G.K. Chesterton once said "a man without history is almost in the literal sense half-witted" because he "does not know what half his own words mean, or what half his own actions signify." In recent years, jurists from various points on the ideological matrix have come to the same conclusion. Many of the most consequential legal issues recently addressed by the United States Supreme Court have been debated and decided based primarily on legal history — not the sometimes anfractuous reasoning of prior cases or the ipse dixit declarations of iconoclastic judges. The art of morphing dicta from prior opinions into future holdings, exaggerating or understating the scope of precedent, and moving law along the desired trajectory using case-by-case incrementalism — skills naturally acquired through a typical law school education and the tools of choice for some modern courts — has not been wholly abandoned. But, truth be told, it is a spent force rapidly losing whatever intellectual capital it once had.

Understandably so. It simply asks too much of us to be told that "[l]iberty finds no refuge in a jurisprudence of doubt" and then to learn that the jurisprudence of certitude considers liberty to be "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 844, 851 (1992). Such reasoning would more than puzzle Thomas Jefferson who thought laws should be "construed by the ordinary rules of common sense" and not by "metaphysical subtleties, which may make anything mean everything or nothing" depending on the sophistic skills of jurists. To be sure, a worthy cynicism of such philosophical vapors has set in among many on the bench and in the academy — leading in part, I believe, to a resurgence of the role of legal history as a basis for judicial decisionmaking.
Even this short list would be incomplete without mentioning *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), which involved a core issue silently embedded in our constitutional structure: legislative term limits. *Thornton* held state-imposed term limits on federal office holders were inconsistent with the Framers’ intent to “form a ‘more perfect Union.’”

To inform its understanding of that intent, *Thornton* began with a discussion of *Powell v. McCormack*, 395 U.S. 486 (1969), a case that thoroughly traversed the parliamentary history of England (focusing on the infamous expulsion of John Wilkes from the House of Commons), primary source materials from the Philadelphia Constitutional Convention, private and public writings of many of the leaders of the Revolution, records from state ratification conventions, and selections from the Federalist and Anti-Federalist Papers.

As these few examples demonstrate, the use of legal history is resurgent in modern United States Supreme Court opinions. The phenomenon is not limited to arcane disputes over the Rule in Shelley’s Case, the territorial boundaries of Blackacre, or other such legal trifles. The historical model has instead influenced some of the most important issues of our times: the scope of the Bill of Rights, the modern reach of the ancient writ of habeas corpus, and even the structure of our constitutional republic. The impact, moreover, appears to be ideologically neutral. On various stormy issues, both the conservative and liberal factions of the United States Supreme Court have found safe harbor in historical reasoning. No case establishes this point more clearly than *Heller*. Both the majority and the dissent relied primarily on legal history, prompting many commentators to concede, “We are all originalists now.”

Along these same lines, take account of the splinted opinions in *Bilski v. Kappos*, 130 S. Ct. 3218 (2010). The plurality opinion in *Bilski* attempted to clarify whether business practices can be patented. Justice Stevens, joined by Justices Ginsburg, Breyer, and Sotomayor, concurred in the result but “strongly disagree[d] with the Court’s disposition of this case.”
Equality, and the New Rhetoric of Planned Parenthood v. Casey, 45 Am. U. L. Rev. 77, 80 (1995) (stating that despite the opinion’s “lofty overture,” it was “so fractured that...there is something in it for everyone to hate”); Prakash Mehta, An Essay on Hamlet: Emblems of Truth in Law and Literature, 83 Geo. L.J. 165 (1994) (the Court’s reasoning created “a double-laden jurisprudence that fails to persuade”); Alex Kozinski & Eugene Volokh, A Pennumbra Too Far, 106 Harv. L. Rev. 1639, 1645 (1993) (“If liberty finds no refuge in a jurisprudence of doubt, it similarly finds none in a jurisprudence that any court can read to mean anything it pleases.” (internal quotation marks and footnote omitted)).


5 Heller, 128 S. Ct. at 2815 (emphasis in original).


9 Id. at 787-795.


13 Id. at 3232.

14 Id. at 3249.

15 Id. at 3250.
