Constructive Constitutional History and Habeas Corpus Today

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In her book, *Habeas Corpus in Wartime: From the Tower of London to Guantanamo Bay*, Professor Amanda Tyler has written a definitive constitutional history of the habeas privilege in the United States.¹ Rather than rehearsing the book’s many virtues, I propose to devote this short Essay to the familiar yet intractable problem of historical translation.

The problem of how to translate the lessons of history into modern constitutional law remains largely unresolved.² True, almost everyone would agree with originalists that history can help answer some modern interpretive questions.³ But just about everyone also recognizes that relevant history does not always point in one direction: well-informed observers may dispute the historical meaning of a constitution’s text, and their views may conflict with the way the

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¹ See Amanda L. Tyler, *Habeas Corpus in Wartime: From the Tower of London to Guantanamo Bay* (2017) [hereinafter Tyler, Habeas].

² Many regard originalism as a doctrine of historical translation. But by seeking to reclaim the original meaning of the text at the time of ratification, originalism might be better described as historical archeology. For a notable attempt to tackle the problem of translation, see Lawrence Lessig, *Fidelity in Translation*, 71 Tex. L. Rev. 1165 (1993). For criticisms, see John O. McGinnis, *The Inevitable Infidelities of Constitutional Translation: The Case of the New Deal*, 41 Wm. & Mary L. Rev. 177, 179 (1999) (describing Lessig’s translation model in light of changed social facts as complex, open-ended, and unsuitable for judges).

text has been applied by the federal courts. The context of a modern dispute might differ from that in which the issue first arose, making the past application an uncertain guide to current questions.

If methodological problems abound among originalists, they persist for those who have yet to take the originalist pledge. Even if the text and original meaning seem unusually clear, interpreters (originalist and non-originalist alike) must reckon with the claims of intervening decisions and historical eras. Further, non-originalists display some continuing devotion to the idea that federal courts should fashion a body of law that fits tolerably well with the nation we once were and the nation we have become. With so much room for argument about the many relevant histories that inform constitutional decisions, why bother to conduct serious constitutional history at all except within an originalist framework? What can constitutional history contribute to non-originalist constitutional discourse, and what guideposts mark the path of persuasive constitutional history in a world of constant change?

This Essay will use Professor Tyler’s book to sketch the outlines of an approach to constitutional history for non-originalists, one I will call constructive

4. Consider, for example, the problem of whether Congress has power to incorporate a national bank, an issue that divided Alexander Hamilton and Thomas Jefferson and featured plausible constitutional arguments on both sides. President Andrew Jackson’s view of constitutionality departed from the meaning that President James Madison viewed as having been established through practice. For a brief sketch of the issue and the interpretive puzzles to which it gave rise, see PAUL BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 8–58 (4th ed. 2000) (collecting and interrogating sources on the bank’s constitutionality and reprinting Jackson’s veto message).

5. See Richard H. Fallon, Jr., “The Rule of Law” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 45 (1997) (noting that normative consensus may erode between enactment and application of law, and questions may arise in an altered “factual or normative” context); see also Lawrence B. Solum, Originalism and Constitutional Construction, 82 FORDHAM L. REV. 453 (2013).


7. See Fallon, History, supra note 3, at 1788–89 (analyzing the relevance of such intervening events and observing that “more history” may be needed to assess “when precedent should trump original meanings”).

8. See id. at 1758 (stating that “claims of constitutional validity and authority depend on current agreement manifest in the judgments of officials, judges, lawyers, and others concerning the contemporary legal significance of past events. This agreement begins with foundational matters.”); see also Larry Kramer, Fidelity to History—and Through It, 65 FORDHAM L. REV. 1627, 1651–52 (1997) (treating the founding era as establishing a textual framework within which our institutions began to evolve and emphasizing the importance of fidelity to institutional history over time).

constitu­tional history. Use of the term “construc­tive” to de­scribe a constitu­tion­al history for non-origin­alists re­flects a vari­ety of con­sid­er­a­tions. First, a con­struc­tive his­tory por­tra­ys the fram­ers as they saw them­selves: as build­ers. They were build­ing a “new or­der for the ages,” a ma­chine that would “go of itself,” a com­plex set of gov­ern­ment in­sti­tu­tions that would doubt­less de­velop in new and un­ex­pect­ed ways.10 Sec­ond, the term con­struc­tive con­veys the idea, com­mon among constitu­tion­al his­tors, that the mean­ing of the Con­sti­tu­tion re­flects the con­struc­tions and prac­tices and layers of mean­ing that law­yers, judges, legis­la­tors, and pre­si­dents have ad­opted over the de­cades.11 Third, the idea of a con­struc­tive con­stitu­tion­al his­tory calls to mind the con­structivist ap­proach to con­stitu­tion­al in­ter­preta­tion that Pro­fes­sor Rich­ard Fallon has ad­vanced and re­fin­ed over a bril­liant ca­reer. For Fallon, in­ter­preters must of­fer an in­ter­preta­tion that takes ac­count of—that coheres or “fits” with—a whole range of in­ter­pre­tive con­sid­er­a­tions, in­clud­ing the les­sions of text, his­tory, pri­or deci­sion­al law, and in­stitu­tion­al de­vel­op­ments.12

Finally, in pro­pos­ing a con­struc­tive con­stitu­tion­al his­tory, the Essay seeks to en­cour­age a form of his­tor­i­cal dis­course that makes a pos­i­tive con­tri­bu­tion to the in­ter­pre­tive en­ter­prise. Con­struc­tive, in this sense, means use­ful and for­ward-look­ing; it con­trasts with de­struc­tive or op­pos­i­tional. The an­ti-federal­ists strug­gled in the rat­i­fi­ca­tion de­bates in part be­cause, busy op­pos­ing the fed­eral­ist pro­ject, they ne­glected to of­fer a pos­i­tive ac­count of the form of gov­ern­ment they

10. See Kramer, supra note 8, at 1655 (stres­sing for in­ter­pre­tive pur­poses not the foun­ding it­self but “the Foun­ders’ choices in put­ting their ideas to work,” con­struc­tive work that “shaped the course of Amer­i­can gov­ern­ment”). The fram­ers of­ten em­braced con­struc­tive im­age­ry in their dis­cus­sion of the con­stitu­tion­al pro­ject. The unof­fi­cial na­tional motto, novus ordo se­clorum (a new or­der for the ages), first ap­peared in 1782 on the back of the great seal. See FOR­REST McDONALD, NOVUS ORDO SE­CLORUM: THE INTEL­LECTUAL ORIGINS OF THE CON­STITU­TION (1985). Later gen­er­a­tions picked up such them­es. See gen­er­al­ly MI­CHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CON­STITU­TION IN AMER­ICAN CUL­TURE 125 (1987) (quot­ing an 1888 state­ment by James Rus­sell Low­ell say­ing to the ef­fect that in draft­ing the Con­sti­tu­tion, “we had in­ven­ted a ma­chine that would go of it­self”); cf. JILL LE­PORE, THESE TRUTHS: A HIS­TO­RY OF THE UNITED STATES (2018), passim, (invok­ing the fram­ers’ meta­phor of the ma­chine).

11. No single mo­ment of his­tory ne­ces­sar­ily de­cides the mean­ing of the doc­u­ment; in­ stead, it has lay­ers of sed­i­ment­ary mean­ing that build up over time. See BARRY FRIED­MAN & SCOTT B. SMITH, THE SED­iMENT­ARY CON­STITU­TION, 147 U. PA. L. REV. 1, 6 (1998) (argu­ing in fa­vor of an in­ter­pre­tive ap­proach in which “the re­levant his­tory is not just that of the Foun­ding, it is that of all Amer­i­can con­stitu­tion­al his­tory”). That sed­i­ment­ary con­cep­tion of mean­ing ex­plains the last­ing ap­peal of Ju­stice Hol­mes’s ob­ser­va­tion in Mis­so­uri v. Hol­land, 252 U.S. 416, 433 (1920), invit­ing us to con­sult our en­tire his­tory as a na­tion in de­cid­ing how to read the Con­sti­tu­tion. See also ERNEST A. YOUNG, OUR PRE­SCRIPTIVE JUDICIAL POWER: CONSTIT­U­TIVE AND ENTRENCH­MENT EFFECTS OF HIS­TORICAL PRACTICE IN FEDERAL COURTS LAW, 58 W&M. & MAR­Y L. REV. 535, 540 (2016) (argu­ing that his­tory prop­erly at­tends to the prac­tices that help to con­sti­tute the pow­ers of gov­ern­ment that have been in­com­plet­ely spe­ci­fied in the Con­sti­tu­tion’s text and link­ing this con­cep­tion of his­tory to Burke­an val­ues of cus­tom­ary prac­tice and pre­scriptive wis­dom).

12. For the lat­est re­fin­ements of Fall­on’s con­structivist ap­proach to con­stitu­tion­al in­ter­preta­tion, see gen­er­ally RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018). Fall­on seeks to estab­lish a mid­dle way for as­sess­ing the leg­i­ti­macy of Supre­me Court de­ci­sions, one that re­jects the stron­gest claims of liv­ing con­stitu­tion­alists and orig­i­nalists alike. For an ear­lier ar­ti­cu­la­tion, see RICHARD H. FALLON, JR., A CON­STRUC­TIVIST COHERENCE THE­ORY OF CONSTITU­TIONAL IN­TER­PRE­TA­TION, 100 HARV. L. REV. 1189 (1987).
would embrace. Perhaps it makes sense for those who doubt the wisdom of exclusive originalism to frame their contributions in positive terms. Better to put forward a constructive vision of the Constitution’s meaning than to stand in opposition as anti- or non-originalists, or as supporters of an unwritten Constitution.

Part I of the Essay begins with an overview of Professor Tyler’s work. Part II will use the arguments in the book to develop the idea of constructive constitutional history. Part II highlights in particular the value of non-instrumental approaches to constitutional history, approaches that aim to get the history right for its own sake. Part II also takes a closer look at Professor Tyler’s normative claims about the habeas litigation at Guantanamo Bay, revealing them as exemplars of a form of constructive constitutional history. A brief conclusion highlights the value of Professor Tyler’s history, which aims to illuminate and explore with an open mind, whatever the implications for constitutional law.

I. PROFESSOR TYLER’S CONSTRUCTIVE CONTRIBUTION TO HABEAS HISTORY

As an example of the craft of constructive constitutional history, Professor Tyler’s book on habeas corpus illustrates the power of the enterprise. The work has much to recommend it: the eye for telling detail, the depth of learning on display. Professor Tyler begins in England, appropriately enough, with the Habeas Corpus Act of 1679, which made habeas a cornerstone of due process. Professor Tyler arrives some chapters later in the twenty-first century, bringing her findings to bear on the use of habeas to contest detention at Guantanamo Bay. A brief sketch of her history will get us underway.

By starting where she does, with the British Habeas Corpus Act of 1679, Professor Tyler establishes the centrality of habeas to the criminal justice process, particularly as it applied to treason trials. The centerpiece was the Act’s assurance that individuals, upon arrest and imprisonment, were to be either charged with a crime (based on legally sufficient evidence) or released from custody. The Crown could no longer justify detention of its political opponents by fiat, even when the individual in question was suspected of plotting to overthrow the King. Since a treason conviction required two witnesses, and the


15. See TYLER, HABEAS, supra note 1, at 21–31.

16. Id. at 263–76.

17. Parliament added protections for those accused of treason in 1696, seventeen years after the Habeas Corpus Act of 1679. Id. at 30–31. At the time, treason included a wider range of offenses than those later specified in the Constitution. Id.

18. Id. at 28–29.
preliminary hearing into evidentiary sufficiency had teeth, suspicion no longer sufficed as the basis for a trip to the Tower. Professor Tyler demonstrates how central the 1679 Act was to founding-era conceptions of what the habeas privilege entailed.

With habeas embedded in a statute, Professor Tyler shows that the Crown’s measures to put down the Jacobite uprisings of the eighteenth century necessitated a legislative suspension of the privilege.\footnote{Id. 35–61 (discussing the Parliamentary suspensions of the early eighteenth century).} Professor Tyler explains that these suspensions granted a temporary reprieve from the rigors of due process, allowing the Crown to get control of a fraught security situation and to build a case for treason convictions, perhaps by questioning detainees or by offering them incentives to cooperate.\footnote{At least for those shipped to Scotland after the Rye House plot dissolved, torture was also part of the incentive package. Id. at 32.} Once the case had been built, the Crown might prosecute defendants for treason in the midst of an ongoing suspension.\footnote{Id. at 45.} Professor Tyler also shows that the privilege of the writ and its suspension applied only to those in allegiance with the Crown (subjects and aliens with substantial ties to the realm). Unlike British subjects, foreign nationals fighting against the King did not face potential treason prosecution.\footnote{Professor Tyler acknowledges an exception for aliens who, by virtue of long residence, might come to owe a local allegiance that would justify a treason prosecution. See id. at 60–61.} When captured, alien enemies (like the French nationals who joined the Jacobite rebellion in Britain) were subject to detention as prisoners of war and were later swapped for prisoners on the other side. Immune from criminal prosecution, prisoners of war could not claim the habeas privilege to speed their release or contest their confinement.

British jurists, including Lord Mansfield, wrestled with the problem of allegiance as they tried to manage the rebellious North American colonies in the latter half of the eighteenth century.\footnote{Lord Mansfield, a leading English statesman, jurist, and Chief Justice of the King’s Bench, advised the Crown as to its detention practices and served as a judge in cases contesting the legality of detention. See id. at 73–78.} Early in the war, British forces captured Americans in land and naval encounters. Americans, of course, returned the favor. The British took the view that, as subjects owing allegiance to the Crown, all American soldiers and sailors were subject to treason prosecutions. But this characterization of captured Americans presented a problem: individuals brought to England for detention were entitled to habeas, and it was quite difficult, both politically and legally, to mount treason prosecutions. (The higher-ups recognized that General George Washington would likely order the execution of captured British soldiers in reprisal for any treason executions.\footnote{Id. at 84–86.}) So the British temporized: Parliament suspended the privilege as it applied to prisoners in England but treated those held in America as prisoners subject to exchange.\footnote{Id. at 83, 86–89.}
Bearing the mark of the British experience, the Constitution’s habeas suspension provision reflects several bedrock assumptions. Citizens and others in allegiance have a right to be prosecuted only through due course of law (criminal procedure and jury trial) or to be released on habeas. The government cannot, for reasons of national security or military necessity, detain citizens it has come to distrust; it must pursue criminal charges against them, release them, or persuade Congress to suspend the privilege of the writ. Such a suspension, proper only during rebellion or invasion, temporarily legalizes detention without charge. But when the suspension ends, due process springs to life, and detainees can contest custody and secure their release unless properly charged with a crime.

Antebellum legal thinkers in the United States shared this view of the Suspension Clause. No less a figure than James Kent made habeas available to New Yorkers who were detained by the US Army during the War of 1812 for playing footsie with the British. Members of Congress, meanwhile, had little patience for detention outside the due course of law. Shortly after Congress rejected President Jefferson’s request for legislation suspending the writ, the Supreme Court ordered the release of the Burr conspirators.

After the War of 1812, however, the wartime writ fell into decline. President Abraham Lincoln, the great suspender in Professor Tyler’s reckoning, claimed the power to suspend the writ in the early days of the Civil War. Eventually, Congress enacted legislation that clothed Lincoln with the power to suspend the writ and sought to legalize to some extent his past suspensions. Lincoln used this power aggressively, detaining Confederate soldiers and sympathizers to prevent them from undermining the Union war effort. Professor Tyler agrees with Chief Justice Taney’s circuit justice decision in Ex parte Merryman that the Constitution assigned the suspension power to Congress and did not vest any similar authority in the President. But Professor Tyler nonetheless expresses some sympathy for the gravity of the situation and observes that, however misguided, Lincoln at least understood that valid

26. Id. at 123–56.
27. U.S. CONST. art. 1, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).
28. TYLER, HABEAS, supra note 1, at 149–54.
30. The Senate narrowly adopted suspension legislation, but the House refused to enact the bill into law. TYLER, HABEAS, supra note 1, at 148–52.
32. TYLER, HABEAS, supra note 1, 159–81.
33. 17 F. Cas. 144 (C.C.D. Md. 1861).
34. TYLER, HABEAS, supra note 1, at 167.
preventive detention required a suspension of the writ. In notable contributions
to the literature, Professor Tyler also explores Civil War suspension practices by
the Confederate States of America, and the Reconstruction suspension
administered by President Grant, as further evidence of mid-nineteenth-century
opinion.35

The twentieth century witnessed a sharp erosion of the constitutional
privilege against suspension of the writ. Professor Tyler recounts the story of
President Roosevelt’s Order 9066 directing the mainland evacuation and
internment of some 120,000 persons of Japanese ancestry, 70,000 of whom were
US citizens.36 Rightly viewing these events as a clear violation of the Suspension
Clause, Professor Tyler describes the initial but ultimately ineffective opposition
of Roosevelt’s lawyers (who argued that internment was unlawful absent
suspension).37 Professor Tyler also recounts the government’s duplicitous
litigation tactics, which resulted in representations of military necessity that were
unwarranted by the record. While Professor Tyler places responsibility for the
order squarely at Roosevelt’s feet, she also faults the Supreme Court’s failure to
invalidate the order on suspension grounds, quoting with approval a
contemporary commentator who wondered what the courts are for if not to
protect the people against unconstitutional arrest.38

Turning to the recent past, Professor Tyler offers a thoughtful and
informative account of the war on terror and the Guantanamo Bay cases, 
Hamdi
and
Boumediene.39 For Professor Tyler, the plurality opinion in
Hamdi,
upholding the government’s power to detain US citizens as enemy
combatants after conducting a due process-based evaluation to inquire into the accuracy
of their detention as such, represents a clear denial of the right guaranteed by the
Suspension Clause.40 True, Hamdi was captured in a foreign land in circumstances that suggested he had taken up arms against the United States. But
he was later brought to Guantanamo Bay and then to the US mainland. As a
citizen, Hamdi was subject to prosecution as a traitor, but he was not subject to
detention as an enemy combatant (or prisoner of war). Habeas should have been
an available remedy for Hamdi, and should have led to his discharge from
military custody, in keeping with the approach that Justice Scalia articulated in
dissent.41 Absent a treason indictment or a habeas suspension, Hamdi should
have gone free.42

35. Id. at 185–98, 199–207.
36. Id. at 222–43.
37. Id. at 237–43.
38. Id. at 242 (quoting Eugene Rostow).
40. TYLER, HABEAS, supra note 1, at 260–62; Hamdi, 542 U.S. at 509.
41. See Hamdi, 542 U.S. at 554 (Scalia, J., dissenting).
42. TYLER, HABEAS, supra note 1, at 262.
Professor Tyler sees *Boumediene* as a tougher case for an assured right to habeas review. 43 She draws an interesting parallel between Fort Jefferson, a military fortress in the Dry Tortugas (off the coast of Florida) where the Lincoln assassination conspirators were held, and Guantanamo Bay, where enemy combatants captured in the war on terror have been detained. But the Lincoln conspirators were citizens, and entitled to the privilege of the writ. Not so the aliens detained at Guantanamo Bay. Owing no allegiance to the United States, and falling outside the protection of the laws of the United States, Guantanamo Bay detainees cannot claim the privilege of the writ at least as historically understood.44 To the contrary, as foreign nationals captured during military hostilities, they more closely resemble prisoners of war than alien friends owing allegiance to the United States. Because prisoners of war have no privilege, Professor Tyler views the *Boumediene* decision as hard to defend under an originalist approach to constitutional interpretation.45

Apart from productively doubting *Boumediene*’s originalist support (doubts that Justice Kennedy acknowledged in his majority opinion),46 Professor Tyler has taught constitutional historians a great deal about the origins and application of habeas during war. Readers of Tyler’s book thus hear in the new world an echo of the old. Professor Tyler has also shown how constitutional meaning and practice evolve over time. However understandable as a response to Fort Sumter and the disruption of Union troop movements, Lincoln’s presidential suspension prefigured the actions of Presidents Roosevelt and Bush. Those presidents exercised the power to suspend in effect but refused to follow Lincoln in acknowledging that their actions implicated the writ. Professor Tyler’s history depicts a steady drift from the relatively formal doctrines of the early nineteenth century to the looser balancing tests of today. That shift accompanies a trend toward greater discretionary executive branch control of all elements of the national security state.47

II.

**TOWARD CONSTRUCTIVE CONSTITUTIONAL HISTORY**

Professor Tyler’s book reveals much about the drafting, ratification, and early implementation of habeas protections in the United States. Clear-eyed and engaging, Professor Tyler’s work considerably broadens the storehouse of historical knowledge. Importantly, too, Professor Tyler treats her history as yielding certain normative conclusions. Let’s focus on two: Professor Tyler’s

43. *Id.* at 263–76.
44. *Id.* at 268–73.
45. *Id.* at 272 (contrasting the majority opinion’s functional approach with the originalist approach adopted by Justice Scalia in dissenting from *Boumediene*).
claim that the Court was wrong in *Hamdi* to allow detention of a citizen *cum* enemy combatant, subject only to due process balancing;\(^48\) and her more tentative conclusion that the Court in *Boumediene* lacked originalist support for its conclusion that aliens out of allegiance enjoyed a habeas privilege. In making these claims, Professor Tyler sets out a constructive form of constitutional history, one that seeks to persuade originalists and non-originalists alike but declines to view the originalist account as conclusive.

Professor Tyler’s first normative conclusion derives a good deal of support from her careful account of the text, purpose, meaning and early application of the habeas privilege. Professor Tyler has made a strong case that the settled meaning of the Suspension Clause at the time it became law points away from the Court’s conclusion in *Hamdi* that a government can detain citizens as enemy combatants under a due process balancing test. Professor Tyler’s originalist case gains important support from the fact that Justice Scalia dissented from the *Hamdi* decision, despite his general lack of sympathy with the plight of those detained in the war on terror.\(^49\) For originalist scholars and jurists Professor Tyler offers persuasive evidence against one cornerstone of the modern Court’s Guantanamo Bay habeas jurisprudence.

Intriguingly, though, Professor Tyler refrains from treating the originalist case as dispositive of these matters of interpretation. First, she works to account for the various intervening episodes that might undercut her conclusion. Notably, Professor Tyler addresses both *Quirin* and *Korematsu*, which upheld the treatment of German Americans as unlawful enemy combatants and the internment of Japanese Americans.\(^50\) Professor Tyler thus attends both to the founding-era history that originalists find persuasive and to the nation’s experience since that time. In adopting an argumentative strategy quite congenial to many scholars who doubt the resolving power but not the relevance of history, Professor Tyler offers history that might well persuade originalists and a nuanced account of later developments that will bring along scholars and jurists who believe that originalism alone cannot answer every question we face today.

Professor Tyler illustrates that interpretive move in her treatment of *Boumediene*.\(^51\) Acknowledging the originalist case against habeas for those out of allegiance, Professor Tyler nonetheless recognizes that due process might provide an alternative basis for the Court’s holding. She thus proposes an intriguing synthesis of *Hamdi* and *Boumediene*, depicting the first decision as

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\(^{49}\) See *id.* at 554 (Scalia, J., dissenting) (finding that US citizens like Hamdi were either triable for treason or subject to release on habeas).

\(^{50}\) See *Tyler, Habeas*, supra note 1, at 222–43, 253–60 (discussing *Ex parte Quirin*, 317 U.S. 1 (1942), which upheld the detention and execution of the Nazi saboteurs, and *Korematsu v. United States*, 323 U.S. 214 (1944), which upheld Japanese-American internment).

\(^{51}\) *Id.* at 273–76 (discussing *Boumediene*, 553 U.S. 723).
having failed to give effect to the formal substantive barrier to the detention of citizens that the Suspension Clause erects. She worries that the due process norm articulated in the Hamdi plurality opinion will lead to the eventual balancing away of the rights of citizens. At the same time, Professor Tyler sees a role for due process balancing in the Boumediene context, where a suspension clause confined in terms of geography and allegiance would have little relevance. By separating the two inquiries, Professor Tyler hopes to prevent a process-based erosion of what she sees as the core purpose of the Suspension Clause.52

In offering an account of history that will persuade originalists—and others—Professor Tyler can be seen as adopting a constructive approach to constitutional history. Professor Tyler has a keen interest in getting the history right and in persuading scholars and jurists that her history has some resolving power today. Her persuasive reach depends on her ability to address a broader audience than those who will agree with her on originalist grounds. In offering a constructive history that seeks to persuade more broadly, Professor Tyler can be seen as having embraced a pluralist interpretive enterprise in which other forms of argument matter. Scholars have identified a dizzying array of modalities that inform constitutional interpretation: text; purpose; history; precedent; gloss or practice; popular customs, values, and traditions; concerns with prudence; and arguments from honored authority.53

With those sorts of argumentative modes available, history might appear to have far less resolving power in debates over constitutional application. Justice O’Connor appears to have fashioned the balancing test to address the prudential concerns about the threat that Hamdi could pose if released on habeas.54 Additionally, although Hamdi was born in the United States, he had only modest ties to the country, having grown up in Saudi Arabia. A court today might ask if changes in the nature of birthright citizenship call for an adjustment in the rules of citizen detention. Birth in the United States at the time of the founding, when people arrived here after a lengthy voyage across the Atlantic and tended to stay,55 may have revealed a more substantial physical and political commitment to this country than birth in a time of global mobility and air travel. Perhaps issues of allegiance should no longer turn entirely on birthright citizenship.

52. Id. at 276.
53. Leading treatments include Bobbitt’s description of the modalities of constitutional interpretation, as elaborated in recent work by Fallon and others. See PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982) (identifying textual, historical, doctrinal, structural, prudential, and ethical modalities of argument); Fallon, History, supra note 3, at 1813–14 (discussing such modalities of interpretation as gloss and honored authority).
54. See Hamdi, 542 U.S. at 527–35.
55. On the relatively permanent implications of migration to America in the late eighteenth century, see James E. Pfander & Theresa R. Wardon, Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency, 96 Va. L. Rev. 359, 365–66 (2010) (describing costly and time consuming trans-Atlantic crossings in the founding era that might have required six weeks to three months and often reflected decisions to relocate on a permanent basis).
One might offer similar complicating arguments about the result in Boumediene. According to recent work by Nathan Chapman, the United States in the nineteenth century took the position that individuals captured on the high seas and charged with piracy were entitled to federal criminal trials and due process with all the trimmings (following English law in this regard). The defendants in such proceedings were often aliens owing no allegiance to the United States and enjoying no prior connection to US soil. As such, they could not claim any obvious right to the protection of the laws of the United States in Professor Tyler’s terms. Pirates captured by US forces were not triable before military commissions; they were brought to the United States to face criminal trial by jury in federal courts.

If Chapman is right that due process norms applied to pirates, it follows that pirates brought here to face charges could test the legality of their detention (or the unlawful denial of bail or speedy trial) by way of habeas corpus. The treatment of pirates may thus raise questions about the controlling role of allegiance in determining an alien’s right to the writ. True, allegiance was a key ingredient in making out a criminal charge of treason under domestic law, but piracy prosecutions went forward against those who owed no allegiance and due process still attached. One might liken terrorists held at Guantanamo Bay to the nineteenth-century pirates who preyed on shipping lanes in the Caribbean, instead of treating them like the members of a foreign military force defeated on the battlefield and held as prisoners of war. Because the US government proposes to prosecute the alien detainees at Guantanamo Bay for having engaged in acts of unlawful combat, substituting such military prosecutions for criminal prosecutions under the anti-terrorism laws of the United States, the piracy analogy may make more sense than the prisoner-of-war analogy. Allegiance may have less resolving power in deciding whether aliens awaiting criminal prosecution should be afforded the due process protections that the writ affords. Perhaps the best synthesis (or constructive history) would draw on Chapman’s findings as to pirates to bolster Professor Tyler’s call for a due-process-based theory to support oversight of alien detention at Guantanamo Bay.

Originalists might nonetheless observe that much of the persuasive force of Professor Tyler’s argument derives from more or less explicitly originalist forms of argument. Professor Tyler contends on textual and historical grounds that Quirin and Korematsu were wrongly decided; she argues that they add little to our understanding of the meaning of the habeas privilege today. Many would agree with both conclusions, but one can fairly ask about the degree to which that consensus reflects the force of originalist-style arguments. Having concluded that the framers incorporated a British conception of the privilege and

57. Id. at 414–17.
58. See TYLER, HABEAS, supra note 1, at 222–43, 253–60 (discussing Ex parte Quirin, 317 U.S. 1 (1942), and Korematsu v. United States, 323 U.S. 214 (1944)).
that Chief Justice Marshall was right in *Ex parte Bollman* to grant the writ on behalf of the Burr conspirators,\(^59\) Professor Tyler may appear to have adopted originalist precepts in all but name.

But one cannot treat *Bollman* or Professor Tyler’s defense of the outcome as wholly a product of originalist arguments. In the early nineteenth century, one might suppose that natural rights, political conventions, popular customs and values, political traditions, and honored authority all pointed in the very same direction. Chief Justice Marshall could invoke British tradition and Blackstone in arguing for a formal liberty-protecting conception of the writ. Meanwhile, popular political support for non-suspension was surely quite strong if it carried the day in the House of Representatives, despite Jefferson’s arguments for suspension in the case of the Burr conspirators.\(^60\)

Apart from its originalist appeal Professor Tyler’s history persuades through the unstated premises that underlie the authorities she invokes from the early republic. When Professor Tyler argues for the controlling quality of constitutional history today, she makes an argument that our nation’s values, customs, and traditions should be understood as corresponding to those that she identifies with the founding era. Apart from their originalist appeal, such arguments sound in the register of honored authority: the past should inform our sense of who we are as a people and what commitments we retain to the idea of individual liberty in times of national insecurity.\(^61\) Such forms of argument have a long and storied role in our history. Pocock showed as much in his account of the use of the ancient constitution as an argumentative trope in seventeenth-century debates over British legal norms.\(^62\) The customary commitments of the early nineteenth century to the protection of personal liberty strike me as quite congenial, as do that century’s skeptical attitude toward the claims so often made in the name of national security.

Not everyone shares those commitments and that skepticism. The same arguments from prudence and necessity that persuaded Lincoln to suspend the privilege during the Civil War retain their power. Indeed, cases from New York during the War of 1812 reveal that the US citizens who were released from military custody by judicial decree may have been aiding and abetting the British side.\(^63\) Such arguments from necessity may have understandably undercut the courts’ willingness to intervene in matters of national security, in part for reasons that Justice Scalia identified in his *Boumediene* dissent: individuals released

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59. *Id.* at 153–55 (discussing *Ex parte Bollman*, 8 U.S. 75 (1807)).

60. *See* *Tyler, Habeas*, *supra* note 1, at 148–52.


from custody might return to the battlefield. Even the most well-framed arguments from honored authority might fail to persuade a Court concerned with terrorist recidivism.

Constructive constitutional history can help address prudential fears about the consequences of judicial intervention. History can show that the protection of individual liberty does not threaten the survival of the republic. The Burr conspirators dispersed into relative anonymity after their release on habeas, and Burr himself was acquitted of treason charges after a trial in Virginia at which the Chief Justice presided. The Japanese Americans interned during World War II posed little threat to national security; Professor Tyler shows that exaggerated fears fueled by racial bias were the more likely explanations for FDR’s decision. But history does not neatly point in a single direction. In suspending access to the writ in early 1861 to prevent southern sympathizers from cutting off northern access to the nation’s capital, Lincoln’s claim of necessity still rings true.

With habeas sidelined, how should we restore the rule of law in light of Lincoln’s action? My own preference would be to allow those subjected to detention to bring suits for damages against the officers responsible for carrying out Lincoln’s orders. In the course of such litigation, government lawyers might well argue that only nominal damages should be awarded as compensation to those who were detained on suspicion of conspiring to undermine the Union’s military readiness. Lincoln himself seemed to have anticipated such suits and to have confronted them with equanimity; he acknowledged having suspended the writ and invited Congress to consider what legislation it should adopt in response. Professor Daniel Farber views this as an invitation to adopt legislation ratifying the suspension and indemnifying any officers sued in tort in compliance with Lincoln’s orders. A jury might celebrate Lincoln’s decisive

65. See Ex parte Bollman, 8 U.S. 75 (1807). Bollman’s companion, one Samuel Swartwout, had his case combined with Bollman’s and was also released. See id. Later, while serving as the collector of New York, Swartwout became entangled in a storied financial scandal. See Murray’s Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272 (1856) (evaluating the legality of government distress levied against Swartwout’s property to recover unremitted tax collections).
67. See TYLER, HABEAS, supra note 1 at 239.
68. See ABRAHAM LINCOLN, MESSAGE TO CONGRESS IN SPECIAL SESSION, JULY 4, 1861 (1861), in 4 COLLECTED WORKS OF ABRAHAM LINCOLN 429–30 (Roy P. Basler ed., 1953) (“Whether there shall be any legislation upon the subject [of habeas suspension] is submitted entirely to the better judgment of Congress.”).
69. See DANIEL FARBER, LINCOLN’S CONSTITUTION 192–95 (2003) (discussing what he terms the classical view of government accountability, under which claims of necessity may animate executive
action and award a single dollar for any violation of the plaintiffs’ rights.\footnote{Following his successful habeas petition to challenge his military detention in Indiana during the Civil War, see \textit{Ex parte Milligan}, 71 U.S. 2 (1866), Lambdin Milligan filed suit in tort for wrongful detention. Only nominal damages were awarded. \textit{See} \textit{John Fabian Witt, Lincoln's Code: The Laws of War in American History} 278–83 (2012).}

Congress could take the sting out of any more substantial award of damages by authorizing indemnifying payments to the defendants.\footnote{See, \textit{e.g.}, \textit{Mitchell v. Harmony}, 54 U.S. 115, 135 (1851) (affirming an award of substantial damages against a military officer responsible for the wartime destruction of the plaintiff’s property on the assumption that Congress would indemnify the officer). For an account of the practice of indemnification during the antebellum period, see James E. Pfander & Jonathan L. Hunt, \textit{Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic}, 85 N.Y.U. L. Rev. 1862 (2010).}

Such a disposition would preserve the Constitution and the rule of law, while signaling to future presidents that actions taken in the name of military necessity must ultimately face a test of legality. It would prevent the loaded weapon problem that Justice Jackson identified in \textit{Korematsu}.\footnote{See \textit{Korematsu v. United States}, 323 U.S. 214, 246–48 (1944) (Jackson, J., dissenting).} Jackson rightly understood that, while the federal courts had no power to countermand presidential directives to the military during a time of war, they should nonetheless refrain from validating FDR’s (or Lincoln’s) action. Jackson saw that a legal decision upholding unconstitutional action based on a claim of necessity would establish a new legal principle—a loaded weapon—for future presidents to use.\footnote{\textit{Id.} at 246 (memorably observing that judicial decisions rationalizing discriminatory military decrees create a principle that “lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need”).}

Professor Tyler and I both agree that the Court has loaded far too many such weapons in recent years.

Still, the task of writing constructive constitutional history differs from the task of judging. Professor Tyler and I enjoy one very important advantage over courts in our ability to select our historical docket. We can devote ourselves to article-length—and eventually book-length—treatments of the constitutional questions we find particularly engaging. For us, so much the better if all of the modes of constitutional argument point in a preferred normative direction. How much harder is the task of courts, which have to deal with issues of constitutional law that turn on ambiguous texts, conflicting historical signals, unsettled practice, and vexed normative and prudential considerations. Constructive constitutional history can assist with the enterprise of judging, but we practicing historians must maintain a certain humility about the answers it supplies.

\section*{CONCLUSION}

As law professors sometimes do, I end where I began. Professor Tyler has made an important and lasting—indeed, a constructive—contribution to
historical knowledge and constitutional meaning. Even if the federal courts do not immediately embrace the lessons of her book, ideas live for a long time. Indeed, constitutional scholarship rests on one such lasting idea: that scholars participate alongside courts in the eventual (if not immediate) creation of constitutional law. In the case of Professor Tyler’s book, the courts have been exceptionally well served.