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Featured Article:

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

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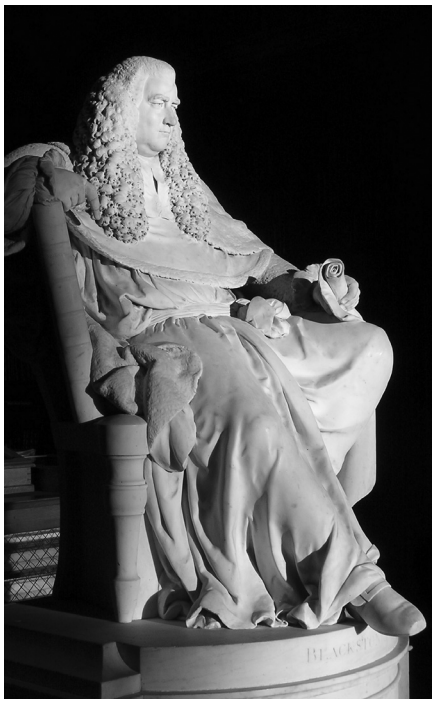
The Resurgent Role of Legal History in Modern U.S. Supreme Court Cases

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."[1] In recent years, jurists from various points on the ideological matrix have come to the same conclusion. Many of the most consequential legal issues recently addressed by the United States Supreme Court have been debated and decided based primarily on legal history—not the sometimes anfractuous reasoning of prior cases or the *ipse dixit* declarations of iconoclastic judges. The art of morphing *dicta* from prior opinions into future holdings, exaggerating or understating the scope of precedent, and moving law along the desired trajectory using case-by-case incrementalism—skills naturally acquired through a typical law school education and the tools of choice for some modern courts—has not been wholly abandoned. But, truth be told, it is a spent force rapidly losing whatever intellectual capital it once had.

Understandably so. It simply asks too much of us to be told that "[l]iberty finds no refuge in a jurisprudence of doubt" and then to learn that the jurisprudence of certitude considers liberty to be "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 844, 851 (1992). Such reasoning would more than puzzle Thomas Jefferson who thought laws should be "construed by the ordinary rules of common sense" and not by "metaphysical subtleties, which may make anything mean everything or nothing" depending on the sophistic skills of jurists.[2] To be sure, a worthy cynicism of such philosophical vapors has set in among many on the bench and in the academy[3]—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."[4] 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:



• 17 citations to William Blackstone's *Commentaries on the Laws of England* originally published from 1765-69, as well as St. George Tucker's 1803 American edition;

• 59 citations to various other 18th and 19th century legal treatises (most prominent being William Hawkins's 1771 edition of *A Treatise of the Pleas of the Crown*, James Wilson's *Collected Works*, William Rawle's 1825 *A View of the Constitution of the United States of America*, and Joseph Story's 1833 *Commentaries on the Constitution of the United States*);

• 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."[5]

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 treatises 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 Guantanamo, 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]

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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 resurgent in modern United States Supreme Court opinions. The phenomenon is not limited to arcane disputes over the Rule in Shelley's Case, the territorial boundaries of Blackacre, or other such legal 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."[13] Reviewing the subject from pre-Revolutionary English precedent, through the Industrial Revolution, and the Constitutional Convention, and tacking 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

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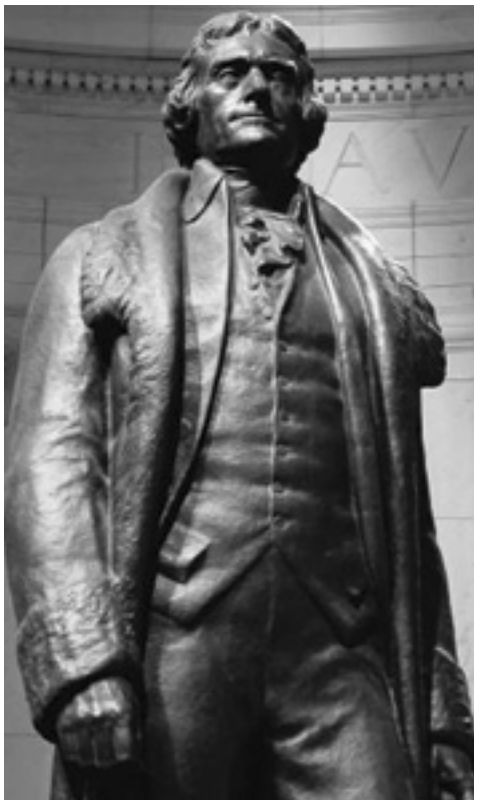
and Constitution of this Commonwealth, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly." Code § 1-200. This statute, first enacted in 1776, "preserves the common law as the 'rule of decision' except when 'altered by the General Assembly.' Absent a clearly expressed legislative intent otherwise, statutes should not be construed to displace long-established common law principles. 'Abrogation of the common law requires that the General Assembly plainly manifest an intent to do so.'"[16] Thus, every Virginia statute touching upon a common law issue must be strictly construed to avoid conflict with common law principles. Many Virginia cases—from the late 1700s through a few months ago—pivot one way or the other on this very fulcrum.[17] Needless to say, no lawyer can know which way the wand of strict construction should be waved without first knowing what the venerable common law says on the subject.[18]

For law schools, the resurgence of legal history as a mode of decision-making means the conventional curriculum 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 historian has noted, "probably no other new nation-state has been so much governed by a single legal authority from abroad."[19] Whether you agree with him or not, Blackstone's enduring influence 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 primary textbook for the first American law professor, Chancellor George Wythe of the College of William and Mary.[21] Wythe's successor, Judge St. George Tucker, edited a version of the *Commentaries* and added American precedents in footnotes.[22] 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 history is resurgent in modern 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 historical legal research and reasoning."

Blackstone's reasoning played a role in *Marbury v. Madison*,[25] *Dred Scott v. Sandford*,[26] *Brown v. Board of Education*,[27] *Roe v. Wade*,[28] and innumerable 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, opinions 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 not 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 students of philosophy?

Incorporating legal history into the law school experience has been made far easier in the Internet age.[29] Extensive online libraries catalog nearly every major source on legal history, from the earliest sources (*e.g.*, the *Domesday Book* of William the Conqueror, Bracton's treatise on common 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 incorporate these materials into their future advocacy. By leaving untouched whole epochs of legal history and focusing so heavily on the latest judicial 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 contrast to the traditional educational model for aspiring lawyers,[30] 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). Those 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 realization that historical argument "is not only very entertaining, but adds a great deal of dignity and weight to what we say." 2 Marcus 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," Jefferson agreed, "and directions in what order the books are to be read."[31] He suggested three columns of books, selections 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.[32] The second column added several others, including Hale, Lord Bacon, John Locke, and Montesquieu. The third column added various history books by Voltaire, Burke, and others. If there was any time left for additional 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."[33]

Over a century later, when asked for advice on "the best mode of obtaining 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."[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."[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.[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.[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.[38]

In short, the Father of the Constitution, the author of the Declaration of Independence, and the legendary Chief Justice (three of Virginia's favored sons) considered the point settled. To them, the only legitimate approach to interpreting the constitutional text is to ask what it meant to those who wrote it and voted it into law.

The historical approach, if employed with intellectual honesty, has the effect of squeezing political prejudices out of judicial decisionmaking. Political sentiments come and go. They lack the constancy necessary for a stable adjudicatory system. They also have the capacity to go very wrong. If you think I overstate the point, reread the *Dred Scott* decision, in which the highest court in the land declared there to be a constitutional right to enslave our countrymen, and on that basis, struck down the Missouri Compromise. After you read the majority opinion, look at the dissent of Justice Curtis. This is what you find:

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.[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.[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."[41]

Like Chesterton, "I am not urging a lop-sided idolatry of the past; I am protesting against . . . [a] lop-sided idolatry of the present."[42] 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*."[43]

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.

1. 33 The Collected Works of G.K. Chesterton 674 (Ignatius Press 1990).

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

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available at http://etext.virginia.edu/toc/modeng/public/JefLett.html (entitled "The Supreme Court and the Constitution").

3. *See, e.g.*, JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 56-59 (2008); Allen O'Rourke, *Refuge from a Jurisprudence of Doubt: Hohfeldian Analysis of Constitutional Law*, 61 S.C. L. REV. 141, 141-42 (2009) (finding the Supreme Court's unclear use of the word "right" has "confuse[d] legal doctrine" and obscured "the nature of constitutional rights"); EDWARD LAZARUS, CLOSED CHAMBERS: THE RISE, FALL, AND FUTURE OF THE MODERN SUPREME COURT 459-86 (1999); Erin Daly, *Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of Planned Parenthood v. Casey*, 45 AM. U. L. REV. 77, 80 (1995) (stating that despite the opinion's "lofty overture," it was "so fractured that . . . there is something in it for everyone to hate"); Prakash Mehta, *An Essay on Hamlet: Emblems of Truth in Law and Literature*, 83 GEO. L.J. 165, 185 (1994) (the Court's reasoning created "a doubt-laden jurisprudence that fails to persuade"); Alex Kozinski & Eugene Volokh, *A Penumbra Too Far*, 106 HARV. L. REV. 1639, 1645 (1993) ("If liberty finds no refuge in a jurisprudence of doubt, it similarly finds none in a jurisprudence that any court can read to mean anything it pleases." (internal quotation marks and footnote omitted)).

4. District of Columbia v. Heller, 128 S. Ct. 2783, 2797 (2008).

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*)).

7. Blakely v. Washington, 542 U.S. 296, 301, 305-06 (2004).

8. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995).

9. *Id.* at 787-795.

10. *See, e.g.*, McDonald v. Chicago, 130 S. Ct. 3020 (2010) (Alito, J.) (incorporating by reference the legal history recited in *Heller*, 128 S. Ct. 2783); Citizens United v. FEC, 130 S. Ct. 876, 948 (2009) (Stevens, J., dissenting) (discussing principles of the First Amendment held by "the Framers and their contemporaries"); Rothgery v. Gillespie County, 128 S. Ct. 2578, 2595 (2008) (Thomas, J., dissenting) (finding there "is no better place to begin than with Blackstone"); Deck v. Missouri, 544 U.S. 622, 626 (2005) (Breyer, J.) (beginning analysis with Blackstone's COMMENTARIES); Eldred v. Ashcroft, 537 U.S. 186, 200 (2003) (Ginsburg, J.) (discussing history of Congress's power under the Copyright Clause from the First Congress onward because "a page of history is worth a volume of logic") (citation omitted); Atwater v. City of Lago Vista, 532 U.S. 318, 327 (2001) (Souter, J.) (beginning analysis with "the state of pre-founding English common law" and citing over 45 historical sources from the 16th to 19th centuries); Alden v. Maine, 527 U.S. 706, 715 (1999) (Kennedy, J.) (beginning analysis with English common law and documents from the ratification debates).

11. Jamal Greene, Heller *High Water? The Future of Originalism*, 3 HARV. L. & POL'Y REV. 325, 325 (2009) (citing *inter alia* Seth Barrett Tillman & Steven G. Calabresi, Debate, *The Great Divorce: The Current Understanding of Separation of Powers and the Original Meaning of the Incompatibility Clause*, 157 U. PA. L. REV. PENNUMBRA 134, 135 (2008); Dave Kopel, *Conservative Activists Key to DC Handgun Decision*, HUM. EVENTS, June 27, 2008, http://www.humanevents.com/article.php?id=27229; Dale Carpenter, Heller *on a First Read*, THE VOLOKH CONSPIRACY (June 27, 2008, 5:03 PM), http://volokh.com/archives/archive_2008_06_22-2008_06_28.shtml#1214589509. *See also* Orin Kerr, *What Does* Heller *Say About Originalism?*, THE VOLOKH CONSPIRACY (June 27, 2008, 1:58 PM), http://volokh.com/posts/chain_1214589509.shtml.

12. Bilski v. Kappos, 130 S. Ct. 3218, 3257 (2010).

13. *Id.* at 3232.

14. *Id*. at 3249.

15. *Id.* at 3250.

16. Newman v. Newman, 42 Va. App. 557, 566-67, 593 S.E.2d 533, 538 (2004) (*en banc*) (internal citations omitted).

17. *See, e.g.*, Evans v. Evans, 280 Va. 76, 84, 695 S.E.2d 173, 177 (2010); Isbell v. Commercial Inv. Assocs., 273 Va. 605, 613, 644 S.E.2d 72, 75 (2007); Country Vintner, Inc. v. Louis Latour, Inc., 272 Va. 402, 412-15, 634 S.E.2d 745, 751-52 (2006); Sabre Constr. Corp. v. Cnty. of Fairfax, 256 Va. 68, 73, 501 S.E.2d 144, 147 (1998); Boyd v. Commonwealth, 236 Va. 346, 349, 374 S.E.2d 301, 302 (1988); Chesapeake & Ohio Ry. v. Kinzer, 206 Va. 175, 181, 142 S.E.2d 514, 518 (1965);

Va. Elec. & Power Co. v. Bowers, 181 Va. 542, 546, 25 S.E.2d 361, 362 (1943); Hannabass v. Ryan, 164 Va. 519, 525, 180 S.E. 416, 418 (1935); Keister's Adm'r v. Keister's Ex'rs, 123 Va. 157, 162, 96 S.E. 315, 317 (1918); Hollingsworth v. Funkhouser, 85 Va. 448, 454, 8 S.E. 592, 596 (1888); Ruble v. Turner, 12 Va. 38, 47-48, 2 Hen. & M. 38, 47-48 (1808) (Fleming, J. concurring); Wallace v. Taliaferro, 6 Va. 447, 467 (1800); Chichester v. Vass, 5 Va. (1 Call) 83, 102 (1797); Braxton v. Winslow, 1 Va. 31, 33 (1791); Wade v. Commonwealth, 56 Va. App. 689, 693-94, 696 S.E. 2d 258, 260 (2010); Moses v. Commonwealth, 45 Va. App. 357, 361 n.2, 611 S.E.2d 607, 609 n.2 (2005) (*en banc*) (quoting Chichester v. Vass, 5 Va. (1 Call) 83, 102 (1797), quoted in part by Wicks v. Charlottesville, 215 Va. 274, 276, 208 S.E.2d 752, 755 (1974)); Meador v. Va. Birth-Related Neurological Injury Comp. Program, 44 Va. App. 149, 155, 604 S.E.2d 88, 91 (2004); Brown v. Burch, 30 Va. App. 670, 677, 519 S.E.2d 403, 406 (1999); Clark v. Commonwealth, 22 Va. App. 673, 681-82, 472 S.E.2d 663, 667 (1996).

18. 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).

21. Paul D. Carrington, *The Revolutionary Idea of University Legal Education*, 31 Wm. & Mary L. Rev. 527, 535 (1990). W. Hamilton Bryson, Legal Education in Virginia 1779-1979, at 23 (1982).

22. Carrington, s*upra* note 21, at 540.

23. *Heller*, 128 S. Ct. at 2799.

24. Bryson, *supra* note 21, at 24.

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

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

27. 347 U.S. 483 (1954).

28. 410 U.S. 113 (1973).

29. The Avalon Project: Documents in Law, History and Diplomacy, http://avalon.law.yale.edu/subject_menus/constpap.asp (last visited August 18, 2010); A Century of Lawmaking For a New Nation: U.S. Congressional Documents and Debates, http://lcweb2.loc.gov/ammem/amlaw/lawhome.html (last visited August 18, 2010); Founding Documents, http://www.constitution.org/cs_found.htm (last visited August 18, 2010); The Constitutional Sources Project, http://www.consource.org/index.asp?bid=530 (last visited August 18, 2010); The Online Library of Liberty, http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Fcollection=65&Itemid=27 (last visited August 18, 2010); The Founders' Constitution, http://press-pubs.uchicago.edu/founders/ (last visited August 18, 2010); British Legal History, http://www.law.cam.ac.uk/resourceshistory.php (last visited August 18, 2010); Bracton Online, http://hlsl5.law.harvard.edu/bracton//index.htm (last visited August 18, 2010); Medieval Legal History: English Law, http://www.fordham.edu/halsall/sbook-law.html #English Law (last visited August 18, 2010).

30. Albert J. Harno, Legal Education in the United States: A Report Prepared for the Survey of the Legal Profession 19-20 (1953).

31. Letter of Thomas Jefferson to John Garland Jefferson, June 11, 1790, available at http://etext.virginia.edu/toc/modeng/public/JefLett.html (entitled "Reading the Law"); *see also* Letter of Thomas Jefferson to Thomas Turpin, Feb. 5, 1769, available at http://etext.virginia.edu/toc/modeng /public/JefLett.html (entitled "The Study of Law").

32. *Id.*

33. *Id.*

34. Letter from Abraham Lincoln to John M. Brockman (Sept. 25, 1860), in Abraham Lincoln: Speeches and Writings 1859-1865, at 180 (1989).

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/letterswritings03madirich#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.

38. Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 332 (1827) (Marshall, C.J., dissenting).

39. Dred Scott v. Sandford, 60 U.S. 393, 620-21 (1857) (Curtis, J., dissenting).

40. D. Arthur Kelsey, *Law & Politics: The Imperative of Judicial Self-Restraint*, 28 VBA News Journal No. 6, at 8 (Sept. 2002), available at http://216.230.13.18/section/judicial/publication.htm.

41. Letter from British parliamentarian and historian T.B. Macaulay to H.S. Randall, author of a Life of Thomas Jefferson (May 23, 1857), available at http://www.americanheritage.com/articles/magazine/ah/1974/2/1974_2_104.shtml.

42. Dale Ahlquist, Common Sense 101: Lessons From G.K. Chesterton 131 (Ignatius Press 2006).

4**3.** *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).