation of Culture 271, 280 (Illini Books ed., 1988) [hereinafter Spivak, *Can the Subaltern Speak?*].

the Subaltern Studies Group and, in particular, the tensions between two giants of postcolonial studies: Ranajit Guha and Gayatri Spivak. Guha's and Spivak's respective contributions and disagreements offer alternative answers for how and why we engage in historical inquiry. Part III will then compare and contrast postcolonial historiography with originalism and argue that postcolonial historiography has a stronger answer to the questions of how and why we do legal history in the first place, particularly for those interested in liberatory legal meaning. Part IV will conclude by briefly examining how a postcolonial approach to American legal history might create alternative and liberatory legal meanings—especially as questions of colonialism and conquest begin to take a more prominent role in domestic American legal scholarship.

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Introduction

Legal history transforms stories into state-backed power. This is most clear when a court engages in historical inquiry over legal meaning. When a court opts for a particular version of history, it does not just cement that version as the authoritative, empirical account of past events. It signals that this history is one the court is prepared to imbue with legal meaning—that the court is prepared to force those it touches

to live by this version of history through its jurisprudence. This sends a clear message to any interpretation or historical subject left uncaptured by a court's positive history: You do not exist. Put differently, and to channel Robert Cover: Courts are violent.[2] They do not create history; they destroy it.[3] Courts, acting as historical exegete, foreclose possible historical worlds to create law. This is an extraordinary power.

And courts are flexing it. In recent years, the kind of "history and tradition" courts and originalists have been prepared to grace with legal meaning has become myopic.[4] Historical narrative is moving rapidly away from *paideia* and towards the *imperial*.[5] This is so not just because of the limited range of historical subjects on which courts have focused

[2] Robert M. Cover, *Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 4, 53 (1983) [hereinafter Cover, *Foreword: Nomos and Narrative*]. Robert Cover wrote extensively about courts, the violence which inheres in the process of legal interpretation, and the stories used to justify that violence. *See generally* Robert M. Cover, *Violence and the Word*, 95 Yale L.J. 1601, 1601 (1986) ("A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur."). Others, too, have written about Cover's views on violence and the law—namely, the unbreakable connection he articulated between the two. *See* Martha Minow, *Introduction: Robert Cover and Law, Judging, and Violence*, *in* Narrative, Violence, and the Law: The Essays of Robert Cover 1, 6–7 (Martha Minow, Michael Ryan & Austin Sarat eds., 1992) ("For . . . Cover, order means at least some violence. When we try to imagine desirable relationships among communities and governments, . . . violence is an unavoidable feature. Producing one orderly system from divergent and conflicting communities means violence. Some views will trump others."); Austin Sarat, *Robert Cover on Law and Violence*, *in* Narrative Violence and the Law: The Essays of Robert Cover 255, 255 (1993) ("[Cover] criticized and worried about the violence of law, about its pain-imposing, destructive qualities, yet, because he could see nothing but opposition between freedom and order, he reconciled himself to law's violence as a tragic necessity."). This Note does accept a core argument that Cover makes in *Nomos and Narrative*: In making decisions, courts destroy the rules, norms, and laws that communities generate for themselves independent of the state, as well as the narratives they use to justify them. *See generally* Robert Cover, *Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 4, 40 (1983) ("But the jurisgenerative principle by which legal meaning proliferates in all communities never exists in isolation from violence.").

[3] *Id.* at 53 ("Confronting the luxuriant growth of a hundred legal traditions, they assert that *this one* is law and destroy or try to destroy the rest.").

[4] *See, e.g.*, N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2128–29 (2022) (applying a narrow "history and tradition" analysis to the Second Amendment despite using an interest-balancing test for other constitutional provisions). In *Bruen*, the Court struck down a New York state law on the grounds that it did not accord with the "history and tradition" of the Nation, despite the law being in effect since 1911. *Id.* at 2128, 2189–91.

[5] Cover famously described two models of how communities who share normative values—what he calls *nomoi*—come together: the *paideic* and the *imperial*. *See* Cover, *Foreword: Nomos and Narrative*, *supra* note 2, at 12–16. The *paideic* model works through discourse. Individuals form interpersonal commitments to each other by discussing and debating norms and laws—and, by extension, the narratives that justify them—to reach a shared understanding. *See id.* at 12–13. The *imperial* model relies on enforcement. "In this model, norms are universal and *enforced* by institutions. They need not be taught at all, as long as they are effective." *Id.* at 13. In the *imperial* model, norms and narratives are forced onto communities, rather than created by them.

their attention, but also because of the normative questions this methodology eschews and the teleology it obscures.[6] As generations of postcolonial historians have argued, the choice to elevate a class of historical subjects at the expense of others is a normative one.[7] Normative too, is originalists' assumption that objective, positive historiography—the act of writing history[8]—is even possible.[9]

The stakes of this methodological myopia could not be higher. Perhaps most obviously, originalism is hegemonic.[10] And it is being used—and was arguably designed—to roll back rights.[11] But the methodology itself has consequences, especially when it comes to our country's ability to grapple with historical injustice. Questions of colonialism and conquest have begun to take a more prominent role in domestic American legal scholarship.[12] This is a welcome step, especially as scholars challenge the notion that areas of law which implicate such questions are *sui generis*.[13] Empire is all around us, whether we acknowledge it or not.[14] But a legal historiography committed to a

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6 *See infra* Section I.A.

7 *See infra* Section I.B.

8 Some distinctions between definitions are in order. While the term "historiography" can refer to the study of the discipline of history, or the "history of history," this Note will use it to describe the act of writing, forming, and shaping historical narrative—the act itself. *See* Richard T. Vann, *Historiography*, Encyc. Britannica, https://www.britannica.com/topic/historiography [https://perma.cc/Y9HR-PPNU] (last visited July 22, 2025) (defining historiography as "the writing of history" while also noting the term can "refer[] to the theory and history of historical writing").

9 *See infra* Section II.B.

10 *See User Clip: Kagan: We Are All Originalists.*, at 00:23 (C-SPAN, June 29, 2010), https://www.c-span.org/clip/no-category/user-clip-kagan-we-are-all-originalists/5136189 [https://perma.cc/U96R-HQR5] ("We are all originalists.").

11 *See generally* Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 Tex. L. Rev. 1127, 1129 (2023) ("[I]t is first critical to clarify that originalism is not only a method of interpreting the Constitution; originalism is also a politics whose longstanding goal has been reversing *Roe*.").

12 *See, e.g.*, Maggie Blackhawk, *Foreword: The Constitution of American Colonialism*, 137 Harv. L. Rev. 1, 20, 23–25 (2023) [hereinafter Blackhawk, *The Constitution of American Colonialism*] (arguing that colonial logics have always shaped the Constitution and that "scholars and jurists should address the constitutional questions presented by American colonialism head on"); K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 Yale L.J. 1062 (2022) (arguing that evolutions in the field of property law cannot be understood without understanding the histories of conquest and enslavement); José Argueta Funes, *The Civilization Canon: Common Law, Legislation, and the Case of Hawaiian Adoption*, 71 UCLA L. Rev. 128 (2024) (arguing that judges used canons of statutory interpretation to impose civilization on Native Hawaiians).

13 *See* Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 Harv. L. Rev. 1787, 1787, 1793–95 (2019) (challenging the notion that Federal Indian Law and the "history of colonialism and violent dispossession" are *sui generis*).

14 *See* Blackhawk, *The Constitution of American Colonialism*, *supra* note 12, at 76 ("[W]hat other option are we left with when the United States does not seem able to even admit its status as empire?").

narrow, positive[15] historiography risks stymying efforts to grapple with the consequences of American empire—much less rectify them. Positive historiography *a la* originalism perpetuates the very modes of knowledge production which provide the intellectual foundations for the Western imperial project.[16] Those interested in marshaling historical analysis to create alternative and liberatory[17] legal meanings cannot afford to let originalists or courts have the final word on legal historiography.

This Note will argue that one way to move beyond originalism and toward liberatory legal meaning is to embrace a postcolonial approach to American legal history—a postcolonial legal historiography. Certainly, this approach, like postcolonial theory more broadly, seeks to understand the world in relationship to the history of imperialism and colonial rule.[18] But that understanding requires more than just a critique of what history is told. A postcolonial legal historiography requires a radical shift in methods—especially relative to how originalism engages in legal historiography. To illustrate how different a postcolonial historiographical inquiry could be, I will discuss the debates engendered

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[15] Throughout this Note, I will speak critically of "positive" approaches to historiography. By positive historiography, I refer to an approach to historical writing that is based on "objective" observation and is undergirded by the belief that history can be captured, described, and explained from only one "true" perspective. *See* Herbert Feigl, *Positivism*, ENCYC. BRITANNICA, https://www.britannica.com/topic/positivism [https://perma.cc/PUR4-9VMK] (last visited July 22, 2025) ("Strict adherence to the testimony of observation and experience is the all-important imperative of positivism."). However, as described later in this Note, postcolonial scholars have remained wary of this approach to history, as it, among other things, obfuscates marginalized voices and the historian's own role in perpetuating marginalization. *See infra* Part II.

[16] *See infra* Section I.B.2.

[17] This Note attempts to refrain from defining "liberatory" legal meaning with specificity. Partly, this reluctance stems from how the purpose of a postcolonial approach is to accommodate pluralistic views of what legal history and meaning should look like. One person—much less one author—should not be able to dictate what liberation means: radical reforms might be "liberatory" to one person, abolition might be to another. *See, e.g.*, Jamelia Morgan, *Abolition in the Interstices*, LPE PROJECT (Dec. 13, 2023), https://lpeproject.org/blog/abolition-in-the-interstices [https://perma.cc/HMX8-GWBH] (discussing the tension between "non-reformist" and "reformist" reforms). Yet, to elucidate its general contours, I would argue that "liberatory" legal meaning is about process rather than outcome. If we reach a point at which, to reference Robert Cover again, it is broadly recognized that communities—not courts and certainly not individual lawyers—are driving and creating law, then whatever meaning comes out of that process is "liberatory." This process occurs at least when law and history are liberated from the clutches of courts, but hopefully, too, when society moves away from systemic marginalization.

[18] J. Daniel Elam, *Postcolonial Theory*, OXFORD BIBLIOGRAPHIES (Jan. 15, 2019), https://www.oxfordbibliographies.com/display/document/obo-9780190221911/obo-9780190221911-0069.xml [https://perma.cc/EM69-G38C] ("Postcolonial theory is a body of thought primarily concerned with accounting for the political, aesthetic, economic, historical, and social impact of European colonial rule around the world . . . .").

by the Subaltern Studies Group, a group of postcolonial historians who raised issues of representation in traditional historiographies of India.[19] While those debates occurred decades ago and are just one facet of postcolonial approaches to telling history, I argue we must look at them afresh. At a time when positive legal historiography, exemplified by originalism, is ascendant, postcolonial legal historiography might allow advocates to complicate *how* and *why* we engage in legal historiography in the first place. In contrast to originalism, postcolonial historiographies show us *how* anyone interested in using legal history—whether they be scholars, jurists, or advocates—might focus their attention on a broader, previously hidden range of subjects and sources obfuscated and destroyed by Western historiography. Postcolonial historiographies also help us both reject traditional "process-based" justifications for *why* we should be originalists and understand that originalism's illusion of amorality is a smokescreen.[20] Postcolonial approaches to legal history also allow advocates to challenge and problematize the bedrock assumption at the core of originalism—that positive, legal historiography is even possible and desirable.[21] That critique in turn raises the possibility of moving legal history out of courts.[22]

This Note will proceed in four parts. Part I will briefly summarize originalism's methodology and justification before moving into an overview of two of its critiques: structuralism[23] and postmodernism.[24]

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19 *See infra* Part II (discussing Ranajit Guha and Gayatri Spivak).

20 *See* Keith E. Whittington, *Originalism: A Critical Introduction*, 82 Fordham L. Rev. 375, 399–400 (2013) (outlining how early justifications for originalism were based on the "process-based" justification—the idea that originalism would restrain judges by directing deference to democratically authorized lawmakers). Corinne Blalock has written about how proponents of neoliberalism falsely hold it out as being objective. *See* Corinne Blalock, *Neoliberalism and the Crisis of Legal Theory*, 77 L. & Contemp. Probs. 71, 99 (2014). I argue that originalism similarly disguises itself as being objective.

21 *See infra* Sections I.B, II.B.

22 *See infra* Section IV.B.

23 Structuralism is a methodological approach to the social sciences, including history, which "studies the underlying, unconscious regularities of human expression—that is, the unobservable structures that have observable effects on behavior, society, and culture." Nico Wilterdink & William Form, *Structuralism*, Encyc. Britannica, https://www.britannica.com/topic/social-structure/Structuralism [https://perma.cc/8YTH-4ZQZ] (last visited July 22, 2025). As will be discussed, structuralist approaches to history offer one way to uncover new, previously unseen sources. *See infra* notes 63–64 and accompanying text.

24 *See* Brian Duignan, *Postmodernism*, Encyc. Britannica, https://www.britannica.com/topic/postmodernism-philosophy [https://perma.cc/9KXC-EBNR] (last visited July 22, 2025) ("[P]ostmodernism . . . [is] a . . . movement characterized by broad skepticism . . . [,] a general suspicion of reason[,] and an acute sensitivity to the role of ideology in asserting and maintaining political and economic power."). This Note will categorize as "postmodern" those approaches to legal history which are skeptical of objective history of any kind and interrogate the role of the historian in legitimating marginalization. *See infra* notes 73–78 and accompanying text (discussing postmodern approaches to history).

In discussing what kind of historiography originalism engages in, why it claims to do history this way, and its contradictions, I hope to underscore what might already be obvious: Originalism prevents liberatory approaches to legal history from emerging. The focus of the critiques in Part I will center on how courts attempt to do legal history, or how they engage in historical inquiry to justify their legal interpretations. Part II will introduce postcolonial approaches to historiography, focusing on the discourse around the Subaltern Studies Group and, in particular, the tensions between two giants of postcolonial studies: Ranajit Guha and Gayatri Spivak. While Guha, Spivak, and the Subaltern Studies Group are just one strand—albeit a rich one—of postcolonial thought, their debate helps demonstrate that postcolonial approaches to historiography have much to offer those trying to move beyond originalism. Their debate is particularly generative because Guha's and Spivak's respective contributions and disagreements offer alternative answers for *how* and *why* we engage in historical inquiry. Part III will then compare and contrast postcolonial historiography with originalism and argue that postcolonial historiography has a stronger answer to the questions of *how* and *why* we do legal history in the first place, particularly for those interested in liberatory legal meaning. Part IV will conclude by briefly examining how a postcolonial approach to American legal history might create—and is already beginning to create—alternative and liberatory legal meanings.

I
What's the Problem with Originalism?

Originalism's methods and justifications—its *how* and *why*—are deeply familiar. First, its *how*: Originalist historiography focuses on "discoverable public meaning" at the time of constitutional and statutory adoption.[25] That meaning, in turn, is authoritative for the purposes of determining legal meaning.[26] The words *discoverable* and *public* may very well come with their own normative assumptions about positive, empirical, and *imperial* legal history—but more on that later.[27] In any case, to find this discoverable public meaning, we ask "what a reasonable person who knew the publicly available facts about the context of [constitutional or legislative] drafting would have taken

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[25] Whittington, *supra* note 20, at 377.

[26] *Id.*

[27] *See infra* I.B.2 (discussing Orientalism, the idea that Western positivism provides the intellectual foundation for colonialism).

it to mean."[28] The individual intentions of the drafters of a particular provision might be relevant, but are not dispositive for original public meaning.[29] Easy enough. The words used in the Second Amendment, Title VII, and the Federal Housekeeping Statute all meant something at the time they became law—"believe it or not."[30] We lawyers, leaning into our *jurispathic*[31] impulses, can marshal history to find legal meaning that, if not authoritative, is at least highly persuasive for juridical purposes.[32]

Next, its *why*. Originalist historiography is often justified based on separation-of-powers concerns. Originalism, as Justice Scalia famously declared, is the "lesser evil."[33] It is the only method of constitutional interpretation that acts as a constraint on courts and respects the role of the political branches as the "more appropriate expositor of social values."[34] Given courts' minimal democratic accountability, jurists should endeavor to view constitutional and statutory text as "fixed" and allow "historical meaning [to] constrain[] legal meaning."[35] This well-worn concern about courts usurping the role of the political branches is a core rationale for originalist historiography, or what Keith Whittington calls "process-based considerations."[36]

At first glance, these are compelling arguments. But, as this Part will begin to tease out, being too quick to accept current originalism's proffered methods and justifications comes with risks. Accepting originalism risks limiting our vision for *how* we do legal history

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28 Richard H. Fallon, *The Chimerical Concept of Original Public Meaning*, 107 Va. L. Rev. 1421, 1425 (2021).

29 For a discussion of the shift among originalists from "original intent" to "original meaning," see Whittington, *supra* note 20, at 379–82.

30 Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cinn. L. Rev. 849, 856 (1989).

31 Cover, *Foreword: Nomos and Narrative*, *supra* note 2, at 40.

32 Lawrence Solum has described some of the disagreement among originalists about how original meaning bears on legal meaning. *See* Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, *in* The Challenge of Originalism: Theories of Constitutional Interpretation 12, 34 (2011) ("At one end of the spectrum, an originalist might believe that each . . . rule of constitutional law must be identical to the original meaning of . . . the Constitution. . . . Further along the spectrum, some originalists might . . . allow for circumstances in which exceptions are legitimate."). But for our purposes, how originalism is applied matters less than the assumptions it makes about finding historical meaning in the first place.

33 Scalia, *supra* note 30, at 849.

34 *Id.* at 854. *See* William Baude, *Originalism as a Constraint on Judges*, 84 U. Chi. L. Rev. 2213, 2214 (2018) (discussing and quoting Justice Scalia's views on originalism).

35 Whittington, *supra* note 20, at 378. *See generally* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 Notre Dame L. Rev. 1 (2015) (introducing and discussing the fixation thesis).

36 Whittington, *supra* note 20, at 399.

and *why* we care about it in the first place. For those interested in historiography's liberatory potential, it's worth sitting with originalism for a moment.

This Part proceeds by briefly reflecting on originalism, critiques, and potential responses. After giving a brief overview of originalism's methodology and justification—its *how* and *why*—I will describe two critiques from the internal and external views.[37] The internal critique accepts that jurists should indeed look for original public meaning, but argues, among other things, that the sources consulted to elucidate that meaning are myopic. The external critique challenges the search for original public meaning as fundamentally misguided. These internal and external critiques, in turn, engender two potential responses that might be labeled as *structuralist* or *postmodern*. While a full account of critiques of originalism and the positive legal historiography it employs is beyond the scope of this Note, my aim is for this Part to briefly articulate just *what* about originalism is objectionable. Further, I hope to show that legal history need not engage in the narrow modes of positive historiography contemplated by originalism.

A. Internal Critique

1. Internal Critique of Originalism's Methods

Let's begin by unpacking *how* originalism uncovers original public meaning. Originalism proceeds on two key assumptions: that the original public meaning of a given constitutional provision (1) exists and (2) is determinate enough to settle disputed questions of law.[38] Originalist legal histories start with the text as the primary source of public meaning.[39] That text must, in turn, "bear the meaning attributed to it at the time of its adoption."[40]

But the question of how to determine textual meaning—and determine it with historical accuracy—is a sticky one. In a famous passage, Justice Scalia noted that such a task "requires the consideration of an enormous mass of material."[41] He flags, for example, a few potential sources and subjects of inquiry for constitutional history: records of and commentaries surrounding the ratifying debates,[42] legal treatises written

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37 *See* H.L.A. Hart, The Concept of Law 79–99 (2d ed. 1994) (discussing the internal and external views of the law).

38 Richard Fallon calls the first premise the "Conceptual Assumption" and the second the "Interpretive Methodology Assumption." Fallon, *supra* note 28, at 1426–27.

39 Whittington, *supra* note 20, at 377.

40 *Id.* at 378.

41 Scalia, *supra* note 30, at 856.

42 *Id.*

at the time of the Founding,[43] and drafts of the colonies' constitutions prior to their statehood.[44] Whittington uplifts similar sources as the clearest examples of an originalist inquiry.[45] Lawrence Solum highlights usage and experience as general categories of historical evidence: Evidence of a given constitutional provision's meaning "will be found in historical fact—that is, evidence about how the relevant language was actually being used at the time and the context in which the language was used."[46] Compiling these sources, analyzing their reliability, and applying them to constitutional text is a difficult inquiry. The historiographical rigor required is, as Justice Scalia noted, originalism's "greatest defect."[47] The practicality of doing originalism presents a real challenge—in short, how to know how much history is enough—and is the crux of the internal critique of originalist legal historiography.

The Supreme Court's recent decision in *Students for Fair Admissions v. Harvard* provides an example of how this internal critique can arise.[48] In *SFFA*, Justices Thomas and Sotomayor engaged in a serious historical inquiry over the question of whether the Constitution is colorblind.[49] While the Justices reached opposite conclusions, our immediate concern is *how* each chose to engage in historiography—and specifically the sources and subjects they examined to piece together the history of Reconstruction. In their respective opinions, the two ideologically opposed Justices looked to various sources, such as the then-Republican Party's platform pledge to abolish slavery,[50] congressional statements,[51] legislation passed after the Fourteenth Amendment,[52] and W.E.B. Du Bois's history of Reconstruction,[53] among others. Sotomayor's and Thomas's respective opinions are notable in that each engaged with sources outside of case law and congressional statements—sources which courts have otherwise tended to exclusively rely on to reconstruct Reconstruction, despite the depth and breadth of Reconstruction-era historiographies.[54] As one scholar has argued, the

43 Such treatises give context to legal terms of art the drafters included in the Constitution and perhaps meant to connote a specific meaning. *Id.* at 859 (discussing Blackstone's *Commentaries on the Laws of England*).

44 *Id.* at 858 (discussing a draft of the Commonwealth of Virginia's Constitution).

45 Whittington, *supra* note 20, at 389.

46 Solum, *supra* note 35, at 47.

47 Scalia, *supra* note 30, at 856–57.

48 600 U.S. 181 (2023).

49 *See id.* at 231 (Thomas, J., concurring); *id.* at 318 (Sotomayor, J., dissenting).

50 *Id.* at 233–34 (Thomas, J., concurring).

51 *See, e.g.*, *id.* at 236–37, 324–26.

52 *Id.* at 243–44, 325.

53 *Id.* at 320.

54 Ryan D. Shaffer, *Jurisprudence of Retreat: The Supreme Court's (Continued) Misreading of Reconstruction*, 99 N.Y.U. L. Rev. 1856, 1875 (2024).

relatively wider range of historical sources the Justices examined was a welcome step for chambers-led historiography.[55]

But even Sotomayor's and Thomas's opinions—"the most extensive" Reconstruction historiographies in judicial opinions to date—are silent as to other relevant historical sources—particularly those from marginalized people.[56] And here, we can begin to see the shortcomings of originalist historiography from the internal perspective. Ryan Shaffer has deftly catalogued the "forgotten sources" both Sotomayor and Thomas left out of their opinions.[57] These silenced sources were varied. While Sotomayor and Thomas favored certain kinds of sources in their historiographies—statutes, jurisprudence, and congressional speeches[58]—other historical sources, such as newspaper articles and actions by non-governmental actors, were left out.[59] These sources all begin to capture what scholars have called *social history*, or the history of the "changes and continuities in the experience of ordinary people."[60] That lack of social history, crucially and categorically, leaves out Black Americans—the very people the Reconstruction Amendments were meant to empower but who, by and large, did not occupy positions of governmental authority—despite the rich history of their struggle for liberation and equality before, during, and after Reconstruction.[61]

For a historiography committed to uncovering legal text's original *public* meaning, one would expect more rigor. If it is true that the "[B]lack complaints against the injustices of Presidential Reconstruction . . . helped create" the political crises leading to the passage of the Fourteenth Amendment, then their perspectives surely shaped the *public* meaning of the Fourteenth Amendment.[62] The categorical exclusion of Black voices and struggles, and those of other racialized, colonized, and marginalized peoples, from historical inquiry is not fatal for originalist legal historiographies on the internal view—despite the frequency of its occurrence.[63] After all, if originalism is a *standard*, not

55 *See id.* at 1862.

56 *Id.* at 1872, 1884.

57 *Id.* at 1883.

58 *Id.* at 1883–84.

59 *Id.* at 1884.

60 Michael Seidman, *Social History and Antisocial History*, 13 Common Knowledge 40, 40 (2007).

61 Eric Foner, *Rights and the Constitution in Black Life During the Civil War and Reconstruction*, 74 J. Am. Hist. 863, 872 (1987).

62 *Id.* at 880.

63 *See, e.g.*, Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Race, Originalism, and Skepticism*, 25 J. Const. L. 1241, 1243 (2023) ("Yet, originalism's retrospective orientation to collective identity makes it almost impossible for Black and Brown Americans 'to experience the Constitution as theirs.'").

a *procedure*, then the fact that originalist legal historiographies fail to engage with every possible source does not invalidate the proposition that the search for objective, positive legal history is how courts should decide questions of legal meaning.[64] It just means that the inquiry might be done better. But simultaneously, history—to borrow from Jeremy Waldron in a different, but related context—is "unforgiving[,] . . . and there is no point using it unless you are prepared to embark on literal historical inquiry."[65] If we are truly committed to the search for objective, historical truth, we must be prepared to turn over every stone and every source—no matter how marginalized or silenced those sources might be.

In short, the internal critique of originalism's *how* might lead someone interested in uncovering liberatory legal histories to search for new, previously hidden, and potentially radical historical sources and subjects that have given shape to legal meaning—what might be characterized as a *structuralist* approach to history.[66] And postcolonial legal historiographies, drawing on structuralist approaches to history, provide at least one response to how we might use those sources to shape legal meaning.[67]

2. *Internal Critique of Originalism's Justification*

An internal critique of originalism's *why*—the process-based consideration—follows from the internal critique of its *how*. Recall that the process-based consideration justifies originalist legal historiography on the grounds that it acts as a restraint on judges: Judges, constrained by originalism, will endeavor to find the one unified, objective, original meaning of constitutional and legislative text instead of being ruled by their own political and normative proclivities.[68] But if positive legal history is now authoritative for legal meaning, then courts' powers have not been limited in any meaningful way. Instead of adjudicating law, courts acting as historical exegete do something just as sinister: They unilaterally choose the very stories and narratives the law forces

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[64] *See* Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 Harv. L. Rev. 777, 779 (2022) ("'What, do you want *wrong* answers?'").

[65] Here, Waldron was discussing a theory of property law—First Occupancy—which asks who was the first, rightful owner of land to determine ownership. *See* Jeremy Waldron, *Indigeneity? First Peoples and Lost Occupancy*, 1 N.Z. J. Pub. & Int'l L. 55, 76 (2003). The intensive positivist historical inquiry required to determine First Possession shares similarities to originalist legal historiography.

[66] *See* William W. Fisher, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 Stan. L. Rev. 1065, 1067–68 (1997) (discussing historians who were strongly influenced by Structuralism).

[67] *See infra* Section II.A. (discussing Ranajit Guha and his structuralism).

[68] *See supra* notes 25–30 and accompanying text.

us to live by.[69] To say which sources get imbued with historical force and which do not—as we saw in Justices Thomas's and Sotomayor's respective opinions in *SFFA*—still leaves courts with unchecked power. Perhaps this is why Justice Coney Barrett has warned that while "[r]elying exclusively on history and tradition may seem like a way of avoiding judge-made tests[,] . . . a rule rendering tradition dispositive is *itself* a judge-made test."[70]

The internal critique of originalism's *why* does not mean that the process-based consideration itself is misplaced. Rather, it might suggest that to take seriously the risks of juridical monopolization of legal history, we should move historiography, the act of writing history, *out* of courts and not allow courts to have the final say on legal history. A postcolonial approach to historiography offers one way to make this act real. And indeed, it is and has already been done, as will be discussed *infra* in Section IV.B.

B. External Critiques

1. External Critique of Originalism's Methodology

The external view of originalist legal historiography takes a different track. Recall that there are two core predicates of originalism: that the original public meaning (1) exists and (2) is determinate enough for a court to settle disputed questions of law.[71] Some critics of originalism, taking the external view, challenge these predicates, as well as the search for positive, objective history, as fundamentally misguided.

Richard Fallon, for example, has made a series of objections to originalist methodology on these lines.[72] He attacks the very premise that constitutional and legislative text "have uniquely correct original linguistic meanings . . . that exist for discovery as a matter of historical and linguistic fact."[73] One of the pillars of Fallon's argument relies on the simple but powerful observation that the *public* in *original public meaning* is not a "unitary speaker" and "is dramatically diverse."[74] As discussed above, the simple fact that what the *public* originalists look to for historical meaning is diverse is not fatal—a dedicated historiography

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69 *See* Cover, *Foreword: Nomos and Narrative*, *supra* note 2, at 4–5 ("Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.").

70 Vidal v. Elster, 144 S. Ct. 1507, 1532 (2024) (emphasis in original).

71 *See* Fallon, *supra* note 28 and accompanying text.

72 *Id.*

73 *Id.* at 1471.

74 *Id.* at 1453.

could theoretically mull infinite sources—but Fallon goes further. Returning to the Fourteenth Amendment, Fallon flags that its text was hotly contested even in its own time and changed dramatically over its drafting process; it would be categorically wrong to try and draw a unitary meaning from such a debated document—especially to resolve controversial hot-button legal questions today.[75] Words meant different things to different people and any use of legal history should acknowledge that simple truth.

Another external critique—the *postmodern* critique—takes Fallon's argument a step further. Where Fallon and others might see a constitutional provision and see the possibility of many original meanings—no one privileged over the other—*postmodern* scholars see no original meaning at all. Neither the historian, nor the judge, nor the legal advocate can escape their own self-interests or concerns in the act of interpretation.[76] Therefore, the "recovery of the 'original' meaning or context of any given text is impossible."[77] Postmodern scholars argue that the interpreter necessarily "completes the text," and no amount of historical contextualization can recover the original meaning.[78] The well of historical interpretation is poisoned and the original meaning of the text lost the moment the interpreter peers in.

This realization is meant to be liberating. Where both structuralist and originalist legal historiographies share a commitment to discovering objective truth—albeit from radically different sources—the postmodern legal historian, instead, enters into *dialogue* with their historiographies. Liberated from a commitment to positive historiography, they can "ask of old texts frankly anachronistic questions" and "bring[] to the surface critical or transformative interpretations of canonical texts."[79]

In any case, postmodern historiography, as will be discussed *infra*, is a style of inquiry in which postcolonial historiographers have engaged to great effect. This is particularly so because the postmodern realization that the historian inserts themselves into any positive history also contemplates self-awareness about the role of the historian and historiographies in creating and reproducing marginality—a feature which will become more relevant in the discussion below.[80]

[75] *Id.* at 1435 (noting "disagreement and uncertainty among those who helped draft the Fourteenth Amendment and who struggled to identify its communicative content").

[76] *See* Fisher, *supra* note 66, at 1069 ("Texts will always escape the efforts of both their authors and intellectual historians to tie them down.").

[77] *Id.*

[78] *Id.*

[79] *Id.* at 1070.

[80] *See infra* Section II.B. (discussing Gayatri Spivak and her postmodernism).

2. External Critique of Originalism's Justifications

There are, of course, a variety of external critiques of originalism's justifications. Many focus on trying to unpack originalism's teleology rather than the truth-value of the process-based consideration.[81] But for our purposes, and to lead into Part III of this Note, I will discuss one postmodern—and postcolonial—critique of originalism's and positive historiography's purpose generally: how both function to legitimate, create, and produce legal marginality.

It would be impossible to describe the power dynamics inherent in historiography without discussing Edward Said's work. Said's writings are too voluminous and important to adequately describe here, but relevant for our purposes is a key insight of writings like *Orientalism* and *Permission to Narrate*: his critique of the Western academic and positivism.[82] Said argues that Western academics—the anthropologists, sociologists, and *historians*—provided the intellectual foundations for colonialism and imperialism by constructing the Orient through their scholarship.[83] Through their research, these academics produced the very idea of the Orient as backwards societies, which "insist[ed] upon" Western intervention.[84] Put simply, the Western academy's efforts to produce the Orient through positive scholarship is not just an ex post rationalization of colonial rule; it was the very thing justifying colonial rule in advance.[85]

The positivist legal historiography which originalism engages has a similar teleology as Said's Orientalism. Just as the Orientalist uses positivist academic research to produce the Orient and justify its occupation, the Originalist uses positive legal historiography to produce and justify legal marginality. Title VII *must* be read to not protect the LGBTQ+ community, as homophobia and transphobia were simply "not the 'principal evil' on Congress's mind in 1964"—never mind the historical and sociological evidence otherwise.[86] Similarly, the

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[81] *See, e.g.*, Charles & Fuentes-Rohwer, *supra* note 63 (arguing that originalism silences Black and Brown voices—historically and in the present).

[82] Edward W. Said, Orientalism (1978) [hereinafter Orientalism]; Edward W. Said, *Permission to Narrate*, 13 J. Palestine Stud. 27 (1984) [hereinafter *Permission to Narrate*].

[83] Orientalism, *supra* note 82, at 39.

[84] *Id.* at 34.

[85] *Id.* at 39 ("To say simply that Orientalism was a rationalization of colonial rule is to ignore the extent to which colonial rule was justified in advance by Orientalism, rather than after the fact.").

[86] *Compare* Bostock v. Clayton Cnty., 590 U.S. 644, 718 (2020) (Alito, J., dissenting) (arguing Title VII should not be read to proscribe discrimination on the basis of sexual orientation and gender identity), *with* Garrett Epps, *What 'Because of Sex' Really Means*, Atlantic (June 16, 2020), https://www.theatlantic.com/ideas/archive/2020/06/what-because-of-sex-really-means/613099 [https://perma.cc/RH7G-MAAY] ("[M]any people who have

Fourteenth Amendment must be read to be colorblind—never mind its contested meanings and the political struggles by Black people which shaped it.[87] Like Orientalist historiographies, originalist legal historiographies' purpose is to produce and reproduce legal marginality while relegating alternative narratives as "inert[,] . . . a nuisance to be ignored or expelled."[88]

Postmodernism's external critique of originalism and, by extension, positive legal history, still leaves a role for history. But rather than an obsessive, empirical focus on capturing history for the purpose of restraining courts, a postmodern and postcolonial legal historiography might allow communities—not courts or academics—to articulate their own legal histories. Certainly, there might be a focus on capturing silenced voices to the extent possible. But simultaneously, communities would be able to exercise the same self-interest that orientalist and originalist historiographers do—shifting power.

The internal and external critiques of originalism's engagement with legal history described above are not new. It is high time for those interested in the law's liberatory, "redemptive" potential to take back history and narrative.[89] Thankfully, there are examples to follow. For decades, postcolonial historians have drawn on structuralist and postmodern insights to address similar concerns about positive history generally—with the explicit goal of giving marginalized people agency or challenging Western knowledge production. Their writings, critiques, and discourses, as I begin to tease out in Parts III and IV, have much to offer to those looking for a way out of originalism's wilderness.

II
The Guha-Spivak Discussion: Structuralism vs. Postmodernism

When history speaks, whose voice(s) is (are) heard? Whose voices should be? And whose voices can be? Amidst the decolonial revolutions of the 1960s and 1970s, a transnational group of historians of India sought to provide answers. This "Subaltern Studies Group"—inspired and shaped by Ranajit Guha—sought to complicate existing accounts of the subcontinent's decolonization and investigate the underclasses'

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studied the history of discrimination do argue[] that [the dissenting Justices'] confident disquisition [in *Bostock*] on history is wrong, that discrimination against women and against LGBTQ people both in fact spring from the same root of patriarchy.").

[87] *See supra* notes 56–62 and accompanying text.

[88] *Permission to Narrate*, *supra* note 82, at 33.

[89] Cover, *Foreword: Nomos and Narrative*, *supra* note 2, at 34–35 (describing "redemptive constitutionalism" as a way to choose between competing legal narratives).

role in social change.[90] The group believed that existing histories failed to capture the influence of the "subaltern," a term coined by Italian political theorist Antonio Gramsci for those who are marginalized.[91] The "subaltern" approach to history would itself be critiqued by Gayatri Spivak. She critiqued the approach as, at best, essentializing the very communities they studied and, at worst, a misguided—and ultimately impossible—search for "lost origins."[92] The back-and-forth between Guha and the Subaltern Studies Group, on one side, and their critics exemplified by Spivak on the other would shape a generation of postcolonial thinkers.[93]

Guha's and Spivak's methodological discussion of how to *do* history is familiar—it represents the tension between structuralist (Guha) and postmodernist (Spivak) approaches to history.[94] While postcolonialism as a normative and epistemic framework is beginning to come into mainstream American legal scholarship, the "history wars" taking place in courts and in the public have yet to move beyond the relatively narrow kinds of historiographies contemplated by originalists.[95] But even in an era of "history and tradition," it would be a mistake to confine ourselves to originalist historiographies when doing legal history. When framed as part of a familiar discussion between structuralists and postmodernists, Guha's and Spivak's discussion can be seen as two modes of a different approach to legal history—a postcolonial approach to legal history.

This Part will summarize Guha/the Subaltern Studies Group's contributions and Spivak's critique. The discussion on-point will be on subaltern communities in South Asia, but the methodological discussion over how to do history can be seen as exemplary of the tension between structuralist and postmodernist history. These are tensions which allow

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90 Stellan Vinthagen, *How Subaltern Studies Changed Our Understanding of Resistance Struggles*, Resistance Stud. (May 1, 2023), https://wagingnonviolence.org/rs/2023/05/how-subaltern-studies-changed-how-resistance-struggles-are-understood-david-hardiman [https://perma.cc/U9AA-REMN] (interview with David Hardiman, an original participant in the Subaltern Studies Group).

91 *Id.*; *see also Subaltern*, Oxford Reference, https://www.oxfordreference.com/display/10.1093/oi/authority.20110803100539334 [https://perma.cc/Q2GB-AYSZ] (last visited July 20, 2025) (noting that the term "subaltern" was conceived by Antonio Gramsci, "who because he was in prison and his writings subject to censorship[,] used it as a codeword for any class of people (but especially peasants and workers) subject to the hegemony of another more powerful class").

92 Spivak, *Can the Subaltern Speak?*, *supra* note 1, at 307.

93 Dipesh Chakrabarty, *Subaltern Studies in Retrospect and Reminiscence*, 48 Econ. & Pol. Wkly. 23 (2013) (describing the impact of the Subaltern Studies Group and its critics).

94 Fisher, *supra* note 66, at 1067–69 (describing the structuralist and postmodernist approaches to legal history).

95 *See, e.g.*, Blackhawk, *The Constitution of American Colonialism*, *supra* note 12; Park, *supra* note 12.

us to address the internal and external critiques of originalism. Further, Guha's and Spivak's discussion demonstrates how even engaging with this one strand of postcolonial thought opens up new discussions about legal historiography.

Specifically, Guha's and Spivak's discussion first addresses the internal critique by showing us that historical sources shaped by marginalized communities can be reached with postcolonial legal historiography. And second, their discussion allows us to question whether positive legal historiography can be done in the first place.

A. Guha and the Subaltern Studies Group: An (Abbreviated) Introduction to Subaltern Studies

Guha and the Subaltern Studies Group raised issues of representation in traditional historiographies of India—a problem with thin and thick accounts. On the thin account: Guha asks us to consider the historiography of peasant insurgencies against British rule in India; Guha notes that these historiographies were based on recollections of colonial judges and magistrates.[96] These imperial officials would construct reports of local uprisings "as a historical narrative," which were eventually incorporated into the "dominant, indeed, the only mode of historiography" on said insurgencies.[97] Left out was any focus on the insurgents as self-motivated actors.[98]

The problem with this kind of historiography goes beyond insufficient research methodology; the very nature of the history was designed to strip insurgents of any sense of self-motivation. The focus on agents of the imperial state—representatives of the very actor the insurgents were rebelling against—as primary sources reverses the reader's understanding of the insurgencies' causality.[99] The judges and magistrates authored their reports with the purpose of utilizing their findings to maintain law and order.[100] To the extent that insurgents' motivations are mentioned in such reports, they are only investigated for the purpose of allowing the imperial state to "prevent a recurrence of similar disorders."[101] The historiography thus functions to confine insurgency's logic to the frame of counter-insurgency: As Guha explains,

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96 Ranajit Guha, Elementary Aspects of Peasant Insurgency in Colonial India 3–4 (1983), https://archive.org/details/dli.bengal.10689.12632/page/n19/mode/2up [https://perma.cc/UA4M-NLBR].

97 *Id.* at 3–4.

98 *Id.*

99 *Id.* at 3 ("Causality was harnessed thus to counter-insurgency and the sense of history converted into an element of administrative concern.").

100 *Id.* at 3–4.

101 *Id.* at 3.

"By making the security of the state into the central problematic of peasant insurgency, . . . the peasant was denied recognition as a subject of history in his own right for a project that was all his own."[102] As a result, the peasant—the subaltern—falls out of their own history. This in turn is an example of a structuralist approach to history, one that uncovers how histories can function as "devices for repressing or obscuring things about which one cannot speak."[103]

According to Guha, denying the subaltern their history means denying them their consciousness.[104] Because the original motivations of the subaltern masses are stripped from history, their insurgencies are seen as "purely spontaneous" and without logic.[105] The result is an erroneous and elitist interpretation of Indian history—and perhaps all histories—one that requires the intervention of "charismatic leaders, advanced political organizations, or upper classes" to explain subaltern insurgencies.[106] In Guha's telling, the subaltern masses can only be acted upon or wait to be led—they have no agency in an event of their own making. The paradigmatic example is the elevation of Mahatma Gandhi and the Indian National Congress in the story of the movement for Indian independence.[107] Because Gandhi and the Indian National Congress are generally seen as the motivating force behind Indian independence, the peasant insurgencies that came before are relegated to marginally relevant "pre-history."[108] But here lies the Subaltern Studies Group's key critique of these historiographies and the historians who write them: The focus on elites and even ideas like class-conflict that are central to Western political theory as "the chief movers of politics" fails to "recognize the trace of [subaltern] consciousness in the apparently unstructured movements of the masses."[109] A social movement like Indian independence necessarily involves a critical mass of people, yet the role of the subaltern in these movements is consigned to the dustbin of history.

Critically, Guha thought it possible to find the subaltern's voice in history, even while acknowledging that many traditional sources

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102 *Id.*

103 Fisher, *supra* note 66, at 1067–68 (describing Foucauldian analysis).

104 GUHA, *supra* note 96, at 4.

105 *Id.*

106 *Id.* ("[B]ourgeois-nationalist historiography has to wait until the rise of Mahatma Gandhi and the Congress Party to explain the peasant movements of the colonial period so that all major events of this genre . . . may then be treated as the pre-history of the 'Freedom Movement.'").

107 *Id.*

108 *Id.*

109 Vinthagen, *supra* note 90 (interviewing David Hardiman, one of Guha's students, and a participant in the Subaltern Studies Group); GUHA, *supra* note 96, at 5.

of historical knowledge might be biased. But instead of reproducing histories as told by oppressors, Guha and other subaltern historians call for a wider and more critical view of history to find the subaltern's voice.[110] Such tactics include taking a structuralist approach to religion and folklore—i.e., finding history in oral histories and cultural practices that have become codified through repetition.[111] Guha also thinks it possible to read elitist histories of insurgencies against themselves to understand how subaltern rebellion shaped elitist discourse.[112]

For example, he describes how British reports of relatively minor, but otherwise rare, acts of civil disobedience by Indian subjects foreshadowed full-throated acts of rebellion.[113] Guha describes how on the eve of one particular rebellion, a British report described how some Indians "had thrown off their customary quiet and respectful behaviour, and had become forward, if not insolent; they paraded the public roads in parties, scarcely deigning to move to one side for a passing carriage, and singing at the highest pitch of their unmelodious voices, heedless of who heard them."[114]

As suggested by this passage, this was a sharp break from the deference and restraint that the British had come to expect from their subjects. But in this way, the subaltern's disobedience begins to explain an otherwise inexplicable rebellion. It suggests that rebellion is not spontaneous—it has a logic. And if it has a logic, it can be understood and, for our purposes, marshaled for use in legal history. This focus on the "disjunctures [and] radical discontinuities[] in the history of consciousness" is a hallmark of the structuralist approach.[115] Accordingly, Guha argues that this kind of analysis may allow us to locate the subaltern's "rival consciousness."[116]

Guha and the Subaltern Studies Group's account of how to find the subaltern in imperial histories is a structuralist one.[117] Guha's response to the thick problem of traditional historiographies of the British occupation of India creating their "own devices for repressing or obscuring" the Indian peasant's motivations for insurgency, was to channel his Foucauldian instincts.[118] He examined the subaltern's

110 *Id.* at 14–17.

111 Chakrabarty, *supra* note 93, at 25 (describing Guha's structuralist approach to subaltern history).

112 Guha, *supra* note 96, at 17.

113 *Id.* at 39–40.

114 *Id.* at 40.

115 Fisher, *supra* note 66, at 1067–68.

116 Guha, *supra* note 96, at 17.

117 *See* Fisher, *supra* note 66, at 1067 (discussing structuralism).

118 *Id.*

culture, religion, and rebellion to better understand her role in social movements.[119] Examining the subaltern in this way, as Dipesh Chakrabarty notes, marks Guha's "deep acceptance" of structuralism, the idea that "certain cultural practices . . . continue to exist long beyond their historical origins by becoming codified through constant repetition and . . . entering the structural aspects of a culture."[120] This accounts for his focus on religion and folklore in his attempt to locate the subaltern subject in history.

The approaches to historiography Guha and the Subaltern Studies Group advocated for were not monolithic—and an attempt to encapsulate their views and academic projects is beyond the scope of this Note. But for our purposes, the approach(es) to historiography advocated by the Subaltern Studies Group share three things in common. First, the subaltern approach to history was motivated by "a commitment to the poor and powerless."[121] Second, the subject of history is the subaltern, broadly defined as someone who is subordinated and oppressed.[122] And third, the subaltern's history—their voice—though suppressed, can be recovered through a structuralist approach to history and examination of unorthodox sources. And if the subaltern's voice can be recovered, it can be used to shape the narratives that give rise to legal meaning: legal history.

B. Spivak's (Abbreviated) Response

The Subaltern Studies Group was not immune from criticism. Among the group's foremost critics was Gayatri Spivak, who was an early participant in its discussions.[123] While she shared the group's commitment to liberatory politics, she challenged how the subaltern was constituted as subject of a historical inquiry, and whether the subaltern's voice can be recovered at all. This Section will briefly discuss Spivak's response to Guha and critiques of other scholars, which she expounded in a famous and aptly titled essay, *Can the Subaltern Speak?*.

Before asking the ultimate question of whether the subaltern can speak, Spivak challenges how Guha and, by extension, the participants in the Subaltern Studies Group construct the subaltern. She argues that, despite suggestions otherwise, the subaltern exists only as "identity-in-differential."[124] Consider again Guha's insurgent. We know

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119 Chakrabarty, *supra* note 93, at 25.
120 *Id.*
121 Vinthagen, *supra* note 90.
122 *See supra* notes 90–91 and accompanying text.
123 Chakrabarty, *supra* note 93, at 26.
124 Spivak, *Can the Subaltern Speak?*, *supra* note 1, at 284.

that the insurgent exists only because she stands in contrast to and in rebellion against an imperial power. The term "insurgent" necessarily implies something to be insurging against—just as the term "subaltern" necessarily implies a subordinating power. Therefore, the insurgent only exists in relation to others, or as Spivak notes, the subaltern is "itself defined as a difference from the elite."[125]

Yet, despite the subaltern's inability to exist without contrast, Spivak argues Guha and others erroneously impute onto the subaltern a "pure, retrievable form of consciousness" that can be discerned with the right historical methods.[126] This "consciousness" purports to represent unadulterated subaltern thought—free from the influence of the oppression that is, crucially, necessary to creating the subaltern in the first place. Spivak calls this argument essentialist; it assumes that the quality or characteristic of subalternity is intrinsic rather than socially contrived.[127] But subaltern thought cannot exist without reference to the conditions or actors creating subalternity in the first place. And if this is true, subaltern "consciousness" as an object of study cannot be "pure" in the sense that it can exist by itself without reference to the superordinate.

Spivak further argues that studying the subaltern might be hopelessly essentialist. If subaltern historians like Guha are forced to resort to "identity-in-differential" to make the subaltern legible, then, Spivak says, one must provide a taxonomy of power relations within the society studied.[128] This act of measuring the subaltern subject's "specific nature and degree of the deviation" from the elite could "hardly be more essentialist . . . ."[129] One reifies and accepts the logic of subalternity by using the superordinate's logic to define the subordinate.

Spivak's critique of Michel Foucault and Gilles Deleuze—two figures associated with structuralism—helps illustrate her argument. Spivak argues that when Foucault and Deleuze, like Guha and the subaltern historians, use subordinated populations as the subject of analysis—say, the prisoner[130]—they risk "consolidat[ing]" the very forces giving rise to subordination.[131] In other words, by describing the prisoner, for example, as a function of the logics and forces that create imprisonment, the academic is in danger of reinforcing the status of

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125 *Id.* at 285.

126 *Id.* at 286.

127 *Id.* at 285.

128 *Id.* at 284–85.

129 *Id.* at 284.

130 *See generally* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) (documenting the various social and historical mechanisms that drove the evolution of punishment towards the modern penal system).

131 Spivak, *Can the Subaltern Speak?*, *supra* note 1, at 275.

being imprisoned. Foucault, Deleuze, and Guha are uncritical about this "historical role of the intellectual" in attempting to study subordinated people.[132]

This is a critical point: Spivak argues that the approach described risks making "the intellectual . . . complicit in the persistent constitution of Other as the Self's shadow."[133] Because (1) "everything [the metropolitan intellectual] read[s] . . . is caught within the debate of the production of that Other, supporting or critiquing the constitution of the Subject as Europe";[134] and (2) the imperial powers took "great care . . . to obliterate the textual ingredients with which such a subject could cathect, could occupy (invest?) its itinerary," it is therefore "impossible for contemporary [metropolitan] intellectuals to imagine the kind of Power and Desire that would inhabit the unnamed subject of the Other of Europe."[135] Put differently, the Western intellectual cannot, by the very nature of their position and of colonialism itself, know the subaltern.

The same forces make the subaltern subject both irretrievable and voiceless. The subaltern can only attempt to be defined in reference to and on the terms of the superordinate, empire, colonizers, etc. Further, by nature of being conquered, any historical record the subaltern could have left does not exist.[136] Thus, just as with race, gender, class, or any other status connoting a power hierarchy, the very use of the category of subaltern keeps the superordinate dominant.[137] The result is that the subaltern is "even more deeply in shadow" and rendered mute—the subaltern cannot speak.[138]

Spivak's rejection of the Western intellectual's quest for the subaltern's "lost origins"[139] fits squarely within the Postmodernist approach to history. The Postmodernists believed that because all historical texts have had layers of prior interpretation, "recovery of the 'original' meaning or context of any given text is impossible."[140] The historian's focus, then, should be less on reconstruction and more on "dialogic exchange" with and "subverting the ideological contexts" within historical sources in order to "subvert[] the ideological contexts

132 *Id.*

133 *Id.* at 280.

134 *Id.*

135 *Id.*

136 *Id.* at 287.

137 *Id.*; *cf.* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 153–55 (1992) (suggesting that the social construction of race inevitably leads to racism by design).

138 Spivak, *Can the Subaltern Speak?*, *supra* note 1, at 287.

139 *Id.* at 307.

140 Fisher, *supra* note 66, at 1069.

in which they were written."[141] The postmodernist tendency to liberate oneself from what William W. Fisher calls "obsessive historicism" allows the historian to "brush against the grain" or subvert canonical legal histories in light of present-day concerns.[142]

Fisher's description of the postmodernist approach to history closely resembles Spivak's admonition to subaltern historians: "[Y]ou don't give the subaltern voice. You work for the . . . subaltern, you work against subalternity."[143] "Working against subalternity" is ultimately what Spivak believes historians should strive for. She argues that the focus on retrieving information about the subaltern from "silenced areas" is both well-intentioned and useful,[144] but rather than "museumize" subalternity by searching for their voice, she calls on historians to provide an account of how a particular historical narrative was established as the dominant and normative one.[145]

As an example, Spivak problematizes the history of the British outlawing of *sati*—a former practice where a Hindu widow would self-immolate on her deceased husband's funeral pyre.[146] As Spivak describes it, there were two problematic narratives advanced around the practice. First, an Orientalizing-argument: The British needed to outlaw *sati* in order to "sav[e] [B]rown women from [B]rown men."[147] The second is what she calls an "Indian nativist" argument, and perhaps the closest to a Guha-style-ian type argument: The self-immolating woman actually wanted to die.[148] To say otherwise would be, supposedly, to deny the woman agency.

Both narratives are unsavory for Spivak. To complicate the Indian nativist argument, she engages in a deep grammatological, theological, and anthropological analysis of *sati* to demonstrate that practice could have been seen by these women not as the taking of one's own life, but as acts of martyrdom or war.[149] But even she cannot say what precisely these women's motivations were, in large part because the British police records are so "grotesquely mistranscribed . . . [that] one cannot put together a 'voice'"—"[t]here is no itinerary we can retrace here."[150] Yet, Indian nativists, seeking to recover a pure subaltern consciousness,

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141 *Id.* at 1070.

142 *Id.* at 1070, 1081.

143 Leon De Kock, *Interview with Gayatri Chakravorty Spivak: New Nation Writers Conference in South Africa*, 23 ARIEL 29, 46 (1992).

144 Spivak, *Can the Subaltern Speak?*, *supra* note 1, at 295.

145 *Id.* at 281; De Kock, *supra* note 143, at 46.

146 Spivak, *supra* note 1, at 297.

147 *Id.*

148 *Id.*

149 *Id.* at 297–302.

150 *Id.* at 297, 302.

move past the ambiguity and are quick to impute "agency" onto the women's actions.

But, says Spivak, this actually serves to justify the British account—and here, crucially, is where Spivak begins to plot out a third way of postcolonial historiography. If the Indian nativist argument—that women wanted to self-immolate—is true, then that further justifies British colonial intervention to save "uncivilized" Indians from themselves.[151] The British must intervene, then, to save Indian women from a society that teaches them to self-immolate. Indeed, the nativist argument might inadvertently advance colonial logics. It pits "the noble Hindu"—who is against *sati*—against "the bad Hindu, [who is] given to savage atrocities."[152]

The point here is that Spivak and postmodern historians are less focused, if at all, on reconstructing history. Instead, they focus on the question of what function history serves within broader systems of oppression. Here, the history of *sati*, through both the British and nativist narratives, is actually serving to justify colonialism. The role of the historian, then, is not necessarily to search for these "lost origins," but rather to better illustrate the process and mechanics of the social forces that construct subalternity itself.[153]

At the core of Guha's and Spivak's discussion of how we *do* historiography—whether we uncover them from the shadows (structuralism) or construct and enter into dialogue with them (postmodernism)—is the question of *why* we do history in the first place.

Guha's approach to history is defined by its (1) commitment to emancipatory politics, (2) focus on the subaltern as subject, and (3) attempt to locate the subaltern's voice in alternative historical sources; Spivak responds by questioning whether the last two features are desirable or even possible in light of the first. If Guha's structuralism is designed to further "counterhegemonic ideological production"—to challenge extant accounts of the supposedly limited, non-self-motivated role of the masses in challenging colonialism—Spivak argues that Guha's approach would only serve to reify the positivism that provided the intellectual foundation for colonialism in the first place.[154] Certainly, this disagreement is partly a question of methods, but it is also

[151] *Id.* at 299 ("Imperialism's image as the establisher of the good society is marked by the espousal of the woman as *object* of protection from her own kind.").

[152] *Id.* at 301.

[153] *Id.* at 291; De Kock, *supra* note 143, at 46.

[154] Spivak, *Can the Subaltern Speak?*, *supra* note 1, at 307, 280 (describing Edward Said's position); *see Logical Positivism*, ENCYC. BRITANNICA, https://www.britannica.com/topic/logical-positivism [https://perma.cc/TC8C-UJ3W] (last visited Sep. 11, 2025) (describing

a fundamentally normative one over the goals of historiography—its teleology. If we "must change the 'stories' we live by in order to change the world," what does it mean to change our histories?[155] How can a commitment to liberatory politics inform historiographies? How can we do historiographies such that we can see history in its best light?[156] Whose voices should we prioritize? Whose voices can be? What does it mean to uplift subaltern voices? And, crucially, what role is there for academic, intellectual, and legal elites in doing so?

III
Moving Beyond Originalism's How and Why

Despite this rich, decades-long debate over history's teleology, courts and practitioners continue to argue about legal history on originalism's terms, as discussed above. The deeper questions about *how* and *why* we do history are largely bypassed, especially those calling into question the possibility and desirability of positive, empirical legal history. Originalists wave these concerns away—words and history *must* have objective meaning.[157] Non-originalists, for their part, attack the *process* of doing originalism on its own terms rather than contrasting it with other ways of doing history or critiquing its substance as a *standard*.[158] Perhaps this is a function of originalism's ascendency. After all, if "we are all originalists,"[159] now, it might make more sense to accept the originalist project on its own terms and attempt to argue about its application.[160] The practical approach might mitigate originalists' worst tendencies.

Or perhaps arguing about the mechanics of doing originalism correctly rather than challenging originalism's intellectual merits is a function of the general decline of theory and critique in the legal academy.[161] As Corrine Blalock notes, due to the rise of neoliberalism's

how a core claim of positivism is that the "ultimate basis of knowledge rests upon public experimental verification or confirmation rather than upon personal experience").

[155] Vinthagen, *supra* note 90.

[156] *See* Ronald Dworkin, Law's Empire 249 (1988) ("Which story shows the community in a better light, all things considered, from the standpoint of political morality?").

[157] Scalia, *supra* note 30, at 856 ("Not that I agree with, or even take very seriously, the intricately elaborated scholarly criticisms to the effect that (believe it or not) words have no meaning.").

[158] *See generally* Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 Harv. L. Rev. 777 (2022) (arguing that originalism's practical difficulties do not undermine its superiority as a method of constitutional interpretation).

[159] *User Clip: Kagan: We Are All Originalists.*, *supra* note 10.

[160] *See, e.g.*, Shaffer, *supra* note 54 at 1856 (arguing that, even by its own standard of originalism, the Supreme Court has failed to "utilize Reconstruction history" correctly).

[161] *See* Blalock, *supra* note 20, at 95.

hegemony in the legal academy, "[i]nstrumental forms of legal scholarship are more successful within the academic market, especially as the academy is pressured to focus more on supporting the legal profession at large."[162] Whatever the underlying cause, those looking to utilize history or critique its use normatively are forced to do so on originalism's narrow terms.

This need not be the case. Guha and Spivak show us that originalists do not have the final word on historiography. Their structuralist and postmodern approaches to subaltern history provide powerful alternatives to the narrowness of originalism's answer to *how* we should do legal history and *why* we should care about it. The tensions raised by the Guha-Spivak/structuralist-postmodernist debate can help us think about how advocates and scholars might marshal history beyond originalism's narrow confines and toward liberatory politics. Accordingly, this Part will demonstrate how subaltern and postcolonial approaches might broaden our understanding of *how* and *why* we do legal history.

A. How We Do Legal History

Let's start with the *how*. For those frustrated with the narrowness of *how* originalists do history, both Guha's and Spivak's subaltern historiographies allow us to create alternative legal historiographies, "reinvigorate the practice of critique," and uncover (or construct) the Constitution's liberatory potential.[163] For example, consider how Guha's structuralism might shift how we think about originalist legal historiographies. Recall that originalists often focus on those who occupy positions of power in their inquiries into original public meaning.[164] But doing history in this way, with a focus on elites, shares parallels to the "bourgeois-nationalist history" Guha critiqued.[165] Just as Guha critiqued traditional Indian histories for establishing elites rather than the subaltern masses as the primary motivators of the Indian Independence movement, we can critique originalists of all stripes for doing the same when telling the story of revolutionary moments in American constitutional history.[166]

This is not so far from originalist legal historiography, especially relative to Spivak's postmodern approach: Both Guha's structuralist

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162 *Id.*

163 *Id.* at 102.

164 *See, e.g.*, *supra* notes 50–63 and accompanying text (sources used by originalists).

165 GUHA, *supra* note 96, at 4 ("The result . . . has been to exclude the insurgent as the subject of his own history.").

166 *See supra* Section I.A.

approach and originalism (1) have a historical subject (2) whose voice is retrievable through historical analysis. The two approaches share a commitment to a positive, empirical approach to history—i.e., a belief "that there is such a thing as the past" to reconstruct.[167] But they do differ substantially about which subject historiographies should consider authoritative when constructing legal meaning. In an era of "history and tradition," Guha asks us to consider *whose* history and *whose* tradition should dictate constitutional meaning. Thus, Guha's structuralist critique creates space for the legal historian to examine a much broader range of subjects and sources, democratizing historiography.

For example, Guha's critique helps us think twice before constructing the meaning of the Fourteenth Amendment based on the perspectives of its congressional drafters.[168] In this way, Guha is similar to historians who both see the Reconstruction period as our Second Founding and would highlight the broader social movements, such as the Colored Conventions Movement, animating the Fourteenth Amendment's passage.[169] But critically, a Guha-ian approach might even caution against placing too much weight on certain strains of Black activism as "indigenous elite" or "native informants for first-world intellectuals."[170] A Guha-ian might also ask us to consider how enslaved people's insurgency shaped the Fourteenth Amendment. Such an approach might look to accounts of the rebellions by enslaved people—just as Guha examines peasant insurgencies against colonial rule—for the "'ruptures,' 'discontinuities,' and 'disjunctions' in the history of consciousness" that might shed light on how enslaved people shaped the Fourteenth Amendment.[171]

The Guha-ian subaltern approach complicates the originalist focus on "original public meaning." The shift from original intent to original public meaning was meant to, among other things, lock down "an objective legal rule," as "[t]he language of original intent too often encouraged the pursuit down false trails in an effort to locate

167 Fisher, *supra* note 66, at 1087.

168 *See, e.g.*, William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 Stan. L. Rev. 1185 (2024) (using general law principles, instead of original intent or public meaning).

169 *See generally* Eric Foner, The Second Founding: How the Civil War and Reconstruction Remade the Constitution (2019) (discussing the rich history of Black activism shaping the passage of the Fourteenth Amendment).

170 Spivak, *Can the Subaltern Speak?*, *supra* note 1, at 284 (describing Guha's approach to subaltern history).

171 Henry L. Gates, Jr., *Did African-American Slaves Rebel*, PBS, https://www.pbs.org/wnet/african-americans-many-rivers-to-cross/history/did-african-american-slaves-rebel [https://perma.cc/6EH9-VR7M] (last visited July 19, 2025) (noting many such rebellions); Fisher, *supra* note 66, at 1089.

the preferences of political actors, or buried ideas, or value systems."[172] But for Guha's structuralist approach to history, locating those buried ideas is precisely the point. If we see historiography as an opportunity to "reveal[] suppressed alternatives," a Guha-ian approach might focus on whether, for example, rebellions by enslaved people—a subaltern group—were able to force elite discourse "to reduce the semantic range of many words and expressions, and assign to them specialized meanings" in the drafting of the Fourteenth Amendment.[173]

Spivak's critique of Guha applies to originalist legal historiographies as well. Just as Spivak critiqued Guha for attempting to locate the subaltern's "pure . . . consciousness," the Spivak-ian historian would likely find originalism's search for "lost origins"—for the authoritative, objective, original public meaning or intent—fundamentally misguided. This is a postmodernist insight: Any subject examined by even the most objective originalist historian "will always escape the efforts of both their authors and intellectual historians to tie them down."[174]

What might a Spivak-ian approach to legal history look like? Returning to the previous discussion of the Fourteenth Amendment, the Spivak-ian approach would highlight the dangers of any attempt to locate a subaltern or marginalized consciousness in history. Just as the Western intellectual cannot know the subaltern as a function of their positionality in the West, a legal historian cannot uncover the impact of enslaved people on the Fourteenth Amendment.[175] No historian can ever "escape either her own concerns or the layers of prior interpretation that have encrusted all substantial texts."[176]

But the impossibility of objectivity allows the legal historian to move beyond originalism's narrow episteme. So instead of preoccupation with objective history, the subaltern historian can move to infuse subjectivity and be "openly perspectival."[177] A Spivak-ian legal historian asks a different set of questions that allows them to illuminate the conditions and processes that create subalternity and marginalization in the first instance.[178] How did a particular narrative about the Fourteenth Amendment come to be the dominant one? What does that say about the historian's role in furthering systemic racism? What would it take

172 Whittington, *supra* note 20, at 381.

173 Fisher, *supra* note 66, at 1097; Guha, *supra* note 96, at 17.

174 Spivak, *Can the Subaltern Speak?*, *supra* note 1, at 286, 291; Fisher, *supra* note 66, at 1069.

175 *See supra* notes 75–78 and accompanying text.

176 *See* Fisher, *supra* note 66, at 1069.

177 *Id.* at 1070.

178 *Id.* at 1069.

to displace hegemonic narrative? And what role is there for impacted communities in that project?

B. Why We Do Legal History

There is, of course, more at stake than just a methodological discussion of historiography. Just beneath the surface, we can see that Guha/structuralists, Spivak/postmodernists, and the originalists occupy different moral universes, different *nomoi*.[179] As I have already discussed, Guha's and Spivak's approaches to history are motivated by a commitment to shifting power relations; both hope to provide an account of how the subaltern might be liberated from systems of oppression, methodological differences notwithstanding.[180] Spivak's postmodernism, for example, is a normative and subjective mode of doing history. Justifications for originalism facially leave such considerations out of the picture, but, as we shall see, that itself is a moral claim. These disagreements about *why* we do legal history ultimately help us clarify just how much originalism has severely limited history's normative horizons.

Recall that one justification for *why* we ought to do originalism implicates liberal concerns about courts as an institution, the "process-based consideration."[181] Because the judiciary's ability to nullify or uphold legislative policy is a plenary one and only specific lawmakers were democratically authorized to govern, courts should use originalist legal historiographies to "defer to the authorized lawgiver, rather than deliberate anew on what might be desirable constitutional rules."[182]

At first blush, the process-based justification for originalism seems to not concern itself with morality. The legislature makes the law; judges discern the original public meaning/intent and apply it. In fact, Justice Scalia argues that legislatures, not courts, are the "more appropriate expositor of social values."[183] Therefore, normative considerations supposedly have no place in originalist historiography. But this conceptual move by a hegemonic paradigm should be familiar.[184] As Blalock has argued in reference to neoliberalism's "illusion of amorality," a claim to amorality is in fact a moral claim itself.[185]

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179 *See* Cover, *Foreword: Nomos and Narrative*, *supra* note 2.
180 *See supra* Part II.
181 Whittington, *supra* note 20, at 399.
182 *Id.*
183 Scalia, *supra* note 30, at 854.
184 *See* Blalock, *supra* note 20, at 89.
185 *Id.* at 99.

Spivak's postmodern approach to subaltern histories helps us uncover originalism's hidden moral claim. In framing originalism as the lesser evil and the only alternative if we care about the democratic legitimacy of the courts, originalists ask us to assume—and notably, Guha does as well—that positive, objective, and empirical historicism is possible in the first place. This is, after all, the basis for the originalist assertion that the original public meaning is recoverable. But Spivak's critique shows us that knowledge is deeply contingent, precluded by oppressive forces and the observer's own positionality, and shaped by multiple layers of interpretation. In other words, history is anything but objective and, if anything, is constructed.

This is particularly true in histories telling the story of how law came to be. As Spivak notes when she describes the British Empire's codification of previously unwritten Hindu law, this way of doing history represents "epistemic violence," or the construction of one narrative of law through the destruction of another.[186] By channeling Spivak-ian postmodernism, we can see that the originalist claim to the possibility of positive, empirical history establishes the observer as the all-powerful knower of history while simultaneously *creating* that history whole cloth and *destroying* alternative narratives. This is a deeply normative claim. By arguing for originalism and its positive, empirical approach to history, originalists argue for the propriety of establishing particular historical sources and observers as the final—and only—arbiters of legal history, meaning, and power. Spivak-ian postmodernism reveals how originalism has transformed the *why* of doing legal history into the elevation of a narrow range of observers, historical sources, and possible interpretations.

Seen this way, originalism's supposed non-consideration of norms when justifying itself is a feature, not a bug. It elides both the tensions and inconsistencies in *why* we should do legal history and prevents the emergence of alternative justifications. Originalism, like other hegemonic paradigms, "functions precisely on the logic that there is no alternative."[187]

Spivak's subaltern approach helps us see originalism's inconsistencies and begin to chart an alternative to *why* we should care about history. As discussed, Spivak's openly perspectival and dialogic approach to history allows us to see history as a vehicle to understand the mechanics of marginalization and work against it.[188]

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[186] Spivak, *Can the Subaltern Speak?*, *supra* note 1, at 281. Robert Cover would likely come to a similar conclusion. *See supra* notes 1–2 and accompanying text.

[187] Blalock, *supra* note 20, at 100.

[188] *See supra* notes 140–49 and accompanying text.

A postmodernist approach to history like Spivak's might allow us to "imagine . . . and achieve dramatically different social arrangements."[189] Once we move beyond originalism's narrow justification for doing history, the possibilities are plentiful.

Guha's and Spivak's respective approaches to subaltern history show us the potential of bringing back critical insights into legal histories. Both approaches complicate *how* and *why* we do legal history in a world dominated by originalism. Guha's structuralist approach, in keeping with the spirit of the originalist focus on positive, empirical history, shows us how legal historians might focus their attention on a broader, previously hidden range of marginalized subjects and sources. Spivak's postmodernist approach rejects the originalist approach altogether as fundamentally misguided. Crucially, the Spivak-ian approach also allows for a critique of originalism's teleology, revealing how originalism limits the normative questions legal history can ask. In any case, both Spivak and Guha allow us to see how subaltern legal history can be a liberating force. We just need to ask the right questions of history.

C. Critiques of Guha and Spivak

I should address some critiques. Some are external. Committed originalists will likely not be keen on an approach which displaces and fundamentally disrupts their preferred subjects of inquiry, sources, and historiographies. The Spivak-ian/postmodern position that objective history is impossible makes for easy mischaracterization. One can imagine the Scalia-like response: Words and, therefore, history have meaning, believe it or not(!).[190] So too, to a lesser extent, can one characterize the Guha-ian/structuralist position that we can only find the subaltern in non-traditional, hard-to-pin down sources as nihilist. These do not seem insurmountable. Making the affirmative case for subaltern legal history accordingly requires that we, as Blalock argues, "reinvigorate the practice of critique within the legal academy."[191] Spivak's postmodernist approach shows that we can critique originalism on its own terms by demonstrating how its seemingly objective and non-normative approach to history is anything but.[192]

Some critiques are internal. The Subaltern Studies Group disbanded decades ago and Guha's and Spivak's respective critical approaches

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189 Fisher, *supra* note 66, at 1097.

190 *See* Scalia, *supra* note 30, at 856.

191 Blalock, *supra* note 20, at 102.

192 *See id.* (describing a similar approach for countering neoliberalism's hegemony in the legal academy).

have since been subject to critique themselves. For example, Nivedita Majumdar has argued that the way that Spivak, Guha, and other postcolonial scholars have conceptualized resistance and subalternity in subaltern women actually "redefine[s the subaltern's] agency so that acquiescence to patriarchy is presented as a struggle against it."[193] For an approach to historiography focused on either locating agency (Guha) or challenging subalternity (Spivak), this critique might undermine the liberatory potential of the subaltern approach.

But this too is not fatal for our purposes. The goal of highlighting Guha's and Spivak's subaltern approaches is to reveal the narrowness of how the legal academy and profession talks, writes, and thinks about history. Internal critics of Guha's and Spivak's approaches may well have a point, but, for now, we find ourselves in originalism's thick, *nomic* reserve—unable to see past its borders.[194] But with discussions of colonialism and empire beginning to break through into mainstream American legal scholarship, reviving the subaltern approach to history might allow us to begin articulating an alternative to originalism.[195]

IV
Postcolonial Legal History

A. *Postcolonial Legal Historiographies*

What effect might Guha-ian structuralism, Spivak-ian postmodernism, or another postcolonial approach have on legal historiography? One consequence might be different historiographical methods. For example, deploying Guha-ian structuralism is within the bounds of current positivist approaches to legal history. But Guha looks to radically different sources. As I have discussed *supra*, Guha's focus on subjects who resist oppressive legal regimes might give those interested in liberatory legal histories methodology and inspiration to insert these radical narratives into legal historiography. Acts of resistance, some extralegal, against oppressive legal regimes abound. Thousands of protesters forming a human barrier to prevent the eviction of low-income Filipino residents from San Francisco's I-Hotel.[196] Abolitionist activists literally storming a courtroom to

[193] Nivedita Majumdar, *Silencing the Subaltern: Resistance & Gender in Postcolonial Theory*, 1 Catalyst (2017), https://catalyst-journal.com/2017/11/silencing-the-subaltern [https://perma.cc/3HKH-XLEM].

[194] *See* Cover, *Foreword: Nomos and Narrative*, *supra* note 2, at 9 ("A legal tradition is hence part and parcel of a complex normative world.").

[195] *See supra* notes 12–15 and accompanying text.

[196] Brandon Yu, *A Community Lost, a Movement Born*, S.F. Chron. (Aug. 11, 2017), https://projects.sfchronicle.com/2017/international-hotel [https://perma.cc/6J3M-RKLY] (detailing

free a person at threat of being returned to enslavement under the Fugitive Slave Act.[197] All resisters to oppressive legal regimes whose narratives and experiences deserve to be recognized in a redemptive telling of our country's history.[198] And if we can create new historical narratives, that may very well give rise to new legal meanings. Indeed, "[t]he stories the resisters tell, the lives they live, [and] the law they make" might create new worlds.[199]

Those seeking to move away from positivist legal history altogether, alternatively, might rely on Spivak-ian postmodernism. A Spivak-ian legal historiography focuses less, if at all, on reconstructing the *meaning* of legal text and more on *situating* that text and its interpreters within systems of power and control. Take the Second Amendment. A Spivak-ian historiography of the constitutional right to bear arms might reject as misguided the recent debate around recovering exactly what the history and tradition of gun ownership looked like at the Founding—such a recovery of the text's original meaning is impossible. Instead, a Spivak-ian legal historiography might ask *who* exactly the Framers were trying to deputize its citizens against. On this point, Carol Anderson has argued that the colonists feared rebellion by enslaved people.[200] Slaveholders, looking to successful rebellions in Haiti, were fearful of a similar fate.[201] And if the Second Amendment was racialized from the start—if Black people were actively excluded from America's racial contract of armed self-defense—then there are fundamental questions about the historiographies and history-tellers (see courts) that fail to address this history.[202] The Spivak-ian approach allows us to reach questions of historiography's teleology—the role that history serves in perpetuating marginality.

how 3,000 protestors formed a human barricade around San Francisco's International Hotel to prevent an eviction order from being executed on low-income Filipino residents).

197 Daniel Farbman, *Resistance Lawyering*, 107 Calif. L. Rev. 1877, 1908 (2019) (describing extralegal tactics used by abolitionist activists—but not their lawyers—to disrupt slavery).

198 *See* Cover, *Foreword: Nomos and Narrative*, *supra* note 2, at 34–35 (arguing for a "redemptive constitutionalism"—one that "set[s] out to liberate persons and the law and to raise them from a fallen state").

199 *Id.* at 68.

200 *See* Carol B. Anderson, The Second: Race and Guns in a Fatally Unequal America 50 (2021). *See generally* Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. Davis L. Rev. 309 (1998) (compiling historical evidence that the Second Amendment was a response to fears of rebellions by enslaved people).

201 *See* Anderson, *supra* note 200, at 50 (describing concerns by American colonists, including James Madison and Thomas Jefferson, that the ideals of the Haitian Revolution would influence enslaved people in America).

202 *See generally* Charles W. Mills, The Racial Contract 13–14 (1997) ("[T]he Racial Contract establishes a racial polity, a racial state, and a racial juridical system, where the status of whites and nonwhites is clearly demarcated, whether by law or custom.").

I have referenced throughout this Note the desirability of moving legal history out of the courts. This conclusion comes from both the internal and external critique of originalism and positive legal history.[203] But what might this actually look like? One option might be a remand. Legal process theorists have long argued that when a court is faced with a difficult question of law—e.g., two conflicting but equally reasonable interpretations of a statute—the court should remand to the legislature to provide clarification.[204] Questions of contested history could similarly be remanded to move the decision away from courts—a recognition that legal history was, is, and will continue to be created by *nomic* communities, not courts. This is especially so if those questions will be decided by members of a community directly impacted by that legal historiography. The fights over history currently waged in the courts involve fundamental questions of citizenship, sovereignty, democracy, and morality. Helping communities forge their own legal histories—to articulate the very narratives their laws will both enforce and codify into memory—is one way to address concerns about courts aggrandizing their powers *a la* the process-based consideration and the privileging of elite narratives and narrators *a la* structuralism and postmodernism.

Communities are not waiting for permission to narrate their histories. The Equal Justice Initiative's Community Remembrance Project (CRP), for example, has been a leading voice in documenting this country's long history of racial injustice.[205] CRP both educates the public and, crucially, "provid[es] tangible opportunities to participate in restorative truth-telling."[206] That participatory historiography

> enables communities to overcome silence and avoidance by participating in a sequential process of truth, healing, justice, and repair. Public memorials and gatherings centered around reflection and narrative change can help us advance more honest conversations about our past and present, and better demonstrate a commitment to solving racial inequality and injustice moving forward.[207]

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203 *See supra* Section I.A.2; Section I.B.2.

204 *See* Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 Harv. L. Rev. 1 (1957).

205 *See generally Community Remembrance Project*, Equal Just. Initiative, https://eji.org/projects/community-remembrance-project [https://perma.cc/Z4A7-FSDU] (last visited July 22, 2025) (describing various community-based initiatives to memorialize known victims of racial violence).

206 *Id.*

207 Equal Just. Initiative, Community Remembrance Project Catalog: A New Commitment to Truth and Justice 13, https://simplebooklet.com/crpcatalog#page=13 [https://perma.cc/48N5-J3L7] (last visited July 22, 2025).

Reflecting the understanding that *nomic* communities are the true creators of law and narrative, courts could remand questions about history to similar truth and reconciliation commissions or CRP-type community bodies.

But the remand remedy does not address fully the postmodern/ Spivak-ian critique of legal history—that attempts to reconstruct history, even of marginalized communities, are dangerous. For Spivak and other postmodern, postcolonial historians, interrogating the reasons courts engage in historical inquiry should be the focus. In particular, understanding the role that legal historiography has played in perpetuating systemic racism and colonialism, for example, should be the priority. It is hard to imagine a court doing this itself—most have bought into the positivist vision of objective legal history. But the solution to this problem need not involve them at all. Spivak, since publishing *Can the Subaltern Speak?*, has worked extensively to educate children in West Bengal.[208] Channeling W.E.B. Du Bois, she has argued that her pedagogy helps both promote "critical intelligence" and aid "minds that for thousands of years have been denied the right to think independently" do just that.[209] Similarly, a postmodern, postcolonial approach to legal history would require a complete revolution of how we teach, think, and utilize history. That radical reorientation, that "unruly moment . . . [of] undisciplined jurisgenerative impulse," might happen in the courts.[210] But it also might happen in the streets, on the picket line, or in the classroom.

B. Postcolonial Legal Epistemes

There is an obvious consequence to injecting postcolonial approaches to legal history: to explicitly contextualize American legal history within empire and a settler-colonial project. As mentioned at the beginning of this Note, American legal historiography is often, and Spivak might say deliberately, siloed off from its status as an empire.[211] The subaltern cannot speak. Introducing postcolonial approaches to legal historiography allows us to both better understand our own domestic legal history—recovering unseen sources and problematizing

[208] Francis Wade, *Gayatri Spivak: 'The Subaltern Speaks Through Dying*,*'* Nation (July 6, 2021), https://www.thenation.com/article/culture/interview-gayatri-chakravorty-spivak [https://perma.cc/YG4H-FUZA].

[209] *Id.*

[210] Cover, *Foreword: Nomos and Narrative*, *supra* note 2, at 68.

[211] *See* notes 133–38 and accompanying text (recounting Spivak's argument that the purpose of colonial histories is to make the colonized subject irretrievable).

positivist history—while putting our legal history in conversation with struggles and social movements that transcend borders.

Maggie Blackhawk has, for example, in her scholarship, provided one demonstration of what expanding our epistemic horizons might look like.[212] Professor Blackhawk has argued that "borderlands principles"—the principles that Native people have used for centuries to mitigate and shape the colonial relationship with the United States through Federal Indian Law—might be applied to other communities, defined broadly, who have been subjugated by the United States.[213] The application of doctrines and logics from Federal Indian Law to other groups of marginalized people may very well help articulate a radically different kind of constitutionalism around issues of race, incarceration, poverty, and colonialism.[214] However, to engage in such an analysis and reach liberatory legal meaning requires a different kind of historiography than what originalism would have us do. The alternative mode of historiography must be one less focused on rote reconstruction of history—to the extent that is possible. Instead, it should be centered on engaging in dialogue with history, applying its lessons to the present, and acknowledging hidden empire.

Conclusion

My hope is that this Note provides a reminder that history—even legal history—need not be suffocating. Despite our living in an era of history and tradition, postcolonial approaches to legal history allow us to ask just *whose* history and tradition we care about and, indeed, *whether we can* unearth objective history and tradition in the first place. By articulating an alternative, it is possible to expand our epistemic and normative horizons beyond originalism's narrow *how* and *why*. We just need to ask the right questions of history and of ourselves.

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[212] *See* Blackhawk, *The Constitution of American Colonialism*, *supra* note 12, at 141 n.939.

[213] *See id.* ("[B]orderlands principles could empower colonized people and beyond the constitutional baseline of the United States.").

[214] Blackhawk, for example, observes that borderlands constitutionalism shares similarities to Dorothy Roberts's "abolition constitutionalism"—a theory of constitutional meaning shaped by Black freedom activists—in that both see homogenous equality as insufficient to addressing the legacies of racial marginalization. *See id.* (citing Dorothy E. Roberts, *The Supreme Court, 2018 Term—Foreword: Abolition Constitutionalism*, 133 Harv. L. Rev. 1 (2019)). In the context of equal protection jurisprudence, both constitutionalisms' willingness to eschew formal equal treatment could encourage racialized and colonized people to articulate pluralistic and diverse remedies to historic discrimination. *See, e.g.*, Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 Yale L.J. 470 (1976) (describing a diversity of views on how to remedy school segregation, not all of which involved integration).

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