

2014

# Repetition in History: Anglo-American Legal Debates and the Writings of Walter Bagehot

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## Recommended Citation

Kunal Parker, *Repetition in History: Anglo-American Legal Debates and the Writings of Walter Bagehot*, 4 *UC Irvine L. Rev.* 121 (2014).

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# Repetition in History: Anglo-American Legal Debates and the Writings of Walter Bagehot

Kunal M. Parker\*

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## INTRODUCTION

As historians, we are accustomed to placing our objects of study—ideas, personalities, governmental structures, artistic styles, laboratory techniques, and so on—in a curious modern invention we call “historical time.” A common way of doing so is to group our objects of study together with other coeval objects to produce a sense of “period.” The “periods” we produce may be long (the Renaissance, the Enlightenment, the Long Nineteenth Century) or short (the Interwar Period, the Sixties, the “Age of Reagan”). We know them to be malleable. What, for example, are the precise boundaries of “the Enlightenment” and “the Sixties”? We have professional journals devoted to the deepening and complicating of our understandings of different periods. We announce university jobs for specialists in terms of periods.

In final analysis, our attempts to periodize—to produce a succession of periods each with its own sense derived from relating coeval objects to one another—serve two ends, both of which amount to much the same thing. First, they render “contingent” the objects of our study; second, they underscore the ability of historical time to index difference over time. Neither of these observations is at all new, but it is worth developing them briefly for purposes of what is to follow.

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Placing an object of study in “historical time,” or in its “historical context,” is a way of understanding it sympathetically and of avoiding the pitfalls of what historians call “presentism.” But at the same time, it is a way of framing the object, confining it, and diminishing its hold over us. The clearest example of this would be the centuries-long attempt to historicize the Bible. Once the Bible had been understood as the product of its “own” historical context, its claim to be the eternal word of God could not be accepted in the way it had been accepted earlier. Defenders of the Bible had to come up with alternative accounts of its continued legitimacy. But for opponents of organized religion, the demonstration that the Bible was a historical artifact like any other was experienced as a freeing up. Having rendered the Bible the contingent product of its historical context, they could accept or reject it, dismiss or embrace it. Whatever they decided, their relationship to it had changed. They had cleared ground, given themselves the power to choose in the here and now, the chance to begin anew.

To be sure, what it meant to “begin anew” once history had done its work did not necessarily mean that the power of imagining the future was entirely unfettered. For much of its career as a mode of thought, extending well into our own time, history has come with an inbuilt logic: stadialist, Whiggish, Hegelian, Marxist, and so on. To cabin an object in its “historical context” typically meant that such an object was cabined in terms of, and for the purposes of advancing, a given historical logic. For example, thinkers of the Scottish Enlightenment might cabin a particular legal doctrine—say, the entailment of land that prevented its alienability—by arguing that it was the product of a feudal society that had once sought to confine ownership of land within family bloodlines. But given a historical logic in which feudal society was seen as ceding to commercial society, the ground cleared by rendering entailment the product of its “own” time (i.e., feudalism) was to be occupied by the imagined imperatives of an emerging commercial order, in this case, freely alienable land.

In recent years, professional historians have learned to be more suspicious of historical logics. Many continue to historicize to usher in futures constrained by given imperatives such as greater equality or less oppression. Thus, the work of historians of race, gender, and sexuality has been in important part to show how race, gender, and sexuality were “constructed” or “invented” (i.e., that they arose in historical time and were products of a historical context). The goal has been the very laudable one of shrugging off the weight of these inherited statuses and pointing to a less encumbered future for oppressed groups. But others, more wary of historical logics, are content to render their objects of study contingent for the sake of demonstrating their contingency, to show that the past was different for the sake of underscoring its difference, and to point the way to a reimagining of the future that is more open and less constrained. This brings me to my second observation.

In placing our objects of study in historical context, as historians, we are not only rendering our objects of study contingent, as described above, but also

endlessly underscoring the ability of historical time to index difference. Every object placed in “its” historical context becomes different from every other placed in “its” context. The movement of historical time accounts for the difference. For example, most historians would agree that the conception of democracy in the period of the American Revolution was different from the conception of democracy in Jacksonian America, which was in turn different from the conception of democracy in the Progressive Era. As historical thinkers, they would not even need to be told *how* the idea of democracy differed across these contexts in order to come to this conclusion. They would assume instinctively that the conception of democracy differed *because* the historical contexts differed. Historical time thus not only marks difference over time, but produces difference over time.

Historians’ commitment to rendering objects contingent by placing them in historical time, and to establishing difference over and through the passage of historical time, generally means that they have difficulties with time understood as repetition or identity. If the goal of historical knowledge is to index difference or change over time, then assertions of an object’s identity over time, with concomitant claims about its hold over us by virtue of its identity over time, will be profoundly destabilizing. To many historians, such arguments will appear, quite simply, *wrong*. In terms of historical knowledge, faith in the identity of objects over time, or an insistence upon the power of objects to govern by virtue of identity over time, can be explained, but only historically, by pinning such faiths and insurances down in their own historical contexts.

What is interesting for my purposes, however, is just how often the historically minded are compelled to make a case for thinking historically against those who argue for thinking in terms of identity and repetition. If one looks at the Anglo-American politico-legal tradition over the past few centuries, which is my subject of study, essentially similar historical arguments insisting upon law’s difference over time have been made *again and again and again* against arguments insisting upon law’s identity over time. One could, of course, locate these different debates in their own historical contexts. Or one could explain this history of essentially similar debates by pointing to the extraordinary staying power of wrong-headed pre-modern arguments about the identity of law over time. But I am interested in this Paper in a different kind of explanation, one that sees in this history of replayed arguments—or repeat showings of the same movie—a kind of repetition in history and attends to it.

As historians, we might need to do more than see arguments about identity and repetition as grist for our historical mills, as ideas to be situated in historical context. We ought to engage in a productive conversation with them in ways that interrupt our own thought. Why? In part, because in making arguments about the significance of history as a form of knowledge over and over again, and in endlessly holding up this or that object to demonstrate that it is historically contingent, historians have themselves long been engaged in a kind of repetition, a

repetition that is revealed—undoubtedly as one among many—in history itself. Furthermore, as we shall see, within the Anglo-American politico-legal tradition, proponents of understanding law as identity or repetition over time have shown themselves far more willing to learn from historians' demonstration of change over time than historians have been willing to learn from them.

This Paper is a tentative attempt—one that will undoubtedly seem misguided to some—to explore what it might mean to think repetition or identity over time within the logic of our historical models. It begins with a highly abbreviated discussion of some key moments in the long Anglo-American conversation between common lawyers and their critics, those insistent upon understanding law in terms of identity, repetition, and custom, and those insistent upon a historico-political understanding of law as change over time. The object of this discussion is to draw attention not only to the changes in this conversation over time, but also to its remarkably repetitive quality. Even as historians track the different contexts in which this conversation has taken place—as I have myself done for the nineteenth century in my book *Common Law, History, and Democracy in America, 1790–1900: Legal Thought Before Modernism*<sup>1</sup>—there is something about the endless replay of such arguments that ought to make one think hard about questions of ubiquity, repetition, and identity in history.

What are the different ways in which we might appropriate the lessons of repetition and identity into our thinking as historians? What linguistic constructions, what aesthetic orderings, what tones and moods might we employ to rework the way we think through the antinomies of identity and difference? The Paper moves on to discuss one such model—among many awaiting to be explored—of thinking history together with custom, difference over time together with identity over time. The model in question is that put forth in the writings of the late nineteenth-century British thinker Walter Bagehot (1826–1877). In espousing a historical model that demonstrated difference over time, and then undermining his model by showing how the directionality of history was engulfed in imitation, repetition, and custom, Bagehot gives us an ironic way of inhabiting the antinomies of time as difference and time as repetition.<sup>2</sup>

#### I. CUSTOM AND HISTORY: REPETITION IN DIFFERENCE

In this Section, I present very briefly three different moments in which arguments about law's unbroken identity over time were locked in battle with arguments about law's necessary difference over time. Each of these arguments involve debates waged by and against common lawyers and those with common lawyerly sensibilities. They are (a) seventeenth-century debates between would-be

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1. See generally KUNAL M. PARKER, *COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790–1900: LEGAL THOUGHT BEFORE MODERNISM* (2011).

2. My interest in Bagehot and in the workings of his model are the beginnings of a book on the rhetorical modes of nineteenth- and twentieth-century conservative thought.

absolutist monarchs seeking to enact their will as law and common lawyers defending England's "ancient constitution"; (b) late eighteenth-century debates between adherents of the historical-democratic sensibilities of the Age of Revolution and common lawyers' defense of inherited political structures; and (c) late nineteenth- and twentieth-century debates between those who subscribed to pragmatic, reformist, social democratic, and antiracist historical sensibilities and common lawyerly preferences for relative continuity. Insofar as they belong to different historical moments, these debates are different from one another. Yet at the same time, they are repetitions of one another, going backwards and forwards in time.

Seventeenth-century English idealizations of the common law were part of a pan-European effort to check the claims of increasingly powerful monarchs seeking greater directive control of polity, economy, and society. Partaking of the emerging historical sensibilities of early modern Europe, which had sought to historicize the Roman law by dating it and situating different parts of it in distinct temporal moments, European monarchs had begun to argue that they could make law in the here and now. If law could be broken up and set in discrete bits of time, did that not also imply that it arose, and therefore could be made, in discrete bits of time? There was no particular reason, then, to be governed by the law as it had been repeated over the centuries. In keeping with this view, James I (1566–1625) argued that "kings were the authors and makers of the Lawes, and not the Lawes of the kings."<sup>3</sup>

In order to defend the legal-constitutional *status quo*, early seventeenth-century English common law thinkers advanced a complex set of ideas about the common law designed to limit the law-giving powers of England's monarchs. An important idea had to do with the imprecise origins and essential identity of the common law going back to Anglo-Saxon times. In common lawyers' rendering, the common law stood for the endlessly repeated, "immemorial" customs of the English people, its origins so ancient that they lay beyond "the memory of man." Furthermore, they argued, the common law had come down to seventeenth-century Englishmen essentially unchanged. This antiquity and identity over time, combined with the fact that the common law represented the unbroken wisdom of multiple generations, meant that historically minded monarchs such as James I could not tamper with it at will. In his discussion of the writings of Lord Coke (1552–1634), J.G.A. Pocock puts it as follows:

The law which the [common law] judges declare is unwritten and immemorial . . . It embodies the wisdom of generations, as a result not of philosophical reflexion but of the accumulations and refinements of experience. . . . [W]hat speaks through the judge is the distilled knowledge of many generations of men, each decision based on the

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3. THE POLITICAL WORKS OF JAMES I, at 62 (The Lawbook Exch., Ltd. 2002) (1616).

experience of those before and tested by the experience of those after, and it is wiser than any individual—even James I—can possibly be.<sup>4</sup>

Common lawyers' assertions about the strict identity of the common law over time were at odds, to be sure, with the notion that the common law represented the accumulated wisdom of multiple generations. At the same time, by the second half of the seventeenth century, common lawyers confronted the increasingly compelling arguments of antiquarians such as Sir Henry Spelman and others, who showed that much of the common law—far from being possessed of an identity reaching back to Anglo-Saxon times—was in fact the product of the feudal age. Faced with a historicization that they strained so mightily to avoid, late seventeenth-century common lawyers collapsed difference over time into identity over time by emphasizing the common law's slow, "insensible" pace of change. In his *History of the Common Law of England*, Sir Matthew Hale (1609–1676) reveals how common lawyers effortlessly absorbed the challenges of historians into their assertions about the common law's identity over time:

But tho' those particular Variations and Accessions have happened in the Laws, yet *they being only partial and successive*, we may with just Reason say, They are the same *English* Laws now, that they were 600 Years since in the general. As the *Argonauts* Ship was the same when it returned home, as it was when it went out, tho' in that long Voyage it had successive Amendments, and scarce came back with any of its former Materials; and as *Titius* is the same Man he was 40 Years since, tho' Physicians tell us, that in a Tract of 7 Years, the Body has scarce any of the same Material Substance it had before.<sup>5</sup>

With formulations like this, common lawyers ceased once and for all to argue that the common law was exactly the same over time. Instead, learning from historians, they accepted that change took place over time, but emphasized that the pace of change was so incremental as to imbue the common law with identity over time.

With such conceptions of the common law in mind, English common lawyers successfully defended England's "ancient constitution"—the nation's customary fundamental law—against the encroachments of the Stuarts. In the aftermath of the Glorious Revolution, the common law came to be seen as a bulwark of traditional, faithfully repeated, jealously guarded English freedoms. As celebrated in eighteenth-century Whig thought, the common law was deemed to be what distinguished England's free institutions from the despotic polities of its continental neighbors. As John Phillip Reid has argued, in the late eighteenth century, American revolutionaries made their case for political independence in

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4. J.G.A. POCOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY* 35 (1957).

5. MATTHEW HALE, *THE HISTORY OF THE COMMON LAW OF ENGLAND* 40 (Charles M. Gray ed., Univ. of Chi. Press 1971) (3d ed. 1739) (emphasis added).

important part by showing that Great Britain was violating their established common law rights and freedoms.<sup>6</sup>

Whatever the role of the common law in undergirding the American revolutionary struggle, by the time of the French Revolution, new intellectual currents had emerged that posed a serious threat to the idea of a politico-legal order grounded in ancient, endlessly repeated customs. In important part, these new intellectual currents had to do with a historical consciousness that drew sharp differences among past, present, and future.<sup>7</sup> Ancient legal regulations that could only be justified in terms of their antiquity were to be swept away; they belonged to the *ancien régime* of monarchy, feudalism, and unfreedom. Custom's commitment to identity, repetition, and continuity was now read as reactionary, backward-looking, and homogenizing; it stood in the way of realizing the crucial differences among past, present, and future that structured an irresistible historical time.

Where monarchs such as James I had once insisted on being able to make law in the here and now, partisans of democracy argued that freedom inhered in being able to fashion laws in the here and now. In a celebrated 1789 letter to James Madison, Thomas Jefferson (1743–1826) wrote:

The question Whether one generation of men has a right to bind another, seems never to have been started either on this or our side of the water. . . . I set out on this ground which I suppose to be self evident, “that the earth belongs in usufruct to the living;” that the dead have neither powers nor rights over it. The portion occupied by an individual ceases to be his when himself ceases to be, and reverts to the society.<sup>8</sup>

In direct contrast to common lawyerly sensibilities, Jefferson argued that “by the law of nature, one generation is to another as one independant [sic] nation to another.”<sup>9</sup> This same historical sensibility led Jefferson to argue that post-Revolutionary America had broken entirely from the past and was entirely “new”: “We can no longer say that there is nothing new under the sun. For this whole chapter in the history of man is new. The great extent of our Republic is new. Its sparse habitation is new. The mighty wave of public opinion which has rolled over it is new.”<sup>10</sup> It was no accident, then, that Jeffersonian radicals in the young

6. On the role of common law thought in American revolutionary thought, see JOHN PHILLIP REID, *THE ANCIENT CONSTITUTION AND THE ORIGINS OF ANGLO-AMERICAN LIBERTY* 21–22 (2005). See also JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS* 3 (1986); see generally POCOCK, *supra* note 4 (discussing seventeenth-century debates surrounding England's “ancient constitution”).

7. See generally REINHART KOSELLECK, *FUTURES PAST: ON THE SEMANTICS OF HISTORICAL TIME* (Keith Tribe trans., 1985).

8. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in THOMAS JEFFERSON: *WRITINGS* 959, 959 (Merrill D. Peterson ed., 1984).

9. *Id.* at 962.

10. Letter from Thomas Jefferson to Dr. Joseph Priestley (Mar. 21, 1801), in THOMAS JEFFERSON: *WRITINGS*, *supra* note 8, at 1085, 1086.



Republic, especially after Jefferson's election in 1800, attacked the common law. Committed to instituting a new present, they had little use for a law that grounded its legitimacy on repetition of, and continuity with, the past.<sup>11</sup>

But opponents of the post-revolutionary order, most famously Edmund Burke (1729–1797), would fight back in the name of custom. As they told it, custom softened the blows of the new historical consciousness—blows felt with increasing intensity as the French Revolution entered its violent radical phase—precisely *because* of its commitment to repetition and its concern for continuity. The method of custom corresponded with that of nature itself. Burke put it thus:

Our political system is placed in a just correspondence and symmetry with the order of the world, and with the mode of existence decreed to a permanent body composed of transitory parts; wherein, by the disposition of a stupendous wisdom, moulding together the great mysterious incorporation of the human race, the whole, at one time, is never old, or middle-aged, or young, but in a condition of unchangeable constancy, moves on through the varied tenour of perpetual decay, fall, renovation, and progression. Thus, by preserving the method of nature in the conduct of the state, in what we improve we are never wholly new; in what we retain we are never wholly obsolete.<sup>12</sup>

When Burke defended the British constitutional order as “never old, or middle-aged, or young, but in a condition of unchangeable constancy,” he was essentially expressing Hale's idea of the common law as being unchanging even as it changed.<sup>13</sup> At the same time, Federalists in the United States were arguing that the new U.S. Constitution, far from reflecting difference in time or a break with the past, was nothing other than a repetition of the Anglo-Saxon one. In lectures delivered in Philadelphia between 1790 and 1792, James Wilson (1742–1798) told his audience of American elites: “You will be pleased to hear, that, with regard to . . . many . . . subjects, we have renewed, in our governments, the principles and the practice of the ancient Saxons.”<sup>14</sup> Wilson saw an identity between the Saxon constitutions of yore and the U.S. Constitution in at least the following respects: the resting of the entire government on the elective principle; provisions respecting the adjournment of houses of legislature; the freedom of members of Congress from arrest during their attendance of sessions; the legislative right to

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11. PARKER, *supra* note 1, at 75–78; see also RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 176–77* (1971) (discussing Jeffersonian radicals' opposition to the common law).

12. EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 33–34 (L.G. Mitchell ed., Oxford Univ. Press 1993) (1790).

13. On Burke's common law sensibilities, see J.G.A. POCOCK, *Burke and the Ancient Constitution: A Problem in the History of Ideas*, in *POLITICS, LANGUAGE AND TIME: ESSAYS ON POLITICAL THOUGHT AND HISTORY* 202, 211 (1971).

14. James Wilson, *Lectures on Law*, Part II, Chapter XI: Of Citizens and Aliens, in 2 *THE WORKS OF THE HONOURABLE JAMES WILSON, LL.D.* 431, 437 (The Lawbook Exchange, Ltd. 2005) (1804).

make war; the election of the chief executive; the structure of the judiciary; rights to jury trials; and the right to bear arms.<sup>15</sup>

After the French Revolution, arguments from custom and arguments from history solidified into opposed features of the Anglo-American political, legal, and intellectual landscape. The opposition continued down to the end of the nineteenth century, when it assumed a language that we continue to employ.

In the decades around 1900, the common law method of custom, with its commitment to repetition and continuity, was represented as inapposite when it came to dealing with massive, unprecedented, and diverse issues such as capital-labor conflict, the regulation of industries such as banks, insurance, and railroads, and the government of mammoth urban areas. This was done in the name of a pragmatic, antifoundational historical sensibility revealed in the writings of many, but perhaps most clearly in the writings of Oliver Wendell Holmes, Jr. (1841–1935).

For Holmes, history possessed no underlying foundation, logic, or direction. It served instead to undermine foundations, to sweep away pretended grounds, to clear space for further reflection and discussion. One of law's foundations that Holmes attacked vigorously in the name of antifoundational history was the weight of the past. Historical thinking led him, as it had James I, Thomas Jefferson, and so many others before him, to insist that law should be made in the here and now. In an 1897 essay, "The Path of the Law," Holmes put it famously as follows:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.<sup>16</sup>

In its Holmesian rendering, thinking historically cures us of the "blind imitation of the past" that lies at the heart of the method of custom. Like Jefferson and others, Holmes insisted that, judged from the perspective of the here and now, the past could be swept away in its entirety and the present and future remade anew.<sup>17</sup>

With the rise of pragmatic historical thinking, a model of law as repetition of the past rapidly became unsustainable across the Anglo-American world. In the early twentieth century, under the impact of pragmatic-historical critiques, legislation by democratic majorities and bureaucratic expert rulemaking became the normative methods of lawmaking. Especially after the Russian Revolution of 1917, this change, read against the backdrop of the emerging social democratic

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15. PARKER, *supra* note 1, at 90.

16. Oliver Wendell Holmes, "The Path of the Law," Address at Boston University (Jan. 8, 1897), in 3 THE COLLECTED WORKS OF JUSTICE HOLMES 391, 399 (Sheldon M. Novick ed., 1995).

17. *See id.* at 402–03 ("I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them.").

state in both Great Britain and America, appeared to many critics to signal the creeping advance of socialism.

Just as the rise of absolutism had provoked Coke's invocation of custom and the French Revolution Burke's, the twentieth-century triumph of democratic and scientific control over law, brought about a reaction that drew attention, once again, to the role of custom, the importance of repetition and continuity, the imperative of incremental change. In mid-twentieth-century Great Britain, that reaction is exemplified by the writings of the philosopher Michael Oakeshott (1901–1990). Written with an eye not only on Communism but also on Britain's post-War Labor government, Oakeshott's celebrated 1947 essay, "Rationalism in Politics," began with an indictment of the rationalist tradition, the origins of which he traced back to Bacon and Descartes. The Rationalist (Oakeshott used the capital "R") was characterized as follows:

At bottom [the Rationalist] stands . . . for independence of mind on all occasions, for thought free from obligation to any authority save the authority of 'reason'. His circumstances in the modern world have made him contentious: he is the *enemy* of authority, of prejudice, of the merely traditional, customary or habitual . . . [T]here is no opinion, no habit, no belief, nothing so firmly rooted or so widely held that he hesitates to question it and to judge it by what he calls his 'reason'. . . .<sup>18</sup>

The Rationalist, thus, was hostile to the "traditional, customary, or habitual," skeptical of anything that relied upon the weight of the past for legitimacy. As a result, the Rationalist was deprived of "all sense of rhythm and continuity."<sup>19</sup>

Such a mental framework made the Rationalist constantly disposed to seek total change, a complete destruction of the past and the inauguration of a completely new future. In contradistinction to this approach, Oakeshott advanced a notion of "repair," which was nothing other than common lawyerly incremental change responding to new circumstances and preserving identity over time.

[The Rationalist] disposition makes both destruction and creation easier for him to understand and engage in, than acceptance or reform. To patch up, to repair (that is, to do anything which requires a patient knowledge of the material), he regards as a waste of time; and he always prefers the invention of a new device to making use of a current and well-tried expedient. He does not recognize change unless it is a self-consciously induced change, and consequently he falls easily into the error of identifying the customary and the traditional with the changeless.<sup>20</sup>

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18. MICHAEL OAKESHOTT, *Rationalism in Politics, in RATIONALISM IN POLITICS AND OTHER ESSAYS* 1, 1–2 (1962).

19. *Id.* at 3.

20. *Id.* at 4.

By contrast, the conservative Oakeshott in 1956 wrote in “On Being Conservative,” “[H]e will find small and slow changes more tolerable than large and sudden; and he will value highly every appearance of continuity.”<sup>21</sup>

In the United States, an important strand of post-World War II intellectual life also displayed an affiliation to the method of custom. The constitutional scholar Alexander Bickel (1924–1974) began his last book, *The Morality of Consent* (1975), by describing two traditions that “diverged in response to the impact of the French Revolution on political thought.”<sup>22</sup> These were, according to Bickel, the contractarian tradition associated with Locke and Rousseau, on the one hand, and the Whig tradition associated with Edmund Burke, on the other. The latter, Bickel argued, “is my own model.”<sup>23</sup>

Bickel turned his Burkean ire on none other than the Warren Court. “Like the eighteenth-century philosophers,” Bickel observed in *The Supreme Court and the Idea of Progress* (1970), “our Justices . . . were rationalists coming after men of faith.”<sup>24</sup> Like the historically minded rationalists of two centuries earlier, the Justices were wreaking havoc on the finely woven, allegedly continuous fabric of American political and legal life. For Bickel, the problem with the Warren Court was precisely that, like the French revolutionaries, it was too seduced by “the idea of progress” to pay attention to the fact that it was engendering serious “discontinuity—open or disguised—in specifics.”<sup>25</sup> The Court was guilty of “a striving for fidelity to a true line of progress,” one that led it to “imagin[e] the past and remember[ ] the future” and to sweep away recklessly all remnants of the past.<sup>26</sup> In the process, fractures between past and present were becoming increasingly glaring. Bickel’s solutions were those of the custom-oriented common lawyer—procedural safeguards and what he called “passive virtues”—that would slow down the reckless pace of change and reinject a measure of continuity and repetition into the unfolding of affairs.

The three historical moments discussed above all reveal how commitments to identity over time, on the one hand, and difference over time, on the other, have been intertwined in a kind of double helix over the course of several centuries of Anglo-American politico-legal history. Although the contexts are all very different and change is apparent (James I, Thomas Jefferson, and Oliver Wendell Holmes, Jr. have different historical sensibilities; Oakeshott cannot argue for simple identity over time in the way Lord Coke might have), in the midst of all the difference, the reader will nevertheless also discern a repetitive quality to the

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21. MICHAEL OAKESHOTT, *On Being Conservative*, in RATIONALISM IN POLITICS AND OTHER ESSAYS, *supra* note 18, at 168, 170.

22. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 3 (1975)

23. *Id.*

24. ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 14 (1970).

25. *Id.* at 13.

26. *Id.* (internal quotation marks omitted).

arguments on both sides. Many of these arguments are versions of one another. The concrete contexts in which they arose matter, but also do not matter. History has repeatedly been deployed to argue that law should be the product of the here and now, that the past is a foreign country whose hold over us should be rejected. On the other side, notions of identity and continuity over time have repeatedly been sustained through linguistic formulations describing and calling for “insensible” change, incrementalism, and repair.

In this regard, it must be underscored that proponents of repetition, identity, and continuity over time have done rather better at learning from their opponents than their opponents have from them. Since the seventeenth century, proponents of repetition, identity, and continuity have striven to reestablish a sense of repetition, identity, and continuity in the face of mounting recognitions of change over time. It is the historically minded critics of repetition and identity, by contrast, who have generally failed to recognize the ubiquity of repetition even as they have repeated themselves over and over again. What would historical arguments look like if they accommodated notions of repetition? It is this question that paves the way for my discussion of the historical thought of Walter Bagehot.

## II. WALTER BAGEHOT: IN AND BEYOND REPETITION AND HISTORY

Walter Bagehot’s work is less familiar to many of us than that of contemporaries such as John Stuart Mill, Henry Maine, and Herbert Spencer, although Bagehot shares affinities with all of them. During his brief lifetime, however, Bagehot exercised considerable influence in intellectual life in both Great Britain and America. As editor of *The Economist*—a position he held from 1861 until his death—his advocacy of free trade helped shape the financial policies of Great Britain at the zenith of its power. He became, it was frequently remarked, a kind of shadow Chancellor of the Exchequer. He wrote important essays on the issues of the day as well as on Shakespeare, Milton, Shelley, Adam Smith, Macaulay, and Gibbon. In an essay published in 1948, the Victorianist G.M. Young, upon reviewing various candidates for the title of “The Greatest Victorian” finally decided that Bagehot merited the title.<sup>27</sup> Bagehot is best known to contemporary intellectual historians for his two books, *The English Constitution* (1867) and *Physics and Politics* (1872). I shall devote most of my attention to the latter.

At first blush, *Physics and Politics* reads like yet another late Victorian text offering up yet another “from”/“to” narrative about the movement of history. Bagehot’s commitment to demonstrating difference over historical time, to tracking history’s direction, so pronounced a feature of late Victorian thought, is thus fully present. Society moved, Bagehot argued, from an age characterized by what he called “the cake of custom” to an “age of discussion,” from an age of imitation and repetition to an age of historical self-consciousness, ceaseless

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27. G. M. YOUNG, *The Greatest Victorian*, in TODAY AND YESTERDAY 237, 240 (1948).

questioning of established arrangements, and openness to difference and change. Although his vocabulary would have differed, Thomas Jefferson might not have rejected Bagehot's historical narrative out of hand. Bagehot's contemporary Holmes, with his criticism of "blind imitation of the past," would likely have agreed with Bagehot as well.

In its earliest stages, Bagehot argued, mankind desperately needed the "cake of custom."<sup>28</sup> It was only when habits of imitation and repetition had been instilled in man that it was possible for man truly to progress. Until then, man wandered about aimless, unfixed, disconnected from himself and others. At the earliest stages, in fact, it did not matter what kind of government and law men had, so long as they had some government and some law. Bagehot puts it thus:

In early times the quantity of government is much more important than its quality. What you want is a comprehensive rule binding men together, *making them do much the same things, telling them what to expect of each other—fashioning them alike, and keeping them so.* What this rule is does not matter so much. A good rule is better than a bad one, but any rule is better than none . . . . How to get the obedience of men is the hard problem; what you do with that obedience is less critical.<sup>29</sup>

The "cake of custom"—the phrase evokes density, thickness, weight, suffocation—was directed toward promoting imitation and repetition and stifling discordant thought and behavior: "All the actions of life are to be submitted to a single rule for a single object . . . . That this *régime* forbids free thought is not an evil; or rather, though an evil, . . . it is necessary for making the mold of civilization, and hardening the soft fiber of early man."<sup>30</sup>

The first early societies able successfully to build a viable "cake of custom" for themselves won out over those unable to do so. Bagehot illustrated this by drawing examples from the classical world. Rome was able to defeat a whole range of less organized and obviously inferior societies precisely because it had acceded to a "cake of custom" before other societies. But the Roman "cake of custom," while it guaranteed success, was not necessarily a mark of Rome's superior civilization. Thanks to its "cake of custom," Rome had been able to defeat Athens, its clear intellectual superior and the cradle of European democracy:

Rome and Sparta were drilling aristocracies, and succeeded because they were such. Athens was indeed of another and higher order; at least to us instructed moderns who know her and have been taught by her. But to the "Philistines" of those days Athens was of a lower order. She was beaten; she lost the great visible game which is all that short-sighted contemporaries know. She was the great "free failure" of the ancient world. She began, she announced, the good things that were to come; but

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28. WALTER BAGEHOT, *PHYSICS AND POLITICS* 26 (Ivan R. Dee, Inc. 1999) (1872).

29. *Id.* at 25 (emphasis added).

30. *Id.* at 26.

she was too weak to display and enjoy them; she was trodden down by those of coarser make and better trained frame.<sup>31</sup>

The “cake of custom,” then, even as it guaranteed victory and survival in the earliest times, was already, in a sense, a mark of inferiority.

The idea that Athens “announced . . . the good things that were to come” tells us where the story (i.e., history itself) is going. Bagehot expresses the problem of the next stage of human history (i.e., once a “cake of custom” had been successfully established) thus:

What is most evident is not the difficulty of getting a fixed law, but getting out of a fixed law; not of cementing . . . a cake of custom, but of breaking the cake of custom; not of making the first preservative habit, but of breaking through it, and reaching something better.<sup>32</sup>

As an attentive reader of Henry Maine, and as someone writing from the center of the British Empire, Bagehot was acutely aware that many societies—Asian societies were exemplary in this regard—had acceded to the “cake of custom” but had never managed to break out of it. “Since history began,” Bagehot observed, “Oriental nations . . . have always been what they are.”<sup>33</sup> India, Japan, and China, for all their differences, shared something. “They look as if they had paused when there was no reason for pausing—when a mere observer from without would say they were likely not to pause.”<sup>34</sup> In other words, Asian societies, mired in custom, imitation, and repetition, had no history. However, not surprisingly, European societies instantiated the direction of history. They managed to make the break from the “cake of custom” toward the “age of discussion.” The historical *telos* was something that looked a lot like contemporary Anglo-American polities: “[a] free state . . . in which the sovereign power is divided between many persons, and in which there is a discussion among those persons.”<sup>35</sup> Discussion (necessarily accompanied by tolerance) broke the yoke of custom and gave way to “originality in life,” “originality” standing, obviously, for a break with custom, repetition, and imitation.<sup>36</sup>

For Bagehot, the “cake of custom” prepared a people for the “age of discussion,” but was then necessarily left behind. “The ages of monotony had their use,” Bagehot tells us, “for they trained men for ages when they need not be monotonous.”<sup>37</sup> But custom and discussion, as sequential historical stages, were fundamentally inconsistent. They belonged to different historical moments.

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31. *Id.* at 27.

32. *Id.* at 49.

33. *Id.* at 39.

34. *Id.* at 49.

35. *Id.* at 141.

36. *Id.*

37. *Id.* at 29.

Bagehot emphasizes this strongly: “[D]iscussion and custom cannot be . . . combined; their ‘method,’ as modern philosophers would say, is antagonistic.”<sup>38</sup>

But this is where Bagehot reveals himself to be more complicated. He gives us a clean historical progression—from custom to discussion—and then undermines it. Even as the logic of history dictates a move from the “cake of custom” to the “age of discussion,” Bagehot tells us, the “cake of custom” continually subverts the directionality of history toward greater originality and inventiveness. Even as deliberative discussion is supposed to overcome custom, repetition, and imitation, custom, repetition, and imitation engulf deliberative discussion. It turns out that, just as we cannot free ourselves from the logic of history, we cannot free ourselves from the “cake of custom.” “Originality in life,” allegedly a feature of the “age of discussion,” is an all too precious and scarce commodity in the late nineteenth-century West.

Bagehot makes his case by arguing that, even as the historical sensibility of the late nineteenth century insists upon constant change and endless progress, a more basic impulse to repeat and imitate is everywhere present in the modern world. This impulse to imitate and repeat guarantees a measure of continuity with the past:

We throw aside too much, in making up our images of eras, that which is common to all eras. The English character was much the same in many great respects in Chaucer’s time as it was in Elizabeth’s time or Anne’s time, or as it is now. . . . We overlook and half forget the constant while we see and watch the variable.<sup>39</sup>

At the same time, the same impulse shapes the way we act in the present. For Bagehot, the worlds of journalism, literature, and science—the very hallmarks of the “age of discussion”—were in every way the product of imitation, repetition, and, in final analysis, custom. All the acknowledged causes of modernity—“such as change of climate, alteration of political institutions, progress of science”—functioned on this basis: “they change the object of imitation and the object of avoidance, and so work their effect.”<sup>40</sup> “When once the predominant type [is] determined, the copying propensity of man [does] the rest.”<sup>41</sup>

Imitation, repetition, and custom were especially true when it came to journalism. Bagehot, who spent the bulk of his writing career in journalism, argued that originality and eccentricity had absolutely no place in journalistic writing. Journalism was all repetition and imitation.

Everyone who has written in more than one newspaper knows how invariably his style catches the tone of each paper while he is writing for it, and changes to the tone of another when in turn he begins to write for that. He probably would rather write the traditional style to which the

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38. *Id.* at 154.

39. *Id.* at 30.

40. *Id.* at 89.

41. *Id.* at 35.



readers of the journal are used, but he does not set himself to copy it; he would have to force himself in order *not* to write it if that was what he wanted. Exactly in this way, . . . a writer for a journal . . . *gives the readers of the journal the sort of words and the sort of thoughts they are used to . . . And not only does the writer, without thinking, choose the sort of style and meaning which are most in vogue, but the writer is himself chosen.*<sup>42</sup>

Journalistic writing then—writing that is supposed to represent the inquiring spirit so characteristic of the “age of discussion,” and so inimical to the “cake of custom”—simply gave readers “the sort of thoughts they are used to . . .” It imitates and repeats.

The same is true of literature. As a literary critic acutely attuned to variations in style, Bagehot was intensely interested in the relationship between style and imitation. He found imitation to be ubiquitous.

[V]ery few men are at all equal to the steady labor, the stupid and mistaken labor mostly, of *making* a style. Most men catch words that are in the air, and the rhythm which comes to them they do not know from whence; an unconscious imitation determines their words, and makes them say what of themselves they would never have thought of saying.<sup>43</sup>

So ubiquitous was imitation and repetition in late nineteenth-century Britain, according to Bagehot, that the late nineteenth-century Briton was little more than a superlative copyist, thoroughly subject to custom even as he “discussed” incessantly.

*Physics and Politics* concludes mysteriously. On the one hand, when compared with other peoples, the late nineteenth-century Briton belonged to a highly political, historically self-conscious “age of discussion,” an age that interrogated custom, an age crowded with journalism, literature, science and progress, an age that was a late stage in the unfolding of human history. On the other hand, the late nineteenth-century Briton repeated and imitated endlessly. All the forums in which discussion took place—from journalism to literature to science—were characterized by repetition, imitation, and custom. Having transcended custom, the nineteenth-century Briton was thoroughly in custom’s grip. Even as history superseded custom, custom superseded history.

The paradox is powerfully rendered in a remarkable passage near the end of the text in which Bagehot compares the English with aboriginal Australians. What makes the late nineteenth-century English superior to the aboriginal Australians (for superior they unquestionably are)? Bagehot’s answer is intriguing: “*The English not only possess better machines for moving nature, but are themselves better machines.*”<sup>44</sup> The English think historically and question custom better than anyone else. This ability allows them to progress, to deepen scientific inquiry, and hence to build better machines. At the same time, the English follow custom better than anyone as well,

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42. *Id.* at 31–32 (second emphasis added).

43. *Id.* at 22 (emphasis added).

44. *Id.* at 184 (emphasis added).

and hence are themselves better machines, endlessly repeating and imitating. Bagehot spins a teleological historical narrative, then proceeds to unravel it. He joins history and repetition—and performs his inability to decide between the two—by offering up a historical model in which we break with custom, repetition, and imitation only to undermine it by showing that we can never escape custom, repetition, and imitation.

Bagehot inhabits the antinomies of history and repetition through recourse to irony. He was not as deadly serious about the importance of custom as Burke or Oakeshott. Neither was he an earnest late nineteenth-century progressive—like John Dewey—who held onto the historical faith that democratic discussion and rational knowledge would give rise to laws that would break with the past, and thereby contribute to the betterment of mankind. Instead, in an ironic mode, Bagehot remarks upon our tendency to copy and imitate, as it combines in a fundamentally irresolvable way with our gestures toward originality.

Nothing reveals Bagehot's irony better than his treatment of English "stupidity," which might be something akin to Holmes' "blind imitation of the past." Holmes, as stated in the previous section, calls the method of custom "blind imitation of the past" in order that we might move beyond it. Holmes is unequivocally opposed to "blind imitation."<sup>45</sup> As Bagehot uses the word "stupidity" to describe the English propensity to repeat, to shuffle along, to reject crisp logic, there is no doubt that it comes with pejorative valences. Yet even as he intends these pejorative valences, he embraces them and does not attempt to move beyond them. This is the source of his ironic tone.

Bagehot's journalistic career began when he wrote a series of seven letters from Paris about Louis Napoléon's *coup d'état* in December 1851. Bagehot supported the coup and, in so doing, enraged the British liberal public. His reasons for supporting the coup probably incensed British liberals even further. The French, Bagehot argued, were simply too clever to be trusted with political liberty. The nimble-minded French, he wrote a few years later, "pass from the game of war to the game of peace, from the game of science to the game of art, from the game of liberty to the game of slavery, from the game of slavery to the game of licence."<sup>46</sup>

What the French lacked, as they flitted from game to game, was stupidity, an essential concomitant of the "cake of custom." "Stupidity," Bagehot wrote in a famous passage on the 1851 *coup*, is "about the most essential mental quality for a free people, whose liberty is to be progressive, permanent, and on a large scale."<sup>47</sup> Stupidity was "[n]ature's favourite resource for preserving steadiness of conduct

45. See Holmes, *supra* note 16, at 399.

46. 1 WALTER BAGEHOT, *Shakespeare—the Man*, in LITERARY STUDIES 37, 39 (Richard Holt Horton ed., Logmans, Green, and Co. 1905) (1879).

47. Walter Bagehot, Letters on the French Coup D'Etat of 1851: Letter III, On the New Constitution of France, and the Aptitude of the French Character for National Freedom (Jan. 20, 1852), in 1 THE WORKS AND LIFE OF WALTER BAGEHOT 93, 100 (Russell Barrington ed., 1915).

and consistency of opinion.”<sup>48</sup> Stupidity lay at the heart, in other words, of the method of custom. It was the Englishman’s birthright. French cleverness is what kept the French liberties in a constant state of flux, just as English stupidity is what secured English liberties. Just as the “age of discussion” succeeded the “cake of custom,” only to be engulfed precisely by the superseded “cake of custom,” English stupidity—which English liberty *must* in some sense have surpassed in order to become liberty—ends up preserving and guaranteeing and dulling liberty.

According to Bagehot, the English had not only been stupid for a long time, but had long recognized the virtues of stupidity. This comes across in an 1853 passage on Shakespeare, the central figure of England’s national literature:

Shakespeare was too wise not to know that for most of the purposes of human life stupidity is a most valuable element. He had nothing of the impatience which sharp logical narrow minds habitually feel when they come across those who do not apprehend their quick and precise deductions. No doubt he talked to the stupid players, to the stupid door-keeper, to the property man, who considers paste jewels ‘very preferable, besides the expense’—talked with the stupid apprentices of stupid Fleet Street, and had much pleasure in ascertaining what was their notion of ‘King Lear.’<sup>49</sup>

It is important to recognize that the ability to recognize the virtues of stupidity and to learn from his stupid countrymen did not ensure that Shakespeare, even as he was a genius, was not somewhat stupid himself: “Like any other Englishman, when he had a clear course before him, [Shakespeare] rather liked to shuffle over little hitches in the argument, and on that account he had a great sympathy with those who did so too.”<sup>50</sup> But even as he recognizes stupidity as stupidity, Bagehot does not want to give up on stupidity. On Bagehot’s reading, it is precisely Shakespeare’s own stupidity, his recognition of stupidity’s virtues, and his sympathy for the stupidity of others that makes him great. Bagehot recognizes that stupidity has kept the English free, even as lack of stupidity has robbed the French of their liberties. He dwells serenely, ironically, self-deprecatingly, perhaps even smugly, on the contradiction.

#### CONCLUSION

What kind of model might Bagehot supply for historical thought? Even his contemporaries recognized that Bagehot’s pervasive irony and bemusement rendered him someone who could not inspire, only refresh, entertain, and explain. Albeit a great admirer of Bagehot, Woodrow Wilson put it thus:

[I]t is true that [Bagehot] does not construct for the future. You receive stimulation from him and a certain feeling of elation. There is a fresh air

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48. *Id.* at 102.

49. BAGEHOT, *supra* note 46, at 144.

50. *Id.* at 147.

stirring in all his utterances that is unspeakably refreshing. . . . But you know what you lack in Bagehot if you have read Burke. You miss the deep eloquence which awakens purpose. . . .

You would go to Burke, not to Bagehot, for inspiration in the infinite tasks of self-government; though you would, if you were wise, go to Bagehot rather than to Burke if you wished to realize just what were the practical . . . conditions under which those tasks were to be worked out.<sup>51</sup>

This might be why Bagehot has never had quite the following acquired by more devoted adherents of either history or custom, whether Jefferson or Burke, Holmes or Oakeshott. Bagehot's predilection for revealing his irony in the simultaneous construction and unraveling of histories, for undermining and reinstating, could be frustrating if the point of knowledge was (to borrow Wilson's phrase) to "awaken purpose."

But yet there is something in Bagehot's ironic attempt (as I read him) to insist upon, and simultaneously to undermine, both history and repetition that might be worth retrieving if one is to attempt to navigate the antinomies of history, on the one hand, and repetition, on the other. As we march on, striking a blow, over and over again, either for custom or for history, either for repetition over time or identity over time, we might remember that Bagehot would have pointed out—wryly—that we were merely repeating ourselves. In final analysis, my hope is that historians' questioning of their own models by looking at the work of Bagehot and others—and I emphasize once again that there are many modes of thinking time other than that of Bagehot—will open up and enrich debate. In doing history, we might reveal to ourselves temporalities that escape history's reach and make us reflect on the limits of our knowledge.

This might not be without its risks, challenges, and dangers. For someone as avowedly historically minded and secular as myself, the injection of God into political discourses all over the contemporary world has become a source of concern. Like many, I fret about the ability of the historically minded to engage with religious discourses that appear to reject so much of what historical knowledge accomplishes so beautifully. I have to remind myself that that danger is another version of the one that I have posed here. The hard work might be learning how to respond to it with irony.

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51. WOODROW WILSON, *A Literary Politician*, in *MERE LITERATURE AND OTHER ESSAYS* 69, 99 (2004).