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Law and History

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A venture into cross-disciplinary legal studies may be a mark of scholarly sophistication for the law academic, but it does not do to assume the benefits without understanding the risks. Serious problems result from the crossing of disciplines. Take the crossing of history with law: It is a mixture containing more snares than rewards, as it risks confusing rules of evidence basic to one profession with canons of proof sacrosanct to another.

True, there are those who feel the mix takes well. For example, consider Alfred H. Kelly, a scholar of history well versed in constitutional law but who apparently had only a layman’s knowledge of nonconstitutional law. He thought the connection of methodology between law and history not only easy to locate, but a fairly close match. They not only shared intellectual substance, he explained, but the materials used in each are also the same. Writing in a legal publication in 1965, Kelly stated that

"there is, after all, a fairly close relationship between the day-to-day methodology of the judicial process and that of historical scholarship. When a court ascertains the nature of the law to be applied to a case through an examination of a stream of judicial precedent, after the time-honored Anglo-American technique, it plays the role of historian. A historian might well say that in this process the court goes to the "primary sources.""

The implication—one that is shared by lawyers perhaps even more than by historians—is that there is a similarity between the methodology

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2. Id.
3. Id.
of law and the methodology of history. Indeed, the argument goes much further than process. It is not just techniques or procedure that the two disciplines have in common; they share substance as well. Certainly there have been times when first-year law students thought so. At least we can imagine that many would have agreed with the Chief Justice of the United States Supreme Court when he suggested in 1957 that in real property classes they were learning legal history. “All lawyers are, of course, in some sense students of legal history,” Earl Warren contended.4 “The knowledge of medieval law, which is essential to the most elementary understanding of our land law, is an obvious example.”5

What was obvious to Earl Warren could be quite obscure to other people. Warren would have been correct had he said that first-year law students often learn the name of old, even medieval judicial landmarks, such as the Rule in Shelley's Case.6 They do not, however, learn what the decision stood for when first promulgated, and they certainly do not learn about it as a development in the context of legal history. Indeed, had Warren understood what he was writing, even he might have drawn back from saying that “[a]ll lawyers are . . . in some sense students of legal history.”7 After all, since Earl Warren came to the bar, no American or English lawyer needs “knowledge of medieval law” for even “the most elementary understanding of our land law.” Why should they if their teachers do not? If we could gather thirty or forty American or Canadian professors of real property into a room, it is possible that none present could explain what Shelley’s Case meant when first promulgated in 1579. They would know that in 1579 a gift of the Pussycat Bar and Grill to Gerald T. McLaughlin for life, remainder to his right heirs, did not grant a life interest to the grantee, but that the life estate and the remainder merged into a fee simple absolute.8 They have no professional reason for learning that McLaughlin had hoped the interest he conveyed to his heirs would allow his heirs to escape the incidents of tenure owed either to the lord who held the Pussycat Bar and Grill or to the Crown. Had his heirs taken by remainder, rather than descent, they would have avoided paying relief, and perhaps, avoided wardship.9

Simply stated, the law student, the law professor, or the practitioner, when grappling with the Rule in Shelley’s Case, is interested only in the

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5. Id.
7. Warren, supra note 4, at 1.
9. Id. at 94-95.
latest interpretation of the rule—the last decision in the jurisdiction—and nothing else. Lawyers, to function as lawyers, do not have to learn anything of sixteenth-century law, or of the rule's subsequent historical evolution. All that lawyers need care about is the net result of that evolution, the latest judicial, nonhistorical appraisal or interpretation of the rule. In a frequently quoted paragraph from his inaugural lecture as Downing Professor of the Laws of England at Cambridge University in 1888, Frederic William Maitland explained:

In his first text-book the student is solemnly warned that he must know the law as it stood in Edward I's day, and unfortunately it is quite impossible to write the simplest book about our land-law without speaking of the De Donis and the Quia Emptores. Well, a stranger might exclaim, what a race of medi evalists you English lawyers ought to be! But on enquiry we shall find that the practical necessity for a little knowledge is a positive obstacle to the attainment of more knowledge and also that what is really required of the practicing lawyer is not, save in the rarest cases, a knowledge of medieval law as it was in the middle ages, but rather a knowledge of medieval law as interpreted by modern courts to suit modern facts. A lawyer finds on his table a case about the rights of common which sends him to the Statute of Merton. But is it really the law of 1236 that he wants to know? No, it is the ultimate result of the interpretations set on the statute by the judges of twenty generations. The more modern the decision the more valuable for his purpose.10

The lawyer and the historian have in common the fact that they go to the past for evidence, but there the similarity largely ends. Some historians, such as Kelly, believe that common-law methodology requires the lawyer to play "the role of historian" and to go "to the 'primary sources.' "11 For such historians, Maitland warned there is a temptation "to mix up two different logics, the logic of authority, and the logic of evidence."12 The differences in the logics are the differences that Kelly missed. They are so basic that they make the ways that the two professions interpret the past almost incompatible. In discovering the past, the

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11. Kelly, supra note 1, at 121.
historian weighs every bit of evidence that comes to hand. The lawyer, by contrast, is after the single authority that will settle the case at bar.13

The search for authority, the need to find "the law" or "the right law" is the main reason lawyers speak of the legal past in terms quite different from the historian's. J.W. Gough described how common lawyers

look at the past from an unhistorical standpoint. In the English lawyer's view, a judge who applies a law to a fresh case elucidates what was always, potentially as it were, the law on that particular matter. One interpretation of the law may have been accepted for years, and then suddenly be reversed by a decision in a fresh case in a higher court, whereupon the new decision holds the field and the old interpretation is discarded as erroneous. Again, when a statute, let us say, has been applied over a long period of years, in changing circumstances, to a succession of cases, and has thus accumulated round it a whole nexus of judge-made law, the historian and the lawyer will look at the original statute in a different light. The historian will want to know what the statute meant to the generation which enacted it, apart from the ways in which subsequent judges have adapted their interpretations of it to fresh circumstances. For the lawyer, on the other hand, these successive interpretations reveal the true meaning of the law. Not only, therefore, does the lawyer's business, unlike the historian's, lie not so much with what the statute originally meant as with what it means now, but he will be inclined, unless he is careful, to imagine

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13. Maitland states:
What the lawyer wants is authority and the newer the better; what the historian wants is evidence and the older the better. This when stated is obvious; but often we conceal it from ourselves under some phrase about "the common law." It is possible to find in modern books comparisons between what Bracton says and what [Sir Edward] Coke says about the law as it stood before the statutes of Edward I, and the writer of course tells us that Coke's is "the better opinion." Now if we want to know the common law of our own day, Coke's authority is higher than Bracton's and Coke's own doctrines yield easily to modern decisions. But if we are really looking for the law of Henry III's reign, Bracton's lightest word is infinitely more valuable than all the tomes of Coke. A mixture of legal dogma and legal history is in general an unsatisfactory compound. I do not say that there are not judgments and textbooks which have achieved the difficult task of combining the results of deep historical research with luminous and accurate exposition of existing law—neither confounding the dogma nor perverting the history; but the task is difficult.

Id.
that the statute always, at any rate potentially, meant what it has since come to be interpreted to mean.\textsuperscript{14}

Our lesson is not that the lawyer is uninterested in the original meaning of the statute. Our lesson, rather, is that the lawyer \textit{needs} another meaning. The concept of that other meaning—the legal, or what Gough called "the true meaning"—leads lawyers, unless they are on their historical guard, to commingle the current interpretation of the law with the historical interpretation. Common lawyers tend to be anachronistic, not merely because they are advocates, but because of the way they think and speak about the past.

\section{II. Lawyer's Law Office History}

The way that lawyers think about history is an eccentricity foisted on them by their professional training and, although it may amuse historians who stumble over lawyering anachronisms,\textsuperscript{15} it is not a matter of controversy among lawyers. What has been controversial is the way that lawyers argue and use history. Critics of their methodology have coined terms to describe it. They call it lawyer's history or law office history.\textsuperscript{16} Lawyer's history and law office history are really the same despite the variety of definitions they have been given. Lawyer's history has been called "a stark, crabbed, oversimplified picture of the past, developed largely to plead a case,"\textsuperscript{17} and law office history has been described as "the selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered."\textsuperscript{18} "The 'law office historian,'" one critic has argued, "imbued with the adversary ethic, selectively recounts facts, emphasizing data that supports the recorder's own prepossessions and minimizing significant facts that complicate or conflict with that bias."\textsuperscript{19}

No better discussion of the technique may exist than Benjamin R. Twiss's account of William M. Evarts's argument before the New York

\begin{thebibliography}{99}
\bibitem{} For the most extended instance of the historian's amusement, see J.G.A. Pocock, \textit{The Ancient Constitution and the Feudal Law} (1987).
\bibitem{} Kelly, \textit{supra} note 1, at 119-22.
\bibitem{} Kelly, \textit{supra} note 1, at 122 n.13.
\end{thebibliography}
Court of Appeals in the *Tenement House Cigar Case.* Evarts was challenging the constitutionality of an early instance of labor regulation—a state statute prohibiting the manufacture of cigars in certain types of family dwellings. Referring to Evarts's claim that citizens had a right to pursue a trade and to use their own property as they saw fit, Twiss concluded:

> Evarts not being a historian but a lawyer, it must be called "lawyer's history" when he said, "Ethical and political writers speak but one language on the nature of these fundamental rights and their security against rightful interference by government." Such a statement can be true only in a brief.21

Recently, sarcasm about lawyer's history has even crept into the reports of its most persistent practitioners, the Justices of the United States Supreme Court. In a rather extreme instance of the pot calling the kettle black, Justice Harry A. Blackmun scolded Justice Antonin E. Scalia for treating "history as a grab-bag of principles, to be adopted where they support the Court's theory, and ignored where they do not."22

What can be called either historical jurisprudence or historical adjudication has become a characteristic of Supreme Court opinions only over the past several decades. Just why it came into fashion puzzled Mark DeWolfe Howe.

I suspect that Justice Brandeis played a large part in making elaborate historical investigation an instrument of decision. He brought the data of the past out into the open in order to reveal the complexity of a problem, rather than to indicate the simplicity of its answer. As time passed, his style of adjudication took hold of the minds and habits of his colleagues and successors, and before very long progressive elementary essays in American history [23]—essays which displayed all the trappings

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20. *In re Jacobs,* 98 N.Y. 98 (1885).
23. Historian Kelly noted that there were
   two fundamental types of historical inquiry on the part of the Court: the resort to history to discover "original intent," and the exposition of history as "on-going process." "Intent" history, the simpler of the two, assumes that the original purpose and meaning of a given constitutional provision can be discovered and brought to bear as sanction for contemporary constitutional exposition. It was "intent" history, for example, that Justice Black invoked in his dubious opinion in *Westberry v. Sanders* (1964), in which he argued that the Philadelphia Convention had incorporated the "one-man, one vote" principle in the Constitution. The great weakness of "intent history" is that it assumes that the Constitution is a timeless document, whereas in
of scholarship, but which were not the manifestations of true learning because they were tracts for the times.  

Paul L. Murphy, a constitutional historian who, unlike Howe, was not a lawyer, was less puzzled about why the Supreme Court adopted historical jurisprudence. Murphy concluded that a turn to history was essential. This trend was brought to fruition in 1931 in cases involving freedom of speech, and freedom of the press, and later extended by application to freedom of assembly in 1937, and the “free exercise” section of the religious provisions of the First Amendment with a long series of Jehovah’s Witnesses’ rulings between 1938 and 1946. These cases necessitated a clear reassessment both of the actual intent of the framers of that amendment and the development and rationale of fifty years of erosion of the amendment as a device for the protection of individual rights.

Kelly agreed that the rise of judicial activism was responsible for the trend toward historical adjudication. However, he thought the cause was less the utility of history than the way history or suppositive history could be used to blunt or disguise that activism.

By this means, the Court could maintain with a minimum of difficulty the myth of historical continuity, i.e., the conception of an essentially static and absolute Constitution. Once ultimate truth was thus affirmed, subsequent Courts, equipped with the aboriginal constitutional meaning, were quite content to quote the Court’s earlier affirmation without further historical inquiry. In a sense, by quoting history, the Court made his-

point of fact it is, as the author observes, “no longer the instrument of the framers’ government, but of our own.”

More sophisticated and complex, is the Court’s resort to “on-going history”—that which recognizes the evolutionary character both of the “living constitution” and of the social order within which it functions.


25. Stromberg v. California, 283 U.S. 359 (1931); see also Griffin v. United States, 112 S. Ct. 466 (1991) (limiting application of Stromberg to principle that where provision of Constitution forbids conviction on particular ground, constitutional guarantee is violated by general verdict that may have rested on that ground).
tory,[29] since what it declared history to be was frequently more important than what the history might actually have been.[30]

Howe, primarily a law professor[31] and only incidently a historian, put the matter in harsher terms and used more critical language than Kelly:

In recent years the Court has decided a number of important cases relating to church and state and, in each of the cases, has alleged that the command of history, not the preference of the justices, has brought the Court to its decision. I believe that in the matters at issue the Court has too often pretended that the dictates of the nation’s history, rather than the mandates of its own will, compelled a particular decision.[32]

In defense of the Court, Kelly pleaded mitigating circumstances. “The Court’s historical excursions,” he explained, “are related to its extremely difficult double socio-political role—the maintenance and enunciation of ‘a political-legal order through formal adjudication,’ and the preservation of ‘the social-political bonds of the nation.’”[33] However, it was the lawyer, Mark DeWolfe Howe, who doubted if the difficulty of the Supreme Court’s task was an excuse either for adopting historical adjudication or for how the Justices have used, argued, and in general, manipulated history.

This tension between the complexities of confused reality and the simplicities of sure conviction has, very probably, always marked the divisions within the Court. Only within recent years, however, have the Justices who have discovered and embraced the solacing simplicities endeavored to persuade us that a careful reading of history confirms their confidence. If they

29. Among the stupendous powers of the Supreme Court of the United States, there are two which in logic may be independent and yet in fact are related. The one is the power, through an articulate search for principle, to interpret history. The other is the power, through the disposition of cases, to make it.


30. Kelly, supra note 1, at 123.

31. It may be that as a lawyer I take the Court’s distorting lessons in American intellectual history too seriously. I must remind you, however, that a great many Americans—lawyers and non-lawyers alike—tend to think that because a majority of the justices have the power to bind us by their law they are also empowered to bind us by their history.

HOWE, supra note 29, at 4-5.

32. Id. at 4.

have not always succeeded in this effort, they have at least taught us that a selective interpretation of history can provide much satisfaction to the interpreter.34

Often, however, it provides little satisfaction to observers of the American judicial process—lawyers35 as well as nonlawyers.36 They have voiced several objections to law office history as practiced by twentieth-century American courts. Here are three.

A. Law Office History is Not History According to the Canons of the Academic Historical Method

Law office history is "antithetical to the use of history to ascertain objective truth."357 The United States Supreme Court, for example, in "virtually all" of its historical adjudication, "either relied upon archaic historical works of the earlier devotees of '[judicially] revealed' history, turned to history written by nonhistorians, or trusted its own ability to reconstruct historical evidence from the sources themselves."358 The complaint is that the judges and Justices disguise advocacy in the mantle of history; yet, no matter how persuasive to lawyers, historians know it is not history.39

34. Howe, supra note 24, at 16.
36. For sophisticated criticism published in a historical journal, see J.R. Wiggins, Lawyers as Judges of History, 75 PROC. MASS. HIST. SOC'Y 84, 84-104 (1964). The author says of Clio: "The unfortunate muse, harried by subpoena, harassed by cross examination, subjected to ex parte proceedings, and lectured by the courts, has not spoken with a clear voice in every attendant proceeding." Id. at 84.
38. Murphy, supra note 28, at 77.
39. Howe thought this "disguised advocacy" made much historical adjudication close to misrepresentation.

It is the common-law tradition, perhaps, which leads the Court and those who study its processes to assume (or had I better say "pretend"?) that the history which is made by the Court's decisions is merely the realization of the past which the learning of the justices and their clerks has uncovered. The judge as statesman, purporting to be the servant of the judge as historian, often asks us to believe that the choices that he makes—the rules of law that he establishes for the nation—are the dictates of a past which his abundant and uncommitted scholarship has discovered.

Howe, supra note 29, at 3-4.
If law office history of this kind appeared only in a brief for counsel, it conceivably would do no harm. But the fact is that law office history is almost completely irresolvable, even by the Supreme Court of the United States, into anything resembling historical truth, in large part because the premises that guided its preparation were radically different from those that should guide a professional historian. 40

B. Law Office History “Asks Questions of the Past That the Past Cannot Answer”

Law office history “asks questions of the past that the past cannot answer.” 41 This occurs generally from two causes. First, judges often read the records of the past as if they were prepared similarly to the legislative history of today’s congresses, by professional staffs anticipating issues likely to arise in litigation. 42 They read, for example, eighteenth-century evidence as if it were formulated to meet twentieth-century standards, and hold the record to a measure of accuracy that simply is not there. 43 Second, they ask the past to answer questions about matters that were not thought of at the time.

This difficulty shows up most clearly in the resort to history by the [United States Supreme] Court in the cases concerning the relations of church and state. The church-state matters to which Jefferson, Madison, Fisher Ames, and the others of the First Congress were addressing themselves are not resolvable by any plausible process of historical reasoning into a solution of the problem of aid for parochial schools, lunch programs, bus transportation, released time. 44

40. Kelly, supra note 1, at 156.
41. Id.
42. A striking instance of this is the judiciary’s almost deliberate misreading of the Intercourse Act (which courts persist in misnaming the “Nonintercourse Act”). Intercourse Act (Indian Tribes), ch. 161, 4 Stat. 729 (1834) (current version at 25 U.S.C. §§ 177, 179, 180, 193, 194, 201, 229, 251, 263, 264 (1988)). At the time it was enacted, and for decades afterward, everyone knew the Act did not apply to Indians living within states; but holding the Congress of 1790 to twentieth-century standards of drafting, the courts have ignored history to reach a desired result. See, e.g., Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975).
44. Kelly, supra note 1, at 156-57.
C. Too Often Law Office History Is a Blatant Abuse of the Historical Method

Historians have particularly singled out Hugo Black for criticism. He had a talent for constructing historical arguments that were caricatures of what academics understand to be history. "To put the matter bluntly," Kelly complained of Colegrove v. Green,45 "Mr. Justice Black, in order to prove his point, mangled constitutional history."46 Kelly admitted being blunt, but in truth he was mild; so was the term Murphy used—"distressing"47—to describe Black's opinion in Engle v. Vitale.48 "[F]or the most part he relied upon works which may be 'historical' given the length of time in the past they were written, but which modern scholars would hesitate to suggest an undergraduate rely upon as anything but a once important, although now outdated view."49

Lawyers should be forgiven if they imagine a sigh accompanying Robert L. Schuyler's lament: "Unfortunately, a knowledge of American history has not yet been made a prerequisite for admission to the Supreme Court."50

III. FORENSIC HISTORY

We may wonder if Schuyler meant what he said. Historians understand that criticism of law office history is criticism of forensic advocacy; that lawyers practicing lawyer's history use it as advocates; that the complaint is that they are too much the lawyer and not enough the historian.51 Historians know lawyers are beyond reformation, but wish judges would adopt a more acceptable standard. The United States Supreme Court, Kelly concluded, has "attempted to sit on two stools at once and

45. 328 U.S. 549 (1946).
46. Kelly, supra note 1, at 135.
47. Murphy, supra note 28, at 64.
49. Murphy, supra note 28, at 65. Wilcomb E. Washburn listed 13 books quoted or cited as authority by the United States Supreme Court in United States v. Sioux Nation of Indians, 448 U.S. 371 (1980), and concluded: "Of all the historians cited, only the last few mentioned meet the test of a historian by the standards of the profession today." Washburn, supra note 37, at 7.
51. "The object of this process is not objective truth, historical or otherwise, but advocacy . . . . The premises, the processes of inquiry, and the results are all radically different from those of a historian or a social scientist." Kelly, supra note 1, at 156. There have, however, been historians who do not recognize the distinction. See, e.g., POCOCK, supra note 15, at 255-305 (discussing development of "common-law mind").
has fallen between them. It has confused the writing of briefs with the writing of history."

Although their opinions may often be confused, the judges generally are not. When they tell their law clerks to find them some "history" supporting a point of law they plan to promulgate, their interest lies in authority, not in evidence. This use of history is not to learn about the past, but merely to support an outcome. Law office history does not lead the judge to a decision. In almost every instance when history is employed, the decision has already been formulated. Unprofessional history is used to explain the decision, to make the decision more palatable, or, in most cases, to justify the decision.

History's great attractiveness for judges occurs when they are indulging in judicial activism. History lets them be activists "in the name of constitutional continuity." Kermit L. Hall, a legal historian and law professor, thinks this is a reason why judges should not play around with history, especially when thinking they have discovered "original intent." "[T]here is the real danger, as our constitutional history shows, that we will come to believe that choices of law can be passively made by the discovery of a single 'original intent' that will free our own generation from the difficult social choices that it must make."

Even if his purpose was to defend the integrity of history rather than the autonomy of law, Hall's condemnation of historical adjudication is too restrictive. We have to learn to harass historical jurispru-

52. Kelly, supra note 1, at 155.

53. Along with judges, law clerks have taken some hard knocks from historians. "It is not certain . . . that the change was for the better when the practice developed of having law clerks, as untrained in the arts of the historian as are the Justices themselves, hurriedly erect historical scaffoldings to sustain structures already built by strong men of strong conviction." Howe, supra note 24, at 16; see also Murphy, supra note 28, at 76 (asserting that law clerks choose evidence in one-sided manner, or distort record, to avoid distressing judge); Washburn, supra note 37, at 7-8 (asserting that reliance on out-dated views stems from antihistorical bias of law clerks whose research and drafts of opinions are ultimately issued as decisions).

54. Kelly, supra note 1, at 131.


56. Id.

57. Historians are not alone in thinking history needs to be defended from judges. Thus, a constitutional law professor wrote:
dence, not reject it, as most observers who have written on the subject would want to do. Historical adjudication is too convenient to be banished from decision writing. We should acknowledge that lawyers and judges can use history in a variety of ways and that not every exercise of historical jurisprudence deserves to be dismissed as law office history.

According to the academic canons of the historical method, there is no need to consider instances of the proper use of history either to prove a fact or to establish a point of law—if such instances can be found. Instead, attention should be given to a species of history that does not meet the canons of historians' history, but for centuries has made legitimate contributions to Anglo-American law, especially to Anglo-American constitutional law. It is forensic history.

A. Ancient Constitutionalism

The practice of ancient constitutionalism was the most persistent, long-lived use of forensic history by common lawyers. Sometimes called the gothic constitution, the ancient constitution was the suppositive original political structure of Anglo-Saxon society, the origins of which

By superficial and purposive interpretations of the past, the Court has dishonored the arts of the historian and degraded the talents of the lawyer. Such dishonoring and degrading may not be of large moment when the history that the Court manipulates is merely "legal history"—the story, that is, of the law's internal growth and development. When, however, the Court endeavors to write an authoritative chapter in the intellectual history of the American people, as it does when it lays historical foundations beneath its readings of the First Amendment, then any distortion becomes a matter of consequence. The misreading is of moment not because it has led the Court to a mistaken decision—for the decision may well be right and wise—but because it has woven synthetic strands into the tapestry of American history.

Howe, supra note 29, at 4.

58. When criticizing judges' use of history, historians tend to compound law and fact, not realizing that when they cite a "proper" use of history it is used to prove facts, not law. The following is an example in which a historian showed up the lawyers:

In the Sioux case [United States v. Sioux Nation of Indians, 448 U.S. 371 (1980)], the "smoking gun"... was the discovery of a confidential letter from Lieutenant General Philip Sheridan... reporting... [that] the President had decided that the military should make no further resistance to the occupation of the Black Hills by miners... [T]he attorneys for the Sioux in the Black Hills case gave Professor Fred Nicklason, a historian... three days to turn up evidence that Grant secretly ordered the army out of the Black Hills where they were stationed to prevent the gold miners from invading the land the Sioux held... The Sioux attorneys' charge that Grant had so acted was undocumented, and the government attorneys pointed out... that no evidence existed in the record... that Grant had ever taken such an action. Nicklason, employing his historian's training and intuition, bypassed official military correspondence and went directly to General Sheridan's private papers at the Library of Congress... The five minutes work was probably worth over $100,000,000 to the Sioux.

Washburn, supra note 37, at 8.

59. Perhaps judges never reach decisions about law on the basis of "a critical understanding of the historical facts involved" in a case. Id.
are discoverable in the mythology of the forests of prehistoric Germany. It was the norm of governance, that is, of the Anglos, the Saxons, and the Jutes when they were said by ancient constitutionalists to have been free people living under elected kings vested with limited power and confined by the rule of customary law. For lawyers, constitutionalists, and parliamentarians of the sixteenth and seventeenth centuries, the ancient constitution provided a standard with which to argue against the actions, programs, and decrees of contemporary government. The further that a governmental command deviated from the supposed model of the ancient constitution of liberty, the more it could be opposed as unconstitutional, or, at least, challenged as an act of "power" rather than an act of "right."  

The ancient constitution was timeless, a concept historians find fantastic, but which once fit comfortably into the historiography of English lawyers. After all, that was how they thought of the common law. As William Dugdale noted during the reign of Charles I,  

the Common Law, is, out of question, no less antient than the beginning of differences betwixt man and man, after the first Peopling of this Land; it being no other than pure and tried Reason, . . . or the absolute perfection of Reason, as Sir Edward Coke affirmeth, adding, that the ground thereof is beyond the memory or Register of any beginning . . . .

Dugdale's point must not be missed. He is telling us not to look for historical certainty. The ancient constitution was shaped by subjective, not objective, proof.

The timelessness of the ancient constitution served the polemical needs of forensic constitutionalists in political debate. The concept of timelessness allowed the advocate for certain legal principles or legal institutions to place those principles or institutions in the context of continual constitutionality even if repudiated by the Crown or rendered

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60. It is important to understand, however, that the premises of the ancient constitution could be and sometimes were appealed to by the government—the Crown—to support a position it favored. The ancient constitution as a tool of constitutional argumentation was not restricted to opponents of power, although, of course, over time they made much greater use of it. See Paul Christianson, Ancient Constitutions in the Age of Sir Edward Coke and John Selden, in THE ROOTS OF LIBERTY: MAGNA CARTA, ANCIENT CONSTITUTION, AND THE ANGLO-AMERICAN TRADITION OF RULE OF LAW 89, 104-15 (Ellis Sandoz ed., 1993) [hereinafter THE ROOTS OF LIBERTY].  

61. WILLiAM DUGDALE, ORIGINES JURIDICAEs, OR HISTORICAL MEMORIALS OF THE ENGLISH LAWS, COURTS OF JUSTICE, FORMS OF TRIAL, PUNISHMENT IN CASES CRIMINAL, LAW-WRITERS, LAW-BOOKS, GRANTS AND SETTLEMENTS OF ESTATES, DEGREE OF SERJEANT, INNES OF COURT AND CHANCERY 3 (n.p., 2d ed. 1671).
inoperative by nonusage. Even a constitutional custom of long standing did not necessarily supersede the timeless validity of a doctrine that had been fundamental to the ancient constitution.

A case in point is the way in which, at the quite late date of 1783, the Crown’s discretionary right to create peers was questioned. In the reign of Henry VIII, it was charged, “a power was usurped by the Crown of conferring titles of dignity at pleasure; which incroachment, not being opposed by the Commons, has been continued to this day, contrary to the ancient law and constitution of the kingdom.” The word to be marked is *incroachment*. The practice, which could be traced back at least to Henry VIII, even as late as 1783, was deemed an “incroachment” on the timeless principles of the ancient constitution. The fact that three hundred years had come and gone since the “usurpation” was first introduced was, despite the doctrine of prescription, irrelevant to the jurisprudence of ancient constitutionalism. The usurpation had not become law either because the Crown had no prescriptive rights against the ancient constitution, or because time did not run against immutable principles.

Because American lawyers and historians are largely unfamiliar with ancient constitutionalism, it may be well to rephrase what has been said. As a forensic technique, ancient constitutionalism was less history than advocacy, more imagination than scholarship, yet real enough to be the basic tool for both constitutional argumentation and for the defense of collective liberty. The forensic strengths of the methodology are striking. To gain polemical advantage when contending for a legal doctrine or against the exercise of power, one needed only: (1) to postulate a timeless continuity—an ancient constitution whose origins and functions were lost in infinity; or (2) to postulate a customary tradition that had been practiced from an era to which “the memory of man runneth not to the contrary.” Once these premises were in place, any government innovations to which one objected could be challenged as subversive of the

62. For a lengthy discussion of the historiography of ancient constitutionalism, see John Phillip Reid, *The Jurisprudence of Liberty: The Ancient Constitution in the Legal Historiography of the Seventeenth and Eighteenth Centuries*, in *The Roots of Liberty*, supra note 60,
at 147, 147-231.

63. [WILLIAM W. SEWARD], *The Rights of the People Asserted, and the Necessity of a More Equal Representation in Parliament Stated and Proved* 37 (Dublin, 1783).

Note: In pamphlets printed around the time of the American Revolution, the author’s name was frequently omitted in order to avoid potential prosecution and possible execution. Accordingly, throughout this Essay, brackets appearing around an author’s name indicate that such person is now widely held to be the author although his or her name does not appear on the cited pamphlet.—*Eds.*
ancient constitution or of established legal custom. If there had been alterations in constitutional government that could not be denied—substantial departures from earlier constitutional practice—they could be dismissed as matters of mere form, not amounting to fundamental change. As Charles Leslie explained during the first decade of the eighteenth century: “If you ask whether these things are not an Altering or Breach of the Constitution, I think not. For while the Fountain Constitution stands Secure, any various Runnings of the Rivulets are no Breach of the Constitution.” What mattered was not recent practices or changing customs, but rather the timeless “first principles” of ancient constitutionalism. With the quality of timelessness, the ancient constitution was always available as a standard when arguments were made for correcting the rivulets of erroneous details.

B. Magna Carta: The Spirit of the Ancient Constitution Personified

“Was there an ancient constitution?” J.C. Holt asked. True, but Holt’s answer is a historian’s answer, not a lawyer’s answer. The difference may be seen by considering contrasting interpretations of the ancient constitution and of Magna Carta, the document that is Holt’s chief area of historical expertise. For him, as for historians in general, the ancient constitution was a fiction. It never had a meaning. By contrast, Magna Carta had been a real historical happening: Its original meaning was its current meaning, and had always been such since first promulgated by King John and his barons.

Lawyers once had a different perspective. There was a time when they thought that the ancient constitution was no more a fiction than they thought that Magna Carta had been changeless. Jean Louis de Lolme, an eighteenth-century Swiss writer, may not have been a common lawyer. Yet, he took a common lawyer’s approach to interpreting Magna Carta; that is, he interpreted it by taking into account what Maitland described as “[t]hat process by which old principles and old phrases are charged with an [sic] new content.” Maitland knew it was a process of evolution. It is “from the lawyer’s point of view an evolution

64. [CHARLES LESLIE], THE CONSTITUTION, LAWS AND GOVERNMENT OF ENGLAND, VINDICATED IN A LETTER TO THE REVEREND MR. WILLIAM HIGDEN. ON ACCOUNT OF HIS VIEW OF THE ENGLISH CONSTITUTION, WITH RESPECT TO THE SOVEREIGN AUTHORITY OF THE PRINCE, &C. IN VINDICATION OF THE LAWFULNESS OF TAKING THE OATHS, &C. 17 (London, 1709).
66. Id.
67. MAITLAND, supra note 10, at 491.
of the true intent and meaning of the old law; from the historian’s point of view it is almost of necessity a process of perversion and misun-derstanding.\textsuperscript{68} King John’s charter, de Lolme contended, had evolved into a landmark of liberty, guaranteeing the rights of the general mass of the people, not just the privileges of the feudal magnates who forced John to sign.\textsuperscript{69} To make his point, de Lolme did not need to cite specific articles, offer historical evidence, or discuss “original intent.” Just to mention the “Great Charter” seems to have been enough to remind eighteenth-century readers of what they already knew—that Magna Carta was virtually a bill of individual rights.

\begin{quote}
[What extent, what caution, do we see in the provisions made by that Great Charter! All the objects for which Men naturally wish to live in a state of Society, were settled in its thirty-eight articles. The judicial authority was regulated. The person and property of the individual were secured. The safety of the Merchant and Stranger was provided for. The higher class of Citizens gave up a number of oppressive privileges which they had long since accustomed themselves to look upon as their undoubted rights. Nay, the implements of tillage of the Bond-
\end{quote}

\begin{quote}
\emph{man}, or Slave, were also secured to him; and for the first time perhaps in the annals of the World, a civil war was terminated by making stipulations in favour of those unfortunate Men to whom the avarice and lust of dominion inherent in human Nature, continued, over the greatest part of the Earth, to deny the common rights of Mankind.\textsuperscript{70}
\end{quote}

Whether wishful thinking or factual nonsense, analysis of this sort led some people to wonder if eighteenth-century encomiasts of Magna Carta ever read the document.\textsuperscript{71} Perhaps that is the wrong question, just as it could be wrong to ask today’s First Amendment lawyers if they really believe that Amendment, when originally promulgated, had been intended to protect libellers from civil liability. By the time de Lolme wrote, in the second half of the eighteenth century, Magna Carta could

\textsuperscript{68} Id.

\textsuperscript{69} J.L. de Lolme, \textit{The Constitution of England, or an Account of the English Government; in Which It Is Compared with the Republican Form of Government and Occasionally with the Other Monarchies in Europe} 17 (Dublin, 1775).

\textsuperscript{70} Id. at 188.

\textsuperscript{71} Magna Carta, it was said, was “most boasted by those who never read it. Those who have, can see that it is not at all in favour of what is fondly called the natural liberty of mankind, and only calculated for the benefit of the few landed tyrants who extorted it from their weak sovereign.” \textit{An Essay on the Constitution of England} 11 (London, 1765).
be forensically described as an instrument containing "the common rights of mankind," even if none of those rights had ever occurred to the barons who confronted King John. There was little reason for eighteenth-century constitutionalists to read the document. What was important to them about Magna Carta was not what it said, but what its words had come to mean and the uses to which they could be put. It was forensic history in the extreme. Had King John died on the way to Runnymede and Magna Carta never been issued, eighteenth-century constitutionalists would have "quoted" in its stead some other official or suppositive declaration of restraints on Norman government power—the coronation charter of Henry I perhaps. Magna Carta was, after all, but a medieval codicil reaffirming the ancient constitution. That was the accepted theory of the eighteenth century. Sir William Blackstone insisted that

> it is agreed by all our historians that the great charter of King John was for the most part compiled from the antient customs of the realm, or the laws of King Edward the confessor; by which they usually mean the old common law, which was established under our Saxon princes, before the rigors of feudal tenure and other hardships were imported from the continent by the kings of the norman line.

The Irish barrister Charles Francis Sheridan agreed, even though he attacked Blackstone's jurisprudence on other grounds. "Magna Carta however distant the date of it," he argued, "was even then only declaratory of the Principal Grounds of fundamental laws and liberties long antecedent to itself, and consequently still longer antecedent to the very existence of Parliaments."

The jurisprudence of Magna Carta in the eighteenth century, therefore, was a rejection of arbitrary monarchical power. A pamphlet that the American colonists attributed to Lord Chancellor Somers insisted

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that the rights that Magna Carta enunciated "were not the grants and
concessions of our Princes, but recognitions of what we have reserv'd
unto ourselves in the original institution of our government, and of what
always appertain'd unto us, by common law, and immemorial cus-
toms." Magna Carta, in that version, was a restatement of the ancient
constitution, "[declarative] of ancient rights" according to a late eight-
eleventh-century political catechism; "declaratory of the principal
Grounds, of the fundamental Laws and Liberties of England," according
to a New England newspaper.

Reduced to its essentials, the legal theory was pure ancient constitu-
tionalism. Like the ancient constitution, the provisions of Magna Carta
were traced back through a timeless and changeless infinity. Samuel
Johnson noted in 1772 that

[T]he contents of Magna Charta [are] the undoubted inheritance
of England, being their antient and approved laws; so antient,
that they seem to be of the same standing with the nation . . .
[T]hey passed through all the British, Roman, Danish, Saxon,
and Norman times, with little or no alteration in the main.

What this statement intended, of course, was not to teach a lesson in
history, but to propagate a principle of constitutional law. "The Rights
of Magna Charta depend not on the Will of the Prince, or the Will of the
Legislature," Connecticut lawmakers were told in an annual election ser-
mon, "but they are the inherent natural Rights of Englishmen: secured
and confirmed they may be by the Legislature, but not derived from nor

76. [LORD CHANCELLOR SOMERS], THE JUDGMENT OF WHOLE KINGDOMS AND NA-
TIONS, CONCERNING THE RIGHTS, POWER, AND PREROGATIVE OF KINGS, AND THE RIGHTS,
77. [ROBERT ROBINSON], A POLITICAL CATECHISM 34-35 (London, 1782).
78. Boston Gazette, May 10, 1756, at 1. The Gazette echoed a frequently reprinted
pamphlet that was written around 1690. See HENRY CARE, ENGLISH LIBERTIES, OR THE
FREE-BORN SUBJECT'S INHERITANCE 7 (Providence, 6th ed. 1774) (containing Magna Carta,
Charta De Foresta, Statute de Tallagio Non Concedendo, Habeas Corpus Act, and several other
statutes, with comments on each). Magna Carta "is only an Abridgment of the ancient Laws
and Customs of the Realm. Of the same Nature is the Petition of Rights [sic] . . . ." THE
AMERICAN GAZETTE. BEING A COLLECTION OF ALL THE AUTHENTIC ADDRESSES, MEMO-
RIALS, LETTERS, &C. WHICH RELATE TO THE PRESENT DISPUTES BETWEEN GREAT BRIT-
AIN AND HER COLONIES. CONTAINING ALSO MANY ORIGINAL PAPERS NEVER BEFORE
PUBLISHED 48 (London, 1768). The connection with the Petition was also old theory.
"Magna Charta, instead of being superannuated, renews and recovers its pristine strength, and
athletick vigor, by the Petition of Right, with our many other explanatory or declaratory Stat-
utes." [THOMAS RYMER], A PROSPECT OF GOVERNMENT IN EUROPE, AND CIVIL POLICY:
SHewing the Antiquity, Power, DECAY OF PARLIAMENTS 67 (London, 1681).
79. SAMUEL JOHNSON, A HISTORY AND DEFENCE OF MAGNA CHARTA 3-4 (London, 2d
ed. 1772).
dependent on their Will.” These words were preached in 1744. They stated the precise legal principle upon which Americans would fight their revolution thirty-two years later.

C. American Constitutionalism: The Second Original Contract

The controversy between Great Britain and her thirteen mainland colonies that led to the American Revolution is another occasion when forensic historical argumentation was a chief form of constitutional discourse. There is no need to consider all the historical aspects of the debate. The techniques of advocacy can be sufficiently illustrated by considering just one forensic tool: the concept of the original contract that the English people had negotiated with their rulers at some infinite period in the prehistoric past. Contractarian theory shaped the heart of the American constitutional case—with the exception of custom—as the basic legal authority of traditional English and British constitutionalism. In eighteenth-century Great Britain, many political theories and almost all constitutional theory were expressed by contractarian thought. It was adapted to every issue and stood as a standard that could be used to resolve every problem. During the revolutionary controversy, both sides—even British governmental employees, spokesmen for the constitution of imperial sovereign command—appealed to contractarian theory, making similar constitutional arguments for similar constitutional reasons.

For purposes of illustration, we need only consider one of the shapes that contractarian argument took during the American Revolution. “[O]ur forefathers,” the people of the town of Weymouth, Massachusetts lamented shortly before the Stamp Act became operative,

have told us that they should never have left the land of their nativity, and fled to these ends of the earth, triumph’d over dangers, encountered difficulties innumerable, and suffer’d hardships unparrel’d, but for the sake of securely enjoying civil and religious liberty, and that the same might be transmitted safe to their posterity. 82

80. [ELISHA WILLIAMS], THE ESSENTIAL RIGHTS AND LIBERTIES OF PROTESTANTS. A SEASONAL PLEA FOR THE LIBERTY OF CONSCIENCE, AND THE RIGHT OF PRIVATE JUDGMENT, IN MATTERS OF RELIGION, WITHOUT ANY CONTROUL FROM HUMAN AUTHORITY. BEING A LETTER, FROM A GENTLEMAN IN THE MASSACHUSETTS-BAY TO HIS FRIEND IN CONNECTICUT (65) (Boston, 1744).
81. 1765, 5 Geo. 3, cap. XII (Eng.).
82. Instructions of the Town of Weymouth, BOSTON EVENING-POST, Oct. 21, 1765, at 2.
The voters of Weymouth were applying the original contract, not the "social" contract, which also was a doctrine of ancient Anglo-Saxon law, often associated by American historians with the theories of John Locke. The social contract was a legal fiction explaining the stipulations under which individuals left the state of nature and created societies. The constitutional or government contract—called the original contract in the eighteenth century—was an implied agreement between ruler and ruled from which the powers and limitations of government were inferred. The first is a theory of the origin of society, the second a theory of the constitution of government.\textsuperscript{83}

Unlike the social contract, the original contract did not depend on theories about the need of humans to escape the state of nature. It was implied from historical events and was based on principles of government that the person citing the contract either wanted continued or hoped to establish. It would be wrong, therefore, to think of legal fictions or of constitutional subterfuge. The original contract was much more real than the twentieth century is willing to credit. As late as 1992, a writer described contractarian argument as "modern," a development of the "radicalism" of the American Revolution that supplanted "the traditional patriarchal idea of authority."\textsuperscript{84} That writer was imposing twentieth-century suppositions on eighteenth-century constitutional concepts. Seen from a less speculative perspective, that is, as seen through eighteenth-century suppositions, the original contract was an ancient constitutional doctrine that for centuries had been employed as a forensic argument restraining power, while patriarchalism is modern theory invented to accommodate an otherwise unsupported historical thesis.\textsuperscript{85}

The concept of contract was an apparatus of constitutionalism imposing restraints on the prerogatives of monarchy stretching back beyond legal memory, to the pledge of King Canute to govern by the Anglo-Saxon customs of Edgar, the promise of William the Conqueror to continue the laws of Edward the Confessor, the coronation charter of Henry I, and most notably, the several versions of Magna Carta. It was popular knowledge in the eighteenth century that Charles I had been executed for violating his compact with the English and Scottish nations. "'There is,' he was told on being sentenced to death, 'a contract and a bargain made between the King and his people, and your oath is taken:

\textsuperscript{83} John Phillip Reid, "In Our Contracted Sphere": The Constitutional Contract, the Stamp Act Crisis, and the Coming of the American Revolution, 76 COLUM. L. REV. 21, 21-28 (1976).


\textsuperscript{85} Id.
and certainly, Sir, the bond is reciprocal . . . ."86 The contract that had been invoked against the father was later breached by the son. Although as a matter of precise law, James II had been accused of abandoning the throne, in the popular mind of the eighteenth century he had been deposed for breaking the original contract. The King, in the words of the Massachusetts House of Representatives, not only violated "the original contract with his three kingdoms," he "broke the original contract of the settlement and government of these colonies."87

Discussing the American Revolution in the House of Lords, the Earl of Rockingham protested against Parliament's attempts to bind the colonies by punitive legislation. He had hoped to locate the constitutional limits of Parliament's authority in either the doctrine of consent or the doctrine of contract. "I don't love to claim a right on the foundation of the supreme power of the legislature over the dominions of the Crown of Great Britain," Rockingham explained.88 Instead he looked for American acquiescence in "an original tacit compact."89 Unable to find it, he refused to vote to violate the contract that he thought existed.90

The contract to which Rockingham referred was not the original contract between the rulers of England and the English people. It was a different, more recent original contract, one made between the rulers of England or Great Britain and the first settlers of the American colonies. This can be called the second original contract. The historical event upon which this contractarian doctrine was based was the departure of seventeenth-century English people from the mother country and their emigration to North America. Those first settlers, a governor of Rhode Island explained in 1765, "removed on a firm reliance of a solemn compact, and royal promise and grant, that they, and their successors forever, should be free; should be partakers and sharers in all the privileges and advantages of the then English, now British constitution."91 The legal theory as explained by a London magazine was pure implied contract:

86. Reid, supra note 83, at 23 (quoting C. Wedgwood, The Trial of Charles I 182 (1964)).
87. Id. at 23-24.
88. Id. at 25 (quoting G.H. Guttridge, English Whiggism and the American Revolution 74 (1966)).
89. Id. (quoting G.H. Guttridge, English Whiggism and the American Revolution 74 (1966)).
90. Id. (quoting G.H. Guttridge, English Whiggism and the American Revolution 74 (1966)).
Before [the first settlers of the colonies departed], the terms of their freedom, and the relation they should stand in to the mother country, in their emigrant state were fully settled. [T]hey were to remain subject to the king, and dependent on the kingdom of Great Britain. In return they were to receive protection, and enjoy all the rights and privileges of freeborn Englishmen.92

There were two elements providing validity to the second original contract: the right of the king to make an agreement and the reliance or expectations of the settlers. As the New York Journal explained, having been "invested with authority by the whole nation, which gave a sanction to his action, [the king] . . . made a contract with the colonists, on the faith of which they trusted the lives and fortunes of themselves and their posterity."93 Although the contract was implied, the eighteenth-century legal mind was so attuned to contractarian theory that the terms were often explained as mutual promises exchanged between monarch and subjects. For example, consider how the Boston Evening-Post wrote the contract in 1765:

That if the adventurers will hazard their lives and properties in acquiring, according to the rules of justice, possessions in the desart regions of America . . . they shall lose no part of their natural rights, liberty and property, by such removal; but that they, and all their posterity for ever, shall as fully and freely enjoy them, to all intents, constructions, and purposes whatsoever, as if they and every of them were born in England.94

The second original contract was both a legal fiction and a historical event. For seventeenth- and eighteenth-century constitutional advocates, the second original contract was an actual document. These advocates spoke of kings agreeing to its terms and of the contractees' descendants reading provisions of the contract.95 The second original contract was cited as evidence of constitutional rights all throughout the American colonial era. For example, in 1691, following the New England rebellion against the prerogative taxation imposed by Governor Edmund Andros, John Palmer, the most competent common lawyer in Governor Andros's administration, defended prerogative taxes on the grounds that North America was conquered territory and subject to prerogative decrees. Ed-

92. 35 Gentleman's Mag. (London) 561 (1765).
94. Boston Evening-Post, July 1, 1765, at 1.
ward Rawson, answering Palmer, denied the fact of conquest, and countered with the second original contract, stating its terms close to those asserted by American whigs eighty years later during the revolutionary controversy:

[T]here was an Original Contract between the King and the first Planters in New-England, the King promising them, if they at their own cost and charge would subdue a Wilderness, and enlarge his Dominions, they and their Posterity after them should enjoy such Privileges as are in their Charters expressed, of which that of not having Taxes imposed on them without their own consent was one.96

Rawson is not as clear as we would wish. It may be that he would have limited the second original contract to rights stated or implied in colonial charters. If so, his rule of construction was narrower than that adopted by most Americans who cited, used, and relied on the second original contract. They would have found the terms of the contract in a much wider range of evidence: actual statements made by or on behalf of the Crown, the conditions of emigration, the understanding—expressed or implied—of the emigrants, and subsequent government practice and legal custom. From the twentieth-century perspective, this proof appears difficult to obtain and easily challenged on grounds of relevancy or directness. The eighteenth-century constitutional mind apparently believed the contract readily proven. James Wilson wrote:

However difficult it may be in other states, to prove an original contract, subsisting in any other manner, and on any other conditions, than are naturally and necessarily implied in the very idea of the first institution of a state; it is the easiest thing imaginable to prove it in our constitution and to ascertain some of the material articles of which it consists.97

Wilson was referring to the original contract in British constitutional law. Daniel Dulany, Jr. thought it was even easier to prove the second original contract. “The Origin of other Governments,” he explained, “is covered by the Veil of Antiquity, and is differently traced by the Fancies of different Men; but, of the Colonies, the Evidence of it is as

96. [Edward Rawson], The Revolution in New England Justified, and the People There Vindicated from the Aspersions Cast upon Them by Mr. John Palmer, In His Pretended Answer to the Declaration, Published by the Inhabitants of Boston, and the Country Adjacent, on the Day When They Secured Their Late Oppressors, Who Acted by an Illegal and Arbitrary Commission from the Late King James 43 (Boston, 1691).
clear and unequivocal as of any other Fact.”98 This was forensic history at its most effective.

During the revolutionary controversy, contractarian theory was appealed to more than any other jurisprudential doctrine, especially on the issue of Parliament's authority to bind the colonies by legislation "in all cases whatsoever."99 What must be noticed, however, is how much the principle of custom was involved in every aspect of the American whig case. Custom provided proof of the contents of the second original contract—its terms, stipulations, and provisos. It was one thing for Americans to contend that the first settlers to the colonies had contracted with Charles I on leaving England. All that claim did was allege the second original contract; it said nothing explicit about the contract's terms. The various stipulations of the contract also had to be established, and that was done primarily through the evidence of custom. The contract, remember, was about how future generations of Americans would be governed. Its provisions, therefore, were found by looking at how contemporary colonists and their predecessors had been governed—by looking, that is, at custom as well as at how colonial government currently functioned.

D. The Institutionalization of Forensic History

The practice of forensic history by either English common lawyers or American whigs under the unwritten British constitution was quite different from the practice of forensic history under the written American federal and state constitutions. The methodology is the same: to find, argue, or invent some history that bears on the question at bar and use it as authority similar to a judicial precedent, rather than as evidence to explain the past. What differs is that the practice of forensic history under the American constitutions has been institutionalized. The audience is different. Under the old English and British constitutions, the polemists of history, whether constitutionalists or monarchy absolutists,100 directed their arguments at public or parliamentary opinion.

98. [Daniel Dulany, Jr.], Considerations on the Propriety of Imposing Taxes in the British Colonies, for the Purpose of Raising a Revenue, By Act of Parliament 30 (Annapolis, 2d ed. 1765).


100. This is a point that bears repeating: Although forensic history may have been more useful for those opposing the exercise of power, it could also be put in the service of government power, especially when supported by scientific history. This can be seen in the career of Robert Brady, whom historians in the twentieth century have made into a sort of folk hero. A scholar with the vision and intelligence to be the good historian, he courageously, but in vain,
American forensic history is directed at courts, usually appellate courts. Thus, when directed at public or professional opinion, forensic history is generally propagated from the bench,101 especially by the United States Supreme Court.

Hugo Black was the Supreme Court’s chief practitioner of law office history. None of the numerous uses of history in his decisions can pass muster as historians’ history. If we are generous, however, it could be conceded that in one opinion at least, United States v. Lovett,102 Black edged close to forensic history. At issue was the validity of section 304 of the Urgent Deficiency Appropriation Act of 1943,103 directing that no salary or other compensation be paid to certain government employees named in the legislation.104 “In the background of the statute,” Black noted, “lies the House of Representatives’ feeling in the late thirties that many ‘subversives’ were occupying influential positions in the Government and elsewhere and that their influence must not remain unchallenged.”105 He labelled the legislation “galling,” saying it “accomplishes the punishment of named individuals without a judicial trial,”106 a typical case of the type that generally turned his judicial instincts toward historical adjudication. And, as usual, he wanted history not for evidence but to cite as authority, to use, that is, as lawyers use judicial precedents.

Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons because the legislature thinks them guilty of conduct which deserves pun-

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101. An important exception, that may help to prove the rule as it occurred before the creation of federal courts, is THE FEDERALIST Nos. 18-20 (James Madison).

102. 328 U.S. 303 (1946).


104. No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act, or (2) which is now, or which is hereafter made available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used . . . to pay any part of the salary, or other compensation for the personal services, of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate . . . .

Id.

105. Lovett, 328 U.S. at 308.

106. Id. at 316.
ishment. They intended to safeguard the people of this country from punishment without trial by duly constituted courts.\textsuperscript{107} This was history by judicial fiat. There was no need to cite authority except, of course, for another Hugo Black decision.\textsuperscript{108} This is hardly evidence to persuade historians, but apparently the very thing needed to satisfy Black that points of history had sufficiently been researched. All that remained to reach judgment was to brush on a little more history. “When our Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they envisioned. And so they proscribed bills of attainder. Section 304 is one.”\textsuperscript{109}

For two other lawyers—Justices Felix Frankfurter and Stanley Reed—Black’s argument was much too forensic and not sufficiently historical. Black’s scholarship was unpersuasive, Frankfurter complained. It was, at best, a “gloss of history,” he said in a concurring opinion written to set the historical record straight.\textsuperscript{110} “When the framers of the Constitution proscribed bills of attainder, they referred to a form of law which had been prevalent in monarchical England and was employed in the colonies,” Frankfurter pointed out.\textsuperscript{111} “They were familiar with its nature; they had experienced its use; they knew what they wanted to prevent.”\textsuperscript{112}

It must be recalled that the Constitution was framed in an era when dispensing justice was a well-established function of the legislature. The prohibition against bills of attainder must be viewed in the background of the historic situation when moves in specific litigation that are now conventional and, for the most part, the exclusive concern of courts were commonplace legislative practices. Bills of attainder were part of what now are staple judicial functions which legislatures then exercised. It was this part of their recognized authority which the Constitution prohibited when it provided that “No Bill of Attainder . . . shall be passed.” Section 304 lacks the characteristics of the enactments in the Statutes of the Realm and the Colonial Laws that bear the hallmarks of bills of attainder.\textsuperscript{113}

\textsuperscript{107} Id. at 317.
\textsuperscript{109} Lovett, 328 U.S. at 318.
\textsuperscript{110} Id. at 327 (Frankfurter, J., concurring).
\textsuperscript{111} Id. at 323 (Frankfurter, J., concurring).
\textsuperscript{112} Id. (Frankfurter, J., concurring).
\textsuperscript{113} Id. at 322 (Frankfurter, J., concurring).
Although Black may not have been a student of the historical method, it should not be doubted that someone, perhaps his law clerks, explained to him that Frankfurter had the better historical argument. Bills of attainder had a reasonably exact meaning in seventeenth- and eighteenth-century English and British law, and that meaning did not encompass legislation confiscating the salaries of officials out of favor with Parliament. But Black, promulgating broad principles of constitutional law, was not to be controlled by historical canons accurately applied. Legislative docking of a culprit’s salary without a judicial determination of guilt may not have been a bill of attainder in the eighteenth century, but in the twentieth century it smelled enough like attainder to provide lawyers with a scent of forensic history. Black apparently concluded that, although questions about the historicism of that forensic history would be raised in the concurring opinion, his argument was good enough as law. It got the Court where he wanted it to go. Although he knew his history was forensic history, not historians’ history, Black left it in the opinion.

IV. CONCLUSION

Lawyers who think that Black’s history was argument enough to prove section 304 an unconstitutional bill of attainder need not be embarrassed. The legitimacy of forensic history cannot be left to the professional standards of academic historians. A different measure is needed, one turning on the restraint historical adjudication clamps on judicial discretion. Our problem is to separate history used to screen a judge’s activism from history that fixes the limits of decision. Perhaps the distinction cannot be tested, but at this stage of our knowledge we cannot be sure.

There are no other decisions dealing with American constitutional law that owe more to violations of the canons of historical interpretation than those dealing with the establishment and free exercise of religion. A “wall of separation” has been erected to create the doctrine of “Separation of Church and State,”\textsuperscript{114} ostensibly based on a letter Thomas Jeffer-

\textsuperscript{114} Edward S. Corwin, The Supreme Court as National School Board, 14 LAW & CONTEMP. PROBS. 3, 9 (1949).

Actually, the Constitution does not mention this principle. In fact, it does not contain the word “church,” nor yet the word “state” in the generic sense except in the Second Amendment, in which a “well regulated militia” is asserted to be “necessary to the security of a free state”; even the word “separation” fails to put in an appearance. These singular omissions—singular, if what the Framers wanted was “Separation of Church and State” in the Court’s understanding of it—are now supplied by the Court by the interpretation which it affixes to the “establishment of religion” clause of the First Amendment.
son wrote to Baptist ministers in Connecticut. Historians have been amazed at how this evidence meets no canon of relevancy. Jefferson, who coined the term "wall of separation," had no official connection with the amendment of the Constitution that the Court was interpreting. He was not a member of the committee that drafted it; he was not a member of the Congress that proposed it to the states; and, most important of all from the perspective of historical relevancy, he was not a member of any of the state conventions that ratified it. But to acknowledge that the doctrine rests on irrelevant history need not make it bad law. Just as decisions holding that "[t]he First Amendment has erected a wall between church and state" have become judicial precedents binding on lower courts, so has Jefferson's quotation been repeated so often it has assumed autonomous status as an example of forensic history. If it is not historically relevant as proof of the original meaning of the First Amendment, it enjoys a somewhat greater forensic legitimacy than some of the "history" currently being marshalled against it.

Id.

115. Everson v. Board of Education, 330 U.S. 1, 16 (1946) ("In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"); Reynolds v. United States, 98 U.S. 145, 164 (1878). Of course, Black, who wrote the Everson opinion, cited "historical" authority for this quote: the Reynolds decision.


117. This point was also made in regard to the Supreme Court's use of letters written by Jefferson advocating equal representation in both houses of the Virginia legislature to prove something concerning the original intention of the framers.

To this it may be answered: (a) Jefferson was not at the Constitutional Convention; (b) his ideas are not typical of those who were at the Convention; (c) the letters cited by the Court were written thirty years after the Convention adjourned; and (d) Jefferson's apportionment plan was not adopted by Virginia.


118. Corwin states:

The eager crusaders on the Court make too much of Jefferson's Danbury letter, which was not improbably motivated by an impish desire to heave a brick at the Congregationalist-Federalist hierarchy of Connecticut, whose leading members had denounced him two years before as an "infidel" and "atheist." A more deliberate, more carefully considered evaluation of Jefferson on the religious clauses of the First Amendment is that which occurs in his Second Inaugural: "In matters of religion, I have considered that its free exercise is placed by the constitution independent of the powers of the general government." In short, the principal importance of the amendment lay in the separation which it effected between the respective jurisdictions of state and nation regarding religion, rather than in its bearing on the question of the separation of church and state.

Corwin, supra note 114, at 14 (footnote omitted).


Whether there is a niche of legitimacy on which forensic history can perch is a question that may depend on whether its scope can be limited by generally accepted bounds. If historical jurisprudence is a tool of restraint, forensic history could be a peculiarly American aspect of the rule of law. If so, it bears company with the much disparaged doctrine of "original intent." Kermit Hall has doubts, however: "Imagining what the framers would have said," he complains, "is often a sterile and all but meaningless historical exercise. Too much has changed." His choice of words is important. He says that original intent is a "meaningless historical exercise," and so it may be. But is that the issue? The question is not whether original intent or any other form of forensic history is a meaningful historical exercise. The question should be whether it is a meaningful judicial exercise. Adherence to the rule of law, it has been pointed out, is why original intent is the single "legitimate means of applying the Constitution. Only that can give us law that is something other than, and superior to, the judge's will." The same should be true for forensic history in general if used with proper caution. By forcing the judge to find objective evidence supporting a decision, use of forensic history, together with the authority of precedent, the doctrine of analogy, the canons of evidence, and the maxims of relevancy, enforces the rule of law, even if it does not rise to the level of academic scholarship.

Ancient constitutionalism, contractarianism, and original intentism, along with other forms of forensic history, are some of the instruments that have been used over the centuries to neutralize arbitrary power by placing a rein on discretionary decision making. By limiting discretion, including judicial discretion, forensic history both reinforced the rule of law and protected law itself from the politics of the arbitrary state.

As rules of judicial restraint go, forensic history may be relatively anemic. Yet in constitutional adjudication it could undertake part of the task once performed in Anglo-American constitutional law by the doctrine of custom: to assure that judgment in the case at bar is the judgment of many judges and not just one judge, of all generations and not just this generation. As Frederick Schauer recently said of original intentism:

121. Hall, supra note 54, at 21.
For those who fear the risks of expansive judicial interpretation of open-ended constitutional provisions, obedience to the commands of history provides a way of narrowing, albeit not completely, the options open to the conscientious judge. Here history is used to control not exclusively or even primarily because an historical view of intent is special, but because it is a pragmatic device for cabining the discretion of judges. There might be other ways of achieving the same end: judges could be told to always defer to the legislature when a textual command was unclear; the range of materials to which judges could legitimately refer could be tightly constrained; a strong precedential constraint could be imposed; or, judges could even be told that they must toss a coin in cases of legal indeterminacy. Any of these strategies would serve the same goal—limiting the discretion of judges, especially in the interpretation of such vague provisions as "equal protection of the laws," "due process of law," "cruel and unusual punishment," and "the freedom of speech." Reference to historical intent as a method for limiting judicial discretion might still be thought to be more legitimate or perhaps more constraining than some of those other techniques, but it is the constraint and not the legitimacy that under this view justifies taking original intent as command.\footnote{126. Frederick Schauer, \textit{The Varied Uses of Constitutional History},\textit{ Introduction} to William E. Nelson \& Robert C. Palmer, \textit{Liberty and Community: Constitution and Rights in the Early American Republic} 1, 7 (1987).}

That possibility is just as true for other forms of forensic history.

Yet the risks may be greater than history can guard against. As critics of law office history often argue, historical jurisprudence has more frequently been a shield hiding judicial activism than a method of restraining judicial discretion. "The danger that judges might wield power not in the name of the Constitution but in the service of their own personal moral predilections," Kermit Hall warns, "is heightened, not reduced, by the habit of couching judicial determinations of rights in the form of historical explanations."\footnote{127. Hall, supra note 54, at 21.} It is an open question, even when judges employ the past in a good-faith effort toward neutral judgment, whether they can, in fact, select by some historical method data that will safely guide them to conclusions not predetermined by personal choice.