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The Resurgent Role of Legal History in Modern U.S. Supreme Court Cases

BY HON. D. ARTHUR KELSEY

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 decided on 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.

Take for example the Second Amendment's right to keep and bear arms. The Supreme Court in District of Columbia v. Heller, 128 S. Ct. 2783 (2008), pointed out "it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right." Because these rights predated the 1791 Bill of Rights, Heller looked to the historical background of these rights under English common law and American colonial jurisprudence as the best evidence of their scope and meaning. True to this premise, the majority and dissenting opinions in Heller engaged in rigorous historical analyses and offered over 300 citations to sources predating the 20th century. The text of these opinions includes:

• 14 citations to both popular and legal dictionaries (including the 1773 edition of Samuel Johnson's A Dictionary of the English Language, Timothy Cunningham's 1771 legal dictionary, and Noah Webster's famous 1828 An American Dictionary of the English Language);
• 18 references to the English Bill of Rights enacted in 1689 during the reign of William and Mary;
• 25 citations to the writings of leading Founding Fathers like Samuel Adams, James Wilson, Alexander Hamilton, and Thomas Jefferson (some appearing as Federalist and Anti-Federalist Papers);
• 46 citations to colonial charters, declarations of rights, and the constitutions of newly formed states, as well as statutes from the 17th, 18th, and 19th centuries;
• 30 citations to Jonathan Elliot's compendium of the state ratification debates and Francis Thorpe's collection of early state constitutions and statutes; and
• a discussion of the efforts of Stuart Kings Charles II and James II to disarm their political opponents between the Restoration and the Glorious Revolution.

None of these examples include footnotes, which by themselves offer 88 additional citations to various primary, secondary, and tertiary historical sources. Contrast this approach to the only other Supreme Court opinion attempting to unpack the meaning of the Second Amendment, United States v. Miller, 307 U.S. 174 (1939). Fairly or not, Heller summarily dismissed Miller as unreliable precedent because, among other things, the opinion "discusses none of the history of the Second Amendment."

Another striking example of the power of historical legal reasoning is Crawford v. Washington, 541 U.S. 36 (2004), a case that retooled the Confrontation Clause of the Sixth Amendment. Before Crawford, the pre-
vailing understanding of the right of confrontation came from Ohio v. Roberts, 448 U.S. 56 (1980), a case followed by scores of lower courts administering the criminal dockets of the nation. The legal analysis in Crawford, however, did not begin with Roberts. Instead, the Court in Crawford said it must first "turn to the historical background of the Clause to understand its meaning." 541 U.S. at 43. From there, the opinion cites Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause, 34 Va. J. Int'l L. 481 (1994), and then engages a wide array of historical sources including the 16th century bail and committal statutes under Queen Mary, the notorious trial of Sir Walter Raleigh in 1603, a library of English common law cases and treaties predating the American Revolution, the British use of civil law practices in colonial America, early state constitutions, ratification debates of state constitutional conventions, and a battery of 19th century state case law. In all, Crawford contains over 85 citations to historical sources predating the adoption of the Sixth Amendment in 1791. Only after this historical tour de force does Crawford address the Roberts line of cases and dismiss them as out of sync with the far deeper historical precedent stretching back to antiquity.

Another application of the historical approach to judicial decisionmaking is the politically charged case addressing whether the writ of habeas corpus extends to detainees held as enemy combatants at the U.S. Naval Station in Guantanamo Bay, Cuba. Finding the writ applied to detainees at Guantánamo, the Court in Boumediene v. Bush, 128 S. Ct. 2229 (2008), reviewed English common law authorities (including Bracton's treatise, written in the 1200s, and the Magna Carta, executed by King John in 1215) and a battery of English cases determining the scope of the writ of habeas corpus throughout the British Empire prior to the American Revolution. Why was this extensive review of English legal history necessary? Because "[t]his history was known to the Framers," Boumediene, 128 S. Ct. at 2246, and they wrote the Constitution we now seek to interpret.

Lest you think these are aberrational examples, consider Apprendi v. New Jersey, 530 U.S. 466 (2000), the case that ultimately led to the invalidation of the Federal Sentencing Guidelines. Apprendi did not rely on a clever cut-and-paste presentation from prior judicial opinions, but rather on Sir William Blackstone's observation that under English common law in 1769 the right to a trial by jury required "the truth of every accusation . . . be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours . . . ." 6 Justice Stevens's majority opinion also relied upon the English common law described in scholarly tomes entitled Pleading and Evidence in Criminal Cases and The English Criminal Trial Jury on the Eve of the French Revolution, in The Trial Jury in England, France, Germany 1700-1900. A later case, Blakely v. Washington, 542 U.S. 296 (2004), accelerated the process of dismantling determinate sentencing schemes by emphasizing Blackstone's discussion of the common law and quoting from John Adams's diary, Thomas Jefferson's private letters, and the Anti-Federalist Papers.7

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 are inconsistent with the Framers' intent to "form a more perfect Union." 8 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.9

As these few examples demonstrate, the use of legal history is resurrected in modern United States Supreme Court opinions. This phenomenon is not limited to arcane disputes over the Rule in Shelley's Case, the territorial boundaries of Blackacre, or other such legal curiosities. 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.10 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."11

Along these same lines, take account of the splintered 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."12 What provoked them was the plurality's failure to see the case as an opportunity to "restore patent law to its historical and constitutional moorings." Reviewing the subject from pre-Revolutionary English precedent, through the Industrial Revolution, and the Constitutional Convention, and tackling on for good measure a curious allusion to "the days of Assyrian merchants,"14 the concurring justices concluded "the historical clues converge on one conclusion: A business method is not a 'process.'"15

What does all this mean for us? For the average lawyer it means quite a lot. It is a reminder that legal history can be (and often should be) incorporated into your advocacy model. Before you write this assertion off as relevant only to the tiny handful of lawyers litigating constitutional issues, consider that the Code of Virginia commands that the "common law of England, insofar as it is not repugnant to the principles of the Bill of Rights
nation-state has been so much gov-

rivan has noted, "probably no other new

quite the Solon of America," one histo-

law.  "Although Blackstone was not

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must be strictly construed to avoid

touching upon a common law issue

do so.'''   Thus, every Virginia statute

Assembly plainly manifest an intent to

mon law requires that the General

Assembly.'  Absent a clearly

decision' except when 'altered by the

This statute, first enacted in 1776, "pre-

General Assembly."  Code § 1-200.

of decision, except as altered by the

force within the same, and be the rule

Continued from previous page

For law schools, the resurgence of

legal history as a mode of decision-

making means the conventional cur-

riculum should be reexamined. Let me

begin with the easiest example. By a

wide margin, American courts have

cited Blackstone's Commentaries as the

most authoritative source on common

law.  "Although Blackstone was not

quite the Solon of America," one histo-

rian has noted, "probably no other new

nation-state has been so much gov-

erned by a single legal authority from

abroad."19  Whether you agree with

him or not, Blackstone's enduring

fluence on American law cannot be

understated.20  Every significant

Revolutionary Founder—from John

Adams, to Thomas Jefferson, John

Marshall, and James Madison—read

Blackstone's Commentaries and cited it

as legal orthodoxy.  It became the pri-

mary textbook for the first American

law professor, Chancellor George

Wythe of the College of William and

Mary.   Wythe's successor, Judge St.

George Tucker, edited a version of the

Commentaries and added American

precedents in footnotes22 Tucker's

work became "the most important early

American edition"23 of Blackstone's famed

Commentaries, earning Tucker the title of "the

American Blackstone."24

"Like it or not, legal his-
tory is resurgent in mod-
ern judicial decision-
making. The great
debates of our times will
pass us by if we are ill-
equipped—as lawyers,
law professors, or
judges—to engage in his-
torical legal research and
reasoning."

Blackstone's reasoning played a
role in Marbury v. Madison,25 Dred Scott
v. Sandford, 26 Brown v. Board of
Education27 Roe v. Wade,28 and innu-
merable other cases. Hundreds of
opinions from the United States
Supreme Court cite to Blackstone's
Commentaries.  In the last term of
the United States Supreme Court, which
ended only a few months ago, opin-
ions by various justices included over
forty citations to Blackstone. Yet few—
very few—law students have read,
much less studied, any portion of
Blackstone's Commentaries.  How can
this be?  Do schools of psychiatry
require students to study Freud, or
schools of quantum physics not expect
their students to read Einstein's Annus
Mirabilis papers?  Are the Meditations
of Marcus Aurelius unfamiliar to stu-
dents of philosophy?

Incorporating legal history into
the law school experience has been
made far easier in the Internet age.29
Extensive online libraries catalog near-
ly every major source on legal history,
from the earliest sources (e.g., the
Domesday Book of William the
Conqueror, Bracton's treatise on com-

mon law from the 1200s, and case

reports interpreting the Magna Carta)
to the later retrospective works of
American legal scholars (e.g., the
essays of Justice James Wilson, one of
the principal authors of the
Constitution, Justice Joseph Story's
Commentaries on the Constitution of the
United States, and the writings of
Chancellor James Kent).

Law school graduates should be
-equipped with the knowledge to incor-
porate these materials into their future
advocacy. By leaving untouched
whole epochs of legal history and

focusing so heavily on the latest judi-
cial and academic pronouncements,
modern law schools decouple their
students from the collective wisdom of
the past and immodestly trumpet
false claims of intellectual novelty.

This development stands in stark con-
trast to the traditional educational
model for aspiring lawyers, which
implicitly assumes the truth of
Solomon's axiom: "What has been will
be again, what has been done will be
done again; there is nothing new
under the sun."  Ecclesiastes 1:9 (NIV).

Who aspire to make history,

Solomon understood, must first know
it.  And those who simply wish to
make a point, Cicero would add,

would better do so upon the realiza-

tion that historical argument "is not

only very entertaining, but adds a
great deal of dignity and weight to

what we say." 2 Maria Tullius Cicero,

On Oratory and Orators 291 (circa 55
B.C; 1808 trans. ed.).

"All that is necessary for a [law]
student is access to a library," Jeff-

erson agreed, "and directions in what
order the books are to be read."30 He

suggested three columns of books, selec-

tions from each to be read every
day.  The first column included, among
others, Sir Edward Coke, Blackstone,
Hawkins, and, of course, "Virginia
laws," by which he no doubt meant

statutes.31 The second column added
several others, including Hale, Lord
Bacon, John Locke, and Montesquieu.
The third column added various histo-

ry books by Voltaire, Burke, and oth-

ers. If there was any time left for addi-
tional reading, Jefferson said no

lawyer's training would be complete

without reading books on grammar,
rhetoric, and "the English poets for the

sake of style also."32

Over a century later, when asked
for advice on "the best mode of obtain-
ing a thorough knowledge of the law,"
Abraham Lincoln answered:  "The
mode is very simple, though laborious,

and tedious.  It is only to get the books,

and read, and study them carefully.

Begin with Blackstone's Commentaries,

and after reading it carefully through,
say twice, take up [other historical texts] in succession. Work, work, work, is the main thing.\(^\text{34}\) All that seems to be left of that advice, at least in the modern academy, is work, work, work.

For judges, the resurgent role of legal history offers us an opportunity to reexamine our decisional philosophies. In one of the greatest of understatements, Crawford observed that the "Constitution's text does not alone resolve this case.\(^\text{35}\) Well, then what does? James Madison answered the question this way:

I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution . . . . If the meaning of the text be sought in the changeable meaning of the words composing it, it is evident that the shape and attributes of the government must partake of the changes to which the words and phrases of all living languages are constantly subject.

What a metamorphosis would be produced in the code of law if all its ancient phraseology were to be taken in its modern sense! And that the language of our Constitution is already undergoing interpretations unknown to its founders will, I believe, appear to all unbiased inquirers into the history of its origin and adoption.\(^\text{36}\)

Thomas Jefferson also thought the point equally inarguable:

On every question of construction [of the Constitution] let us carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed.\(^\text{37}\)

So, too, did Chief Justice Marshall:

To say that the intention of the [Constitution] must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers; -- is to repeat what has been already said more at large, and is all that can be necessary.\(^\text{38}\)

Political reasons have not the requisite certainty to afford rules of [judicial] interpretation. They are different in different men. They are different in the same men at different times. And when a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.\(^\text{39}\)

It was only a few years after Justice Curtis issued his dissent that our nation took a violent free-fall into civil war. Imagine how the course of our nation's history could have been altered had the majority on the Supreme Court heeded the warnings in Justice Curtis's dissent.\(^\text{40}\)

The historical model also diffuses the temptation a judge might have to think of himself as a "knight-errant" free to "innovate at pleasure" on social issues and to roam "at will in pursuit of his own ideal of beauty or of goodness." Benjamin N. Cardozo, The Nature of the Judicial Process 141 (1921). In the workshop of the law, we are artisans of the highest order. But in the temple of moral philosophy, "[j]udges are no better qualified than any of the rest of us to identify transcendent principles of right and wrong." Robert H. Bork, The Judge's Role in Law and Culture, 1 Ave Maria L. Rev. 19, 22 (2003). To be sure, arrogating such a power to the judiciary would blow a gale into the persistent charge that our "Constitution is all sail and no anchor."

Like Chesterton, "I am not urging a lop-sided idolatry of the past; I am protesting against . . . [a] lop-sided idolatry of the present."\(^\text{41}\) My only point is a modest one: Like it or not, legal history is resurgent in modern judicial decisionmaking. The great debates of our times will pass us by if we are ill-equipped— as lawyers, law professors, or judges—to engage in historical legal research and reasoning. Even the lesser debates will find us flat-footed if we do not develop basic competencies in this area. How do we begin to ramp up the learning curve? Lincoln answered that question nearly 150 years ago: "Begin with Blackstone's Commentaries."\(^\text{42}\)

Continued on page 16

Notes:

*The views advanced in this essay represent commentary "concerning the law, the legal system, and the administration of justice" as authorized by Virginia Canon of Judicial Conduct 4(B) (permitting judges to "speak, write, lecture, teach" and otherwise participate in extrajudicial efforts to improve the legal system). These views, therefore, should not be mistaken for the official views of the Virginia Court of Appeals or my opinion as an appellate judge in the context of any specific case.

2. Letter of Thomas Jefferson To Justice William Johnson (June 12, 1823) reprinted in 15 WRITINGS OF THOMAS JEFFERSON 439, 449 (Andrew A. Lipscomb ed., 1904), also
Continued from page 13
5. Id. at 2815 (emphasis in original).
6. Apprendi, 530 U.S. at 477 (quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) (omitting emphasis added by Apprendi)).
9. Id. at 787-795.

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Date: Friday, October 29, 2010
Place: Richmond Downtown Marriott
Reception: 6:30 – 7:30 p.m.
Dinner: 7:45 – 9:30 p.m.
Attire: Black Tie
Tickets are $250 each and tables of ten are $2,500

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Justice Samuel Alito of the U.S. Supreme Court will be presenting Senior Justice Carrico with the Medal. David Baldacci will be making the keynote remarks.

SAVE THE DATE: Friday, October 29, 2010
COMMENTARIES ON AMERICAN LAW by Blackstone until publication (1826-30) of the code was promulgated . . . Blackstone, most Americans with any common law, equity, and, the chartered rights of Englishmen. Without much formal instruction—and America, “America had only lawyers years ago.” RUSSELL KIRK, THE ROOTS OF PROFESSION OF THE LAW 111 (1921).

Although “most Americans nowadays think of law as an enactment of a legislature, actually the basis of American law, still applied in countless cases, is the common law which began to develop in England nine hundred years ago.” RUSSELL KIRK, THE ROOTS OF AMERICAN ORDER 371 (4th ed. 2003).

19. Id. at 373. In post-revolution America, “America had only lawyers without much formal instruction—and Blackstone as their manual. From Blackstone, most Americans with any interest in the law acquired their principal stock of knowledge of natural law, common law, equity, and, the chartered rights of Englishmen.” Id. at 368. “In the United States, where no national legal code was promulgated . . . Blackstone remained the standard manual of law until publication (1826-30) of the COMMENTARIES ON AMERICAN LAW by Chancellor James Kent, of New York. Even after that, Blackstone was preferred for a time in some states and districts.” Id. at 369.

20. “It is hardly an exaggeration to say that what we actually took over from England was simply Blackstone.” ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 111 (1921).


22. Carrington, supra note 21, at 540.


24. BRYSON, supra note 21, at 24.

25. 5 U.S. 137 (1803).

26. 60 U.S. 393 (1856).


32. Id.

33. Id.


35. Crawford, 541 U.S. at 42.

36. 3 LETTERS & OTHER WRITINGS OF JAMES MADISON 442-43 (Madison Letter to Henry Lee, June 25, 1824), available at http://www.archive.org/stream/lettersandwritings03madirich#page/442/mode/2up; see also 5 DOCUMENTARY HISTORY OF THE CONSTITUTION 332-34 (Madison Letter to Andrew Stevenson) (March 25, 1826), also available at http://books.google.com (search “To Andrew Stevenson Montpellier, March 25, 1826”). Determining the intent of the Framers “does not follow without difficulty, and two judges equally devoted to the original purpose may disagree about the reach or application of the principle at stake and so arrive at different results, but that in no way distinguishes the task from the difficulties of any other legal writing.” ROBERT H. BORK, THE TEMPTING OF AMERICA 162-63 (1990). “In short, all that a judge committed to original understanding requires is that the text, structure, and history of the Constitution provide him not with a conclusion but with a major premise. That major premise is a principle or stated value that the ratifiers wanted to protect against hostile legislation or executive action. The judge must then see whether that principle or value is threatened by the statute or action challenged in the case before him. The answer to that question provides his minor premise, and the conclusion follows.” Id.

37. Supra note 2.


43. Supra note 34. Particular attention should be paid to the introductory chapter on “The Nature of Laws in General” which is by far “the most jurisprudential” aspect of Blackstone’s COMMENTARIES. Albert W. Alschuler, Rediscovering Blackstone, 145 U. PA. L. REV. 1, 20 (1996).