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John Phillip Reid. *The Ancient Constitution and the Origins of Anglo-American Liberty.* DeKalb: Northern Illinois University Press, 2005. 196 pp. $32.00 (cloth), ISBN 978-0-87580-342-5.

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Legal History: The Persistent Oxymoron

The relationship between legal and constitutional history, as written by historians and as presented by lawyers, has often possessed an ill-tempered edge. In the first half of the twentieth century, the divide between scholars in each discipline reached such proportions that the topic suffered. From the 1960s, however, the advent of the new social history provided scholars of each background with new tools to utilize the insights of both law and history to write a more accessible legal history, no matter what country or what era.

John Phillip Reid's latest book examines the efforts in the seventeenth and eighteenth centuries to use what is now known to be an erroneous past, in the Anglo-American connection, for constitutional argument. This tradition Reid calls forensic history, the use of evidence helpful to your interpretation of the issue in question, rather than the search for all materials associated with historical inquiry and reconstruction. Reid argues that the purposes of constitutional argument in the past make the two disciplines almost incompatible. When historians indict those cases of such reasoning by common lawyers (in their use of an ancient constitution to restrain royal power), Reid proposes that it does not matter whether such a past ever really existed; it was sufficient that precedent and analogy were believed to exist in order to provide an appropriate basis for argument. Lawyers searched the past, seeking evidence in support of the brief at hand, whereas the "scientific" (Reid's word) investigation of history has the burden of collecting and sifting all evidence. Advocacy and history have different goals and historians should understand constitutional arguments as separate from historical investigation. Reid "surveys the use made by lawyers, constitutionalists, and parliamentarians of the suppositive *ancient constitution* as the forensic tool with which to create, defend, and define the concept of liberty and of representative government" (p. 5).

Those who utilized an immemorial constitution, it may be conceded, thought that such an entity actually had existed. Anglo-Saxon parliaments present one famous example. Even as late as 1913, the great German scholar Felix Liebermann thought that there existed a historical continuity between Anglo-Saxon institutions and medieval parliaments. The use of history for forensic purposes occurs all the time, with each side citing the evidence favorable to its own position. By Reid's argument this leads to the use of the past only to serve present purposes; historians rightly protest against present-minded history offered without context.

In addition, the constitutional controversies that Reid recounts were not cases at the bar; they were political struggles that had significant consequences. Indeed, the essence of politics has remained the offering of evidence that bolsters one's position. Political debate all too often, perhaps, privileges spin above historical accuracy. Were the constitutional theorists in the Anglo-American political universe the spin doctors of their time? Perhaps, yet no one thinks the less of other individuals who have gotten the history wrong. Even the great constitutional historian William Stubbs could not escape from the quagmire of Germanic institutional continuity at the end of the nineteenth century, yet his greatness as an historian was and is undoubted. In the end, therefore, what does it really matter that opponents to royal power developed a theory of constitutional development at variance with the historical record as now known? They triumphed in the political arena and their historical skills mattered little.

The alleged chasm between forensic and scientific history also is problematic. Among historians, who would now claim to be scientific? Historians pick and choose among their documents in order to present a thesis; if the evidence does not sustain the argument, as readers of book reviews know so well, then the conclusions are subject to criticism and sometimes rejected completely. Historians plead a case in much the same

way that their legal colleagues do.

The assertion of fundamental differences between the endeavors of historians and lawyers with respect to the past is, I think, unfortunate. The law-and-society approach to the past has reunited the skills of the lawyer and the historian to the benefit of legal history. Scholars in both disciplines have recognized that the domain of law extended into all areas of human concern. Since the 1960s, the proliferation of journals and book series devoted to legal history has indicated the prosperity that synthesis of the two disciplines has brought to the field. The attempt to continue this divide by Reid is thus regrettable, despite the sophisticated arguments that he has made.

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