

# The Historiography of Late Nineteenth-Century American Legal History

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*Although the treatment of history in late nineteenth-century American legal scholarship remains largely unexplored, two recent areas of research have discussed this subject tangentially. Historiographical critiques of the emphasis on doctrine by American legal historians typically maintain that late nineteenth-century legal scholars viewed history as disclosing an inevitable evolutionary progression from primitive to civilized forms. This "whiggish" approach, the critiques add, ignored the context and function of past law while apologetically justifying conservative existing law as autonomous scientific truth. Without addressing the historiographical critiques, scholarship about late nineteenth-century legal thinkers has touched on their historical research and assumptions, mostly in passing as part of inquiries about other subjects.*

*Designed primarily to convey how both areas of research have contributed to the historiography of late nineteenth-century American legal history, this article concludes by drawing on my own extensive reading of the original sources. Sometimes in support but often in refutation of the existing secondary literature, my findings reveal that the late nineteenth-century scholars formed a distinctive and sophisticated American school of historical jurisprudence that merits*

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*further study. Often warning against the very faults ascribed to them by dismissive subsequent scholars, many viewed legal evolution as a contingent response to social change and urged substantial reform of existing law. The American school of historical jurisprudence, moreover, provides an important intellectual context for new insights into two giants of American legal thought, Oliver Wendell Holmes, Jr. and Roscoe Pound.*

## INTRODUCTION

Historical scholarship includes the study of its own history and theory. Some of the most interesting work about these subjects has demonstrated that important theories of history, and even the development of historical consciousness itself, emerged from the work of European legal scholars centuries ago.<sup>1</sup> Yet few have studied the writings of American legal historians or the theories of history contained within American legal scholarship generally. Some attention to methodological and theoretical issues has accompanied the dramatic increase in the underlying study of legal history in the United States since roughly 1970. The history of American scholarship in legal history, however, remains relatively unexplored.

An overview of the history of American legal historiography written by Robert Gordon in 1975 provided an impressive and influential exception to this general neglect.<sup>2</sup> Gordon divided the subject into three periods, each characterized by a distinctive historiographical approach. Under this division, the "internal" study of the history of legal doctrine prevailed in the United States from its beginnings in the 1870s until roughly World War II. The pioneering scholarship of J. Willard Hurst at the University of Wisconsin in the 1940s initiated the second period by founding the "Law and Society" school of legal history, which directly attacked the previous internal emphasis. Hurst and his followers viewed law primarily as an instrument of underlying social and economic forces and were interested in the impact of law on society. As a result, they studied law from an "external" perspective, examining influences on it and effects produced by it. The third approach dates from

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- 1 See, e.g., Donald R. Kelley, *Foundations of Modern Historical Scholarship: Language, Law, and History in the French Renaissance* (1970); J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (1957).
  - 2 Robert W. Gordon, *J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 *Law & Soc'y Rev.* 9 (1975).

the explosion of scholarship in legal history that began around 1970. The numerous young scholars attracted to the field frequently find the exclusively internal or external approaches overly simplistic. Often trained in graduate schools of history as well as in law schools, they apply the full range of current historiographical methods to the study of legal history. Believing that thought can be relatively autonomous from social forces and that ideas themselves can influence society, many in this generation of legal historians have tried to bridge the internal and external study of law.<sup>3</sup>

This division of the history of scholarship in American legal history, which most American legal historians continue to accept, does not assume that each approach entirely superseded its predecessor. Many observe — and often complain — that the internal emphasis on doctrine has never lost its hold on American legal scholarship, particularly among law professors interested in the history of their own specialized fields, but also generally among legal historians. Numerous American legal historians, moreover, continue proudly to identify themselves as adherents of the Law and Society school of legal history that traces back to Hurst. But this division does represent a widespread consensus about successive changes in prevailing approaches to the study of legal history in the United States.

In the generation since Gordon's essay, a few additional articles about legal historiography have examined issues posed by recent theoretical and historical scholarship.<sup>4</sup> Hurst's Law and Society school of legal history continues to generate some historiographical attention, including from scholars who do not perceive themselves to be successors in this tradition. Many who consider their own approaches to legal history vastly more sophisticated than Hurst's nonetheless recognize his enormous contributions to the field.<sup>5</sup> Internal legal history, by contrast, has not received similar attention or respect.

Several common themes emerge from the generally brief and often

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3 See Robert W. Gordon, *Critical Legal Histories*, 36 *Stan. L. Rev.* 57 (1984).

4 See, e.g., William W. Fisher III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 *Stan. L. Rev.* 1065 (1997); Lawrence M. Friedman, *American Legal History: Past and Present*, 34 *J. Legal Educ.* 563 (1984); Michael Grossberg, *Social History Update: "Fighting Faiths" and the Challenges of Legal History*, 25 *J. Soc. Hist.* 191 (1991); Hendrik A. Hartog, *Distancing Oneself from the Eighteenth Century: A Commentary on Changing Pictures of American Legal History*, in *Law in the American Revolution and the Revolution in the Law* 229 (Hendrik A. Hartog ed., 1981); Christopher L. Tomlins, *How Who Rides Whom. Recent "New" Histories of American Labor Law and What They May Signify*, 20 *Soc. Hist.* 3 (1995).

5 See *Engaging Willard Hurst: A Symposium*, 18 *Law & Hist. Rev.* 1 (2000).

dismissive characterizations of internal legal history. Critics portrayed internal legal historians, frequently unnamed, as naively attempting to explain current law by searching for its origins in past law. They attributed this search to evolutionary or "whiggish" assumptions that law and society develop naturally, continuously, and inevitably from primitive to civilized forms, through processes that can be discerned from the study of history.<sup>6</sup> By looking to the past to discover the origins of current legal categories, the critics added, internal legal historians often obscure the actual and often very different functions of earlier law in its own society and time.<sup>7</sup> Rather than attempting to understand law in its historical context, internal legal historians frequently examine precedents to extract legal principles that purport to decide future cases with as much scientific rationality as the principles of biology or physics explain events in the natural world.<sup>8</sup>

Critics often complained that internal legal historians are fundamentally apologetic and, therefore, conservative. They study the past to rationalize and justify current law, which they present as autonomous scientific truth. Their approach cleanses law of any hint that social conflict and political struggle may have influenced its development. It also reduces the historian to a servant of the practicing lawyer and judge.<sup>9</sup> As a result, and perhaps most sadly, it has stifled the historical imagination, diverting attention from much more interesting issues.<sup>10</sup>

Without addressing the historiographical critiques of internal legal history, some recent work has discussed the historical research and assumptions of late nineteenth-century American legal thinkers, who lived during what

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6 Daniel J. Boorstin, *Tradition and Method in Legal History*, 54 Harv. L. Rev. 424, 425 (1941); Gordon, *supra* note 2, at 14-15, 20; Morton J. Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 Am. J. Legal Hist. 275, 276 (1973).

7 Boorstin, *supra* note 6, at 428-33; Gordon, *supra* note 2, at 27.

8 Horwitz, *supra* note 6, at 280. Horwitz used Roscoe Pound as his example of the conservative tradition because he was its "single most influential representative." *Id.* at 276. In a much more recent work, Horwitz seemed to revise his view of Pound. Morton J. Horwitz, *The Transformation of American Law 1870-1960* (1992). In his book, Horwitz claimed that Pound did an "about-face," moving from an imaginative proponent of progressive reform through law before World War I to a much more conservative defender of the legal status quo in the 1930s. *See, e.g., id.* at 217-20.

9 Boorstin, *supra* note 6, at 426; Gordon, *supra* note 2, at 17; Horwitz, *supra* note 6, at 278, 281, 283; Morton J. Horwitz, *The Historical Contingency of the Role of History*, 90 Yale L.J. 1057, 1058 (1981).

10 Boorstin, *supra* note 6, at 429, 436; Daniel J. Boorstin, *The Humane Study of Law*, 57 Yale L.J. 960, 973 (1948); Gordon, *supra* note 2, at 9-11, 54.

Gordon called the "Classical Period" of internal legal history. Scholars interested in "evolutionary jurisprudence" have observed its prevalence in the late nineteenth-century and the extent to which it encouraged the study of legal history.<sup>11</sup> Other scholars have emphasized the enormous influence of the German historical school of jurisprudence on American legal scholarship and education when American law schools first became academically serious in the decades after 1870.<sup>12</sup> Scholars have also contrasted American historical jurisprudence with competing analytical and natural law theories.<sup>13</sup> Studies of major legal figures from the late nineteenth century, such as Langdell and Holmes, have discussed their historical views,<sup>14</sup> and scholars have examined the historical assumptions underlying constitutional interpretation during this period.<sup>15</sup>

Neither the historiographical critiques of internal legal history nor the recent writing about late nineteenth-century legal scholarship provide a comprehensive analysis of American legal historiography prior to 1900. No such analysis currently exists. Yet the historiographical critiques convey many prevailing assumptions about work in American legal history during the late nineteenth century, and current knowledge of this work must be extracted from the secondary sources I have identified.<sup>16</sup> Frustrated by the lack of attention to the treatment of history in late nineteenth-century legal

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11 See, e.g., James E. Herget, *American Jurisprudence, 1870-1970: A History* (1990); Donald Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 Colum. L. Rev. 38 (1985); Herbert Hovenkamp, *Evolutionary Models in Jurisprudence*, 64 Tex. L. Rev. 645 (1985).

12 See especially Mathias Reimann, *Holmes's Common Law and German Legal Science, in The Legacy of Oliver Wendell Holmes 72* (Robert Gordon ed., 1992) [hereinafter Reimann, *Holmes's Common Law*]; Mathias Reimann, *A Career in Itself — The German Professoriate as a Model for American Legal Academia, in The Reception of Continental Ideas in the Common Law World 1820-1920*, at 165 (Mathias Reimann ed., 1993) [hereinafter Reimann, *Career*]; Mathias Reimann, *The Historical School Against Codification: Savigny, Carter, and the Defeat of the New York Civil Code*, 37 Am. J. Comp. L. 95 (1989) [hereinafter Reimann, *Historical School*].

13 See, e.g., Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 Stan. L. Rev. 787 (1989); William P. LaPiana, *Jurisprudence of History and Truth*, 23 Rutgers L.J. 519 (1992).

14 See, e.g., Albert Alschuler, *Law Without Values: The Life, Work, and Legacy of Justice Holmes* 86-90 (2000); Grey, *supra* note 13; Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. Pitt. L. Rev. 1 (1983); Reimann, *Holmes's Common Law*, *supra* note 12.

15 See especially Stephen A. Siegel, *Historism in Late Nineteenth-Century Constitutional Thought*, 1900 Wis. L. Rev. 1431.

16 See sources cited *supra* notes 2, 6, 11-15.

scholarship, I decided to explore this subject myself by reading extensively in the primary sources. Designed primarily to review both the historiographical critiques and the writing about late nineteenth-century legal scholarship that touches on historical issues, this article concludes by placing my findings in the context of this existing secondary scholarship.

While supporting and extending some conclusions of the existing secondary literature, my research challenges others. Most importantly, whether in support or refutation, it reveals that the nineteenth-century scholars were much more sophisticated and complex than portrayed by the summary, and sometimes condescending, comments of their successors. They formed an American school of historical jurisprudence that dominated legal scholarship in the United States during the decades after 1870. Part of a shared approach to legal scholarship that first arose in Germany in the early nineteenth century and spread to England by mid-century, the Americans were major participants in this tradition. Adherents of historical jurisprudence in all three countries frequently engaged in jurisprudential debates, arguing for historical understandings of law in preference to theories based on natural law or analytic jurisprudence. Leading scholars in Germany and England treated their American counterparts as intellectual peers, expressed in correspondence, personal visits on both sides of the Atlantic, and high praise for their work. In a telling but far from unique example, Frederick Maitland, probably the leading English legal historian of the late nineteenth century, relied heavily on the previous work of his close American friend, Melville M. Bigelow, and thanked another American friend, James Bradley Thayer, for praise that helped him obtain his professorship at Oxford.<sup>17</sup>

Confirming the conclusory assertions of recent historiographical critiques, my research revealed that many scholars in the American school of historical jurisprudence focused on the internal evolution of legal doctrine and had smug, even racist, views about the superiority of the Anglo-American legal tradition. Many extracted from their study of legal history evidence of an organic and progressive development of legal principles. They especially emphasized the growth of liberty in the Anglo-American world.

Yet many of these scholars took positions that refute the conclusory assertions of recent historiographical critiques. They observed the discontinuity and contingency of legal history and acknowledged the

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17 H.A.L. Fisher, *Frederick William Maitland: A Biographical Sketch* 26 (1910); Letter from Frederick W. Maitland to James B. Thayer (Sept. 15, 1888) (on file with James Bradley Thayer Papers, Harvard Law School, Box 18, Folder 14).

importance of external influences on the law. They frequently warned against false analogies and improper ascriptions of causality between past and present law. Far from conservative apologists for the status quo, they viewed legal evolution as a response to the changing customs of society and maintained that constitutional as well as common law must reflect these changes. Consistent with these views, they rejected simplistic notions of original intent and textual construction. While they recognized their intellectual debts and many affinities to historical jurisprudence in Germany and England, they occasionally criticized the conservatism of the German and English varieties. Their historical research often uncovered illogical remnants of past law in the present, which prompted them to advocate legal reforms designed to purge the current legal system of these dysfunctional survivals. Many associated with the Mugwump movement or otherwise criticized the excessive materialism and selfishness of the Gilded Age.

Knowledge of a broadly based American school of historical jurisprudence, moreover, provides new insights into two of the most famous figures in the history of American legal thought: Oliver Wendell Holmes, Jr. and Roscoe Pound. Particularly during his extensive decade of legal scholarship that culminated with the publication of *The Common Law* in 1881 and, in many respects, throughout his long subsequent career as a judge, Holmes was an eminent member of this school. And Pound, in his enormously influential early scholarship in the decade before World War I, both produced what is still the most extensive critical treatment of historical jurisprudence in the United States and successfully argued that "sociological jurisprudence" should replace it.

## I. HISTORIOGRAPHICAL CRITIQUES

Morton Horwitz and Robert Gordon, two of the most eminent senior legal historians in the United States today, wrote essays a generation ago that remain the most extensive recent discussions of internal legal history. Their characterization in the 1970s of legal history before Hurst largely overlapped and reinforced observations made by Daniel Boorstin in the 1940s, the decade when Hurst began his pioneering work. This joint portrait of internal legal history continues to dominate current assumptions about American legal historiography in the nineteenth century.

In his 1973 essay, *The Conservative Tradition in the Writing of American Legal History*, Horwitz observed that American legal historians have mostly been lawyers influenced by professional concerns. They have emphasized continuity while minimizing change and, in dealing with legal doctrine,

have devoted themselves largely to uncovering its origins in the past. Horwitz cited Oliver Wendell Holmes, Jr., as the most dramatic illustration of the search for origins by American legal historians and mentioned two other examples: Christopher Columbus Langdell and James Barr Ames, successive deans of Harvard Law School in the late nineteenth century and contemporaries of Holmes. Yet Horwitz focused his discussion on the person he called the "single most influential representative of orthodox lawyer's legal history," Roscoe Pound, who succeeded Ames as Dean of Harvard Law School.<sup>18</sup>

According to Horwitz, Pound relegated economic influences on legal doctrine to "some comfortable distance in the past," after which law became "functionally autonomous."<sup>19</sup> Pound also classified jurisprudential schools historically, without considering their possible relationships to various political or cultural forces.<sup>20</sup> Instead of connecting law to external factors, Pound emphasized that it is a science based on reason. Studying the history of legal ideas, he believed, yields progressively better legal theories.<sup>21</sup> He confidently assumed that the faculty of human reason is unaffected by history and that its application to legal analysis, as to all areas of scientific inquiry, provides right and wrong answers.<sup>22</sup>

Horwitz was struck by the parallels between the history of law written by lawyers, which Pound best exemplified, and the history of science written by scientists as famously described by Thomas Kuhn in *The Structure of Scientific Revolutions*. Both the lawyers and the scientists present history as a continuous process that has produced inevitable and universal understandings within their disciplines. In Horwitz's words, they "use history to justify and glorify the present."<sup>23</sup>

Horwitz connected his characterization of legal history with political conservatism. He stressed that the typical legal historian, in contrast to scholars in the distinct field of constitutional history,<sup>24</sup> divorced history from politics by explaining change as only an intellectual process.<sup>25</sup> Accomplishing this divorce, Horwitz pointed out, is much harder for a historian of law than for a historian of science. The historian of science can plausibly attribute

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18 Horwitz, *supra* note 6, at 275-76.

19 *Id.* at 276.

20 *Id.* at 279.

21 *Id.* at 280.

22 *Id.* at 278.

23 *Id.* at 283.

24 *Id.* at 275.

25 *Id.* at 281.

scientific change to the progress of reason in search of truth. It is impossible, however, for the historian of law to ignore the history of political movements that organized to change the law.<sup>26</sup>

The typical response of the historian of law, Horwitz maintained, has been to defend professional craft as being autonomous from power and politics.<sup>27</sup> The assertion of technical professionalism creates what Horwitz called "a ideological buffer zone between the claims of politics and those of law." It treats American legal history "not as itself a contingent and changing product of specific historical struggles, but rather as a kind of meta-historical set of values within which social conflict has always taken place."<sup>28</sup> For Horwitz, using the ideology of professionalism to remove politics from law constitutes "the conservative tradition" he identified in his title and is itself a political project "dressed up in the neutral garb of expert and objective legal history."<sup>29</sup> Pound, the best representative of the conservative tradition, specifically accomplished such ideological manipulation by extolling the common law, portrayed as the product of professional training and craft, and by hostility to codification, portrayed as the product of democratic, even demagogic, law-making.<sup>30</sup>

Mincing no words, Horwitz concluded that to employ the orthodox legal history exemplified by Pound "is to pervert the real function of history by reducing it to the pathetic role of justifying the world as it is."<sup>31</sup> Legal history of this kind simply ransacks the past to support the "pieties of professionalization."<sup>32</sup> Horwitz regretfully observed, without elaboration, that this unjustifiable approach has dominated the study of legal history from the beginning of the seventeenth century in England and from at least the period following the American Revolution in the United States.<sup>33</sup>

Two years after Horwitz, Robert Gordon wrote his essay dividing the history of American legal history into three periods. Like Horwitz, Gordon maintained that American legal historiography before Hurst had emphasized doctrinal legal history in isolation from external influences. Though Gordon agreed with Horwitz about the conservative ideological implications of this

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26 *Id.* at 283.

27 *Id.* at 281.

28 *Id.* at 278.

29 *Id.* at 276.

30 *Id.* at 277, 281.

31 *Id.* at 281.

32 *Id.*

33 *Id.* at 276.

approach, he qualified Horwitz's conclusions by stressing the professional benefits law professors derive from writing internal legal history.<sup>34</sup>

Gordon opened his essay with a lengthy quotation from the great Italian historiographer Arnaldo Momigliano. While conceding that the histories of literature, art, science, and religion can be limited to those particular fields, Momigliano asserted that the history of law cannot maintain such disciplinary autonomy. Law, he insisted, is too rooted in multiple human activities and relations to be treated in isolation. If historical investigation uncovers an autonomous legal tradition, he added, its existence is itself "a social phenomenon to be interpreted."<sup>35</sup> According to Gordon, American legal historians have only begun to learn this lesson, for they typically studied law as an autonomous discipline.<sup>36</sup>

Like Horwitz, Gordon borrowed from Kuhn to describe the historiography of American legal history. He agreed with Horwitz that legal history written by lawyers bears striking parallels to Kuhn's description of the history of science written by scientists.<sup>37</sup> More specifically, Gordon borrowed Kuhn's distinction between internal and external histories. American legal history, Gordon asserted, until recently had been overwhelmingly internal, written from within the discipline, rather than external, written in relation to the wider society.<sup>38</sup>

When the professional field of American legal history began in the late nineteenth century, Gordon observed, scholars in virtually every field of history shared evolutionary conceptions of historical change. Though differing in various particulars, they assumed

that all societies undergo comparable processes of development from the simple to the complex, the primitive to the civilized; that these processes are continuous and progressive; and that the business of scientists was to discover, through the comparative study of developed and undeveloped peoples, the laws governing the growth of civilizations.<sup>39</sup>

Historians believed that their distinctive function, whatever their specialized fields, is to search for the ancient origins of current customs and trace their development over time. Most interested in their own society, American

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34 Gordon, *supra* note 2, at 31 n.65.

35 *Id.* at 9 (quoting Momigliano).

36 *Id.* at 9.

37 *Id.* at 17 n.22.

38 *Id.* at 11 n.5.

39 *Id.* at 14-15.

historians focused on the history of Anglo-American civilization. These evolutionary assumptions, Gordon stressed, influenced the substantial scholarship in legal history in American law schools during the last two decades of the nineteenth century, particularly at Harvard. He specifically named Holmes, Ames, James Bradley Thayer, and Melville Madison Bigelow as outstanding representatives of this tradition.<sup>40</sup>

Though most historians abandoned evolutionary assumptions about historical change by the early twentieth century, legal historians did not.<sup>41</sup> In addressing this discrepancy, Gordon stressed that an evolutionary account of legal history advanced the needs of the legal profession and that law professors succumbed to those needs. Ames himself, Gordon acknowledged, wanted historical science to direct the development of legal doctrine. But instead of subordinating future doctrine to the lessons of history, legal historians subordinated history to the justification of current doctrine. Their view of law as a process of continuous development made it easy for them to confuse the "common law tradition" with the entire history of law, though Gordon himself described this tradition as merely "the fictional continuity that each generation of common lawyers imposes, in its own fashion, and for its own ends, on the development of judicial doctrine."<sup>42</sup>

By treating the common law tradition as a "source of normative authority," Gordon concluded, legal historians conceived their work as "a professional task," and "as long as it was a professional task it was bound to be internal."<sup>43</sup> Legal historians limited their research and their explanations to legal factors.<sup>44</sup> "Under the spell of evolutionism and professional habit," they "ransacked the past for the ancestors of their own day's categories, though these categories might have possessed no significance or a very different one, for previous generations back through whom they were traced."<sup>45</sup> Legal historians, moreover, frequently found a story of development that was triumphant as well as continuous.<sup>46</sup>

Gordon conceded that the evolutionary approach to legal history did not, in theory, preclude connecting law to broader influences. Indeed, evolutionary legal historians actually made such connections in their investigations of medieval English law. Yet legal historians in America narrowed their scope

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40 *Id.*

41 *Id.* at 15-16.

42 *Id.* at 17.

43 *Id.* at 20.

44 *Id.*

45 *Id.* at 27.

46 *Id.* at 23.

to exclusively legal things. To some extent, Gordon believed, the "organic theory of culture" associated with evolutionary thought "paradoxically encouraged scholars to disregard the social context of the day."<sup>47</sup> They could convince themselves that organic principles, though derived from broad social factors, had already been contained within past legal rules and that the study of the evolution of those rules over time is sufficient for the legal historian. As an example of this approach, he cited James Coolidge Carter, the leading American popularizer of Friederich Carl von Savigny, the great German legal historian.<sup>48</sup> The more general jurisprudential view that the common law, though originally derived from custom, had become grounded in reason reinforced the exclusion of social context.<sup>49</sup> Gordon, however, placed most responsibility for the internal narrowing of American legal history on the subordination of the legal historian to the professional task of rationalizing existing law.<sup>50</sup>

Holmes and Pound, Gordon observed, were pragmatists who wanted to reconnect legal history to external factors in order to demonstrate that existing law, while perhaps appropriate for the social and intellectual contexts in which it arose, no longer made sense in the vastly different present. Whereas Langdell and, to some extent, Ames were interested in deriving immanent principles from the history of legal rules, Holmes and Pound studied history to rid the law of rules that were only pointless survivals of a past that had disappeared.<sup>51</sup> However, in practice, Gordon noted, Holmes and Ames were rather similar. While not sharing Ames' view that the scientific study of past law could uncover traditions that are socially functional in the present, Holmes' skepticism about judicial reform of current law left traditional doctrine in place.<sup>52</sup> In any event, Gordon observed, internal doctrinal history survived legal pragmatism, largely because the pragmatists themselves were eager to preserve their own identities as lawyers. They were unwilling, therefore, to challenge the ideology of professionalism, which depended on the autonomy of law.<sup>53</sup>

A generation before Horwitz and Gordon, Daniel Boorstin anticipated many of their complaints about internal legal history, while calling for more ambitious scholarship connecting the history of law to other subjects of

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47 *Id.* at 19-20.

48 *Id.* at 20.

49 *Id.* at 21.

50 *Id.* at 20.

51 *Id.* at 29-30.

52 *Id.* at 30 n.62.

53 *Id.* at 30-33.

historical inquiry. In an essay published in 1941, *Tradition and Method in Legal History*, Boorstin observed that scholarship in English and American legal history studied the past as "an alchemy for distilling legal principles."<sup>54</sup> Legal historians organized their works around the categories found in current textbooks and treatises about the law.<sup>55</sup> As a result, legal history became a kind of embryology in which the historian searched in the rudimentary forms of the past for the origins and growth of the more fully developed current legal system.<sup>56</sup> "The present becomes the culmination of all the past, and the present forms of institutions seem to be their inevitable forms."<sup>57</sup> To illustrate this pervasive approach, Boorstin quoted from the introduction by Ames to his *Lectures on Legal History*.<sup>58</sup>

Treating legal history as embryology, Boorstin observed, made the legal historian subservient to the practicing lawyer.<sup>59</sup> In a subsequent article, he blamed much of this subservience on the pragmatic orientation of American law schools. Since the common law is based on the interpretation of prior cases, studying the history of those cases had obvious benefits for understanding current law. By accepting the study of legal history only to the extent that it would aid future lawyers, Boorstin bitterly complained, the American "law school has required that the historian who would survive in its midst should justify his inquiry according to criteria which have nothing to do with history."<sup>60</sup>

The methodology of traditional legal history, Boorstin added, often distorted the past and produced false analogies to the present. Organized under the legal categories of the present and obsessively searching for their origins and development, traditional legal history neglected the actual role of law in earlier societies. This organization also undermined the goal of understanding present law, for the functional counterparts to current law in the past often existed under different conceptual headings. Just as contract law might have had a very different role in the past than it does in the present, the origins of contract law might be found in past forms that look more like current tort law.<sup>61</sup> Like Horwitz a generation later, Boorstin concluded that the use of current legal categories to investigate the

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54 Boorstin, *supra* note 6, at 424.

55 *Id.* at 425-26.

56 *Id.* at 428-29.

57 *Id.* at 429.

58 *Id.* at 425.

59 *Id.* at 428.

60 Boorstin, *supra* note 10, at 964-65.

61 Boorstin, *supra* note 6, at 429-33.

past had made the study of legal history unnecessarily conservative.<sup>62</sup> Yet unlike Horwitz, Boorstin did not explicitly elaborate, leaving unclear whether he considered this conservatism to be methodological, political, or both.

Boorstin did make clear, however, that he favored different approaches to the study of legal history. Though practitioners of traditional legal history had not been reflective about their own methodology and had often left the impression that it was natural and inevitable, Boorstin accused them of evading methodological issues while choosing one approach among many alternatives.<sup>63</sup> Sadly, the approach they chose closed the historical imagination.<sup>64</sup> Boorstin himself believed that there are many valid ways to write legal history and that legal history, like all history, must constantly be rewritten. But he did urge legal historians to recognize that law is part of general history and to connect law with the rest of society.<sup>65</sup> He concluded his essay by emphasizing that legal history does not have "a life all its own," but is "part of social history."<sup>66</sup> In a subsequent essay, he added that law should also be studied in relation to intellectual, political, and economic history as well as to broader topics in the humanities.<sup>67</sup>

Yet Boorstin was skeptical about attempts to connect law with the social sciences. He observed that the few classic works of legal history produced by American scholars had been written long ago in a humanistic spirit. As examples of such classics, he cited Holmes' *The Common Law*, Ames' *Lectures on Legal History*, and Thayer's *Preliminary Treatise on Evidence*, all of which had been published between 1881 and 1898. Though these classic works had appeared at the same time as the development of the characteristically American case method of instruction, Boorstin claimed that they were unrelated to it. Rather, they were substantially influenced by, and possibly modeled after, scholarship of nineteenth-century German and English legal historians.<sup>68</sup>

In the course of their essays, Horwitz, Gordon, and Boorstin referred to people they described as late nineteenth-century American legal historians. Often, but not always, they cited the same names. The figures mentioned in at least one of these articles are Ames, Bigelow, Carter, Holmes, Langdell, Pound, and Thayer.<sup>69</sup> Yet with the possible exception of Horwitz, who devoted

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62 *Id.* at 426.

63 *Id.*

64 *Id.* at 429.

65 *Id.* at 433-34.

66 *Id.* at 436.

67 Boorstin, *supra* note 10, at 973.

68 *Id.* at 963.

69 Boorstin, *supra* note 6, at 425, 428 (Ames and Holmes, respectively); Boorstin,

several pages to Pound without examining most of his writing on legal history, none of these essays discussed any of these people in substantial detail. Nor is this lack of attention surprising. Horwitz's essay was primarily a book review of a biography about Justice Joseph Story. His general discussion of the conservative tradition, with Pound as its primary example, placed the biography within this tradition. In introducing a volume of articles honoring J. Willard Hurst, Gordon's essay provided a synthetic overview of the entire history of American legal historiography as the background for understanding Hurst's innovative departure from internal to external legal history. Boorstin's older essay was a brief reflection on the condition and possible improvement of methodology in legal history. Horwitz, Gordon, and Boorstin never intended their essays to be comprehensive discussions of the work of American legal historians.

Lawrence Friedman's *A History of American Law*, the major synthesis of the field published in 1973, reinforced the major points of these essays even more briefly. As part of a chapter about the legal profession during the second half of the nineteenth century, he included a short discussion of scholarship in legal history. Friedman identified the influence of the German historical school on Carter and referred to an American school of legal history that focused on the doctrinal history of the common law rather than on the history of the broader legal system. Most of these American scholars, he observed, wrote about the ancient legal history of England. Friedman mentioned only Ames by name, whose essays he praised as a particularly good example of this genre. He added that Holmes' *The Common Law*, which he called by far the best book on law published by an American between 1850 and 1900, did not differ substantially in historical technique from Ames. Holmes lacked the confidence of Ames and his mentor, Langdell, that logical clarity could be extracted from past precedents. But he remained interested in the history of the common law and searched as eagerly as Ames for its roots in Norman and Germanic sources.<sup>70</sup>

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*supra* note 10, at 963 (Ames, Holmes, Thayer); Gordon, *supra* note 2, at 15 (Holmes, Bigelow, Ames, Thayer); *id.* at 20 (Carter); *id.* at 23 (Pound); Horwitz, *supra* note 6, at 276 (Langdell, Ames); *id.* at 276-81 (Pound).

70 Lawrence M. Friedman, *A History of American Law* 544 (1973).

## II. SCHOLARSHIP ON LATE NINETEENTH-CENTURY AMERICAN LEGAL THOUGHT

Since the 1970s, when Horwitz, Gordon, and Friedman discussed late nineteenth-century American legal historiography, scholars interested in American legal thought of that period have identified its many close connections to legal history. They have addressed the role of evolutionary thought in legal analysis, the impact of German legal scholarship in the United States, and the relationship of history to jurisprudence and constitutional theory. These scholars have neither referred to the historiographical critiques of internal legal history nor focused on the historical issues they have treated in the context of inquiries about other topics. Yet they have devoted greater attention than the historiographical critiques to the actual ideas of late nineteenth-century American legal scholars. Summarizing their work conveys current knowledge about the historical thought of late nineteenth-century American legal writers while revealing the limited extent to which this subject has been investigated.

Donald Elliott, Herbert Hovenkamp, and James Herget have written about "evolutionary jurisprudence," a subject that overlaps with the historical study of law. As Herget observed, the term "evolutionary jurisprudence" has been used interchangeably with "historicism," "the historical school," "legal evolution," and "the Darwinian theory of law." In the late nineteenth century, he added, the boundary between historical jurisprudence and legal history was at best obscure.<sup>71</sup> Both Herget and Elliott maintained that two great nineteenth-century European legal historians, the German, Savigny, and the Englishman, Maine, had enormous influence on their American contemporaries.<sup>72</sup>

Neither Herget nor Elliott elaborated this assertion by demonstrating the influence of Savigny and Maine on particular Americans, and they rarely even identified who those Americans had been. Nor did they explore in detail the evolutionary thought of late nineteenth-century American legal scholars. Herget wrote about evolutionary jurisprudence as part of a book on the variety of schools of American jurisprudence between 1870 and 1970. Though limited to evolutionary jurisprudence, Elliott's article surveyed its entire history in American legal scholarship, especially since 1950. And Hovenkamp explicitly disclaimed interest in legal scholars. He focused

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71 Herget, *supra* note 11, at 22, 118.

72 *Id.* at 22; Elliott, *supra* note 11, at 41, 46 (Savigny and Maine, respectively).

instead on American social scientists, especially William Graham Sumner, Lester Frank Ward, and Edward Alsworth Ross.

Yet these scholars of evolutionary jurisprudence did briefly discuss some late nineteenth-century legal scholars whose work included legal history. Herget remarked that Langdell's method of inferring underlying legal principles from prior case law resembles Savigny's view that law derives from the evolving customs and spirit of a people. He immediately added, however, that no evidence demonstrates Savigny's influence on Langdell or even that Langdell was aware of his work.<sup>73</sup> Herget and Eliot discussed Holmes as an evolutionary thinker,<sup>74</sup> and Herget described William G. Hammond as an important scholar whose historical approach to law reflects evolutionary thought.<sup>75</sup> Both Herget and Hovenkamp also commented on Pound. While acknowledging that Pound rejected the historical school of jurisprudence and the evolutionary views of Savigny, Holmes, and Carter, Herget observed that he included aspects of evolutionary thought in his jurisprudence, especially in recognizing stages of legal development.<sup>76</sup> Hovenkamp traced his primary interest in American social scientists to their influence on Pound, the one legal scholar whose work he explored.<sup>77</sup> And in the major exception to the generally brief discussions of nineteenth-century legal thinkers by these recent scholars of evolutionary jurisprudence, Herget devoted substantial attention to Carter. According to Herget, Carter was the most important American advocate of evolutionary thought in the late nineteenth and early twentieth centuries, whose work, unfortunately, had been neglected.<sup>78</sup>

In an article that only briefly addressed evolutionary thought, William LaPiana identified a group of seven late nineteenth-century legal thinkers who appealed to legal history and often specifically to Maine's work, while resisting the analytic jurisprudence associated with John Austin, the influential English legal philosopher.<sup>79</sup> Unconvinced by Austin's positivism, which views law as a command that is the product of will, these Americans

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73 Herget, *supra* note 11, at 36-37.

74 *Id.* at 43-46; Elliott, *supra* note 11, at 51-55.

75 Herget, *supra* note 11, at 50-53.

76 *Id.* at 143-44.

77 Hovenkamp, *supra* note 11, at 677-83.

78 Herget, *supra* note 11, at 120-30. *See generally* Peter Stein, *Legal Evolution: The Story of an Idea* (1980) (discussing European theories of legal evolution, especially in Germany and Great Britain).

79 LaPiana identified seven legal thinkers as exemplifying this appeal to history: Carter, Hammond, Cooley, Bliss, Tiedeman, Phelps, and Dillon.

investigated legal history, especially the history of the common law, as the source of legal principles rooted in custom. These principles, they believed, transcend the political institutions that Austin saw as the foundation of law.<sup>80</sup> All of these scholars agreed that "the expression of law in rules changes as times change"<sup>81</sup> and accepted "a theory of historical change based on stages of development."<sup>82</sup> At the same time, they asserted the "existence of unchanging principles."<sup>83</sup> In a short and confusing discussion, LaPiana remarked that their views appear linked to evolution, but, in fact, are not, especially given their position about timeless principles and their general aversion to social change.<sup>84</sup> In any event, LaPiana treated their appeal to history as a serious and worthy opponent of Austin's analytic jurisprudence and suggested, without much elaboration, that it was closely related to the general intellectual history of the period.<sup>85</sup>

In three important essays about the influence of German legal thought on late nineteenth-century American scholars, Mathias Reimann illuminated American legal history of this period from a valuable additional perspective. Reimann emphasized that German law schools and legal scholars had served as a model for Americans during the fifty years following the Civil War, when American law schools transformed themselves from trade schools staffed by practitioners to scholarly schools integrated within universities and staffed by full-time professors devoted to research. Because Harvard initiated this trend toward professionalization, which spread throughout American legal education by World War I,<sup>86</sup> Reimann used it as his primary illustration. He observed that Charles W. Eliot, the President of Harvard, and Langdell, whom Eliot appointed Dean of its law school, attempted to reproduce at Harvard the study of legal science that already existed in Germany.<sup>87</sup>

American law professors in the late nineteenth century, Reimann frequently reiterated, revered and emulated German scholars both as historians whose research uncovered fundamental legal principles and as builders of comprehensive logical systems from those principles.<sup>88</sup> Although many German scholars influenced Americans, Savigny, the founder of the

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80 LaPiana, *supra* note 13, at 521-22, 536-54.

81 *Id.* at 555.

82 *Id.* at 556.

83 *Id.*

84 *Id.* at 555-56.

85 *Id.* at 522, 558.

86 Reimann, *Career*, *supra* note 12, at 166.

87 *Id.* at 185-86.

88 *Id.* at 177-81.

German historical school of law and the key figure in nineteenth-century German jurisprudence, was the most important. Many leading American legal scholars, Reimann stated, viewed Savigny as the prototype they sought to follow.<sup>89</sup> Just as Savigny and his German disciples had systematized Roman law in a series of impressive treatises, as part of an effort to create a common law of continental Europe, American and English scholars strove for a similar systematization of their own common law tradition. They believed that even the works of Blackstone, Kent, and Story, the best of their predecessors, were distinctly unscientific and inferior to the German treatises. Reimann acknowledged other sources for the American "historical school" of legal scholarship that spread from Harvard to other law schools in the late nineteenth century. He mentioned, for example, the evolutionary thought of Darwin and the influence of the great British historians Maine and Maitland. But he stressed that the Americans themselves recognized that they owed most to the German historical school, especially to its founder and leader, Savigny.<sup>90</sup>

For Reimann, the appointment of Ames to the Harvard law faculty in 1873 represented the crucial turning point in the professionalization of American legal education through adoption of the German model. Ames was one of the many American and English scholars of his generation who received advanced legal education in Germany<sup>91</sup> and was the first American law professor appointed based on scholarly potential rather than professional accomplishments. President Eliot predicted that the appointment of Ames would be recognized as "one of the most far-reaching changes in the organization of the profession that has ever been made in our country."<sup>92</sup> Ames would be the first of many professors to serve as "expounders, systematizers, and historians" of the law.<sup>93</sup> Ames, Reimann concluded, fulfilled this high expectation. "As a former student in Germany and a lifelong admirer of German legal and historical scholarship, he subscribed to the notion of law as a science and saw German jurisprudence as its most impressive realization."<sup>94</sup> Ames urged his colleagues to emulate German scholarship, and he himself became the model for the American law professor of the next generation.<sup>95</sup>

In a separate essay on Holmes, Reimann extended his discussion of

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89 *Id.* at 170.

90 *Id.* at 179-81; *see also* Michael H. Hoeflich, *Roman and Civil Law in American Legal Education Prior to 1930*, 3 U. Ill. L. Rev. 719 (1984).

91 Reimann, *Career*, *supra* note 12, at 173-75.

92 *Id.* at 184 (quoting Eliot).

93 *Id.* (quoting Eliot).

94 *Id.* at 185.

95 *Id.*

the relationship between German and American legal scholarship in ways that illuminate the practice of legal history in the late nineteenth century. According to Reimann, Holmes attacked German legal scholarship in his major work, *The Common Law*, as an indirect proxy for his main target: the formalism he associated with Langdell and his disciples, people close to home whom Holmes for personal reasons did not want to disparage explicitly.<sup>96</sup> This indirect attack, Reimann maintained, distorted and misrepresented the thought of both the Germans and Langdell.<sup>97</sup> While explicitly criticizing the formalism of Savigny and other German legal scholars, Holmes employed, without attribution, some of their historical methods.<sup>98</sup> And while falsely implying that Langdell and the Germans shared the same formalist views, Holmes obscured the extent to which he and Langdell agreed on many points, including the importance of deriving legal principles from the historical development of case law.<sup>99</sup>

Reimann provided his most specific example of the influence of the German historical school in the United States in an article tracing Carter's successful use of Savigny's ideas to oppose the codification movement in New York from the 1860s through the 1880s. Reimann demonstrated that Carter, who had been exposed to Savigny's ideas in a class on Roman law while a student at Harvard Law School in the early 1850s, expressly referred to Savigny and used similar language in his 1884 pamphlet arguing against codification. According to Reimann, Carter adopted Savigny's historical theory of law to maintain that codification interfered with the laudable flexibility and growth of the common law tradition. Underlining the influence of Savigny in the United States, Reimann pointed out that other American opponents of codification had cited him and his ideas.<sup>100</sup>

Sophisticated American lawyers in the late nineteenth century responded favorably to Savigny's historical approach, Reimann observed, because their training in the common law led them to believe that law develops continuously through cases over time. The historical approach, he added, also reinforced the strong influence of evolutionary theory in the United States.<sup>101</sup> But Reimann stressed ideological and personal as well as intellectual and jurisprudential reasons for Savigny's appeal among American lawyers. Savigny's emphasis on the crucial role of the legal scientist elevated the

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96 See Reimann, *Holmes's Common Law*, *supra* note 12, at 73-74, 92-95.

97 *Id.* at 96-97, 103 (Germans); *id.* at 106-08 (Langdell).

98 *Id.* at 98-99, 103.

99 *Id.* at 106-09.

100 Reimann, *Historical School*, *supra* note 12, at 103-08.

101 *Id.* at 108.

professional lawyer over the legislature in developing the law.<sup>102</sup> In addition, both Savigny and Carter were political conservatives, devoted to laissez faire in matters of private law, who feared codification and other legislation as unwarranted intrusions of the government into the market. Most starkly, Reimann claimed that "Carter's protest against legislation was protest against infringement of the economic freedom of his wealthy clients" through regulations imposing liabilities on employers.<sup>103</sup> Carter developed "the anti-legislative, anti-democratic, and conservative laissez-faire implications of the historical theory of law, which had mostly lain dormant and hidden in the writings of Savigny himself." Without denying that Carter had been convinced by Savigny's jurisprudential arguments, Reimann stressed that those arguments allowed Carter and others to rationalize and hide their political and personal motives within a respected intellectual tradition.<sup>104</sup> Like other recent scholars, however, in none of his articles did Reimann provide a detailed analysis of the actual historical writings by Ames, Holmes, Carter, or other nineteenth-century Americans he discussed more briefly.<sup>105</sup>

From another angle of investigation, Thomas Grey has provided important insights into the treatment of history in late nineteenth-century legal scholarship. As part of his deservedly influential articles, which imaginatively reconstruct the thought of Langdell and Holmes, the two American legal scholars of the period who have attracted the most attention from their successors, Grey referred to their views about history. In his article on Langdell, Grey detected both similarities and differences between what he called classical or orthodox legal thought, represented by Langdell and his disciples, and the historical school of jurisprudence, represented in the United States by Carter, Langdell's contemporary. Both classical orthodoxy and the historical school, Grey observed, accepted the dominant evolutionary thinking of the period. They agreed that law was not static, but evolved progressively over time.<sup>106</sup>

Classical orthodoxy, however, did not accept the historical school's fundamental thesis that law is a contingent product of the evolving customs of a people. It was more likely than the historical school to differentiate

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102 *Id.* at 110-12.

103 *Id.* at 116.

104 *Id.* at 118-19. See also Horwitz, *supra* note 8, at 118-23 (discussing conservative political implications of Carter's intellectual views).

105 By contrast, Reimann has discussed in significant detail the historical views of nineteenth-century German legal scholars. Mathias Reimann, *Nineteenth-Century German Legal Science*, 31 B.C. L. Rev. 837 (1990).

106 Grey, *supra* note 14, at 28-29.

legal principles from evolving customs. Yet classical orthodoxy, which disdained natural law theories as unscientific speculation, recognized an important function for legal history: providing the raw material for the scientific operation of reason in extracting principles that could dictate legal judgments.<sup>107</sup> Classical orthodoxy accounted for legal change by ascribing a crucial role to the legal scientist, whose historical investigations can detect a principle that was imminent but previously unrecognized in past cases. Such a principle simultaneously reflects the slow evolution of society, explains past decisions convincingly, and contributes to the future progress of the law by making explicit on a scientific basis what had not previously been articulated.<sup>108</sup> This approach, Grey concluded, treated contract, tort, and other abstract legal concepts as essences whose characteristics could be discovered by legal scientists.<sup>109</sup>

In comments illuminating the alleged conservatism of legal history in the late nineteenth century, Grey rejected the frequent equation of classical orthodoxy with laissez-faire capitalism. Progressive lawyers throughout the twentieth century, he maintained, were wrong in portraying the classical legal thinkers as avid supporters of big business. Most of them came from established and respected families who worried that they were being displaced by a new class of large business owners advocating laissez faire. Favoring traditional virtues and good government, they tended to be Mugwumps in the late nineteenth century and members of the more conservative wing of the Progressive movement in the early twentieth.<sup>110</sup> Grey disagreed with the frequent assertion, most famously articulated in recent years by Duncan Kennedy,<sup>111</sup> that the Supreme Court's endorsement of laissez faire in *Lochner v. New York* epitomizes classical legal thought. *Lochner*, Grey maintained, represents the pre-classical constitutionalism that can be traced back to the Whigs before the Civil War, who openly maintained that constitutional law should resist the excesses of democracy.<sup>112</sup> Classical orthodoxy, by contrast, was relatively uninterested in constitutional law, which it viewed as inherently political and therefore not amenable to scientific study. On the few occasions when classical legal scholars addressed constitutional

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107 *Id.* at 30; *see also id.* at 2 n.6, 49.

108 *Id.* at 31.

109 *Id.* at 49.

110 *Id.* at 35.

111 Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 Res. L. & Soc. 3 (1980).

112 Grey, *supra* note 14, at 35-36 n.4.

issues, Grey observed, they typically advocated deference to the legislature, except in the rare circumstance when a law clearly violated an explicit constitutional provision.<sup>113</sup> Grey conceded, however, that classical orthodoxy did produce conservative effects by making a clear distinction between private and public law, by defining many issues of economic importance as private law, and by claiming that within this private realm their rigorous scientific methods could produce politically neutral principles of contract and property law autonomous from any historically contingent political allocation of resources.<sup>114</sup>

In a separate article, Grey placed Holmes outside classical orthodoxy. According to Grey, Holmes developed a complex combination of two competing jurisprudential approaches: the Enlightenment school of codification associated with Kant and Bentham and the historical school associated with Savigny, Maine, and Carter. Adherents of both approaches agreed that current law reflects custom. The Enlightenment school viewed this situation as a problem. It sought to free law from the irrational constraints of history and to reconstruct it by reasoning from first principles. In response, the historical school asserted that law, like language, is inevitably a product of the historical development of a people. Efforts to reconstruct law through codification, they maintained, would be as misguided and ineffective as attempts to impose an artificial language.<sup>115</sup>

The historical school, Grey observed, was never as influential in England or the United States as it was in Germany, where Savigny first articulated its fundamental premises. Grey ascribed this difference not to rejection of the historical school by English and American scholars, but to the fact that it seemed only to restate views that were familiar to people trained in the common law. They already saw law as custom adapted to changing circumstances through the gradual process of adjudication, and they doubted that conscious manipulation of the law could produce better results.<sup>116</sup>

Holmes, Grey claimed, synthesized the rival Enlightenment and historical approaches, a synthesis he captured in his maxim that "continuity with the past is no duty but only a necessity."<sup>117</sup> With the historical school, Holmes recognized that law is inevitably situated in a historical tradition that legitimately imposes its expectations. Yet with the Enlightenment school,

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113 *Id.* at 34.

114 *Id.* at 35, 39.

115 Grey, *supra* note 13, at 808-09.

116 *Id.*

117 *Id.* at 809.

Holmes was unwilling to justify law only because it had a basis in custom.<sup>118</sup> Even at the beginning of his life as a scholar, Holmes showed signs of deviating from the common law tradition. Faced with an increasingly industrial society divided by class, Holmes questioned the existence of a uniform community of shared values and demonstrated increasing skepticism about the ability of the common law to adapt to social needs. Especially in response to labor cases he faced as a judge in Massachusetts, Holmes saw much existing law as a dysfunctional survival of the past. For him, legal history became a method to remove the rubbish of these survivals and, thus, an initial step to legal reform. He came to believe that considerations of social policy, not adherence to custom, should govern legal analysis.<sup>119</sup>

Yet while developing his views of history as a critical discipline, Holmes retained what Grey called a "powerful streak of romantic antiquarianism" that produced deep flaws in *The Common Law*.<sup>120</sup> Holmes intended the book to restate the common law in doctrines that respond to contemporary needs, using history to identify anachronistic and dysfunctional survivals for elimination. But his romantic antiquarianism often subverted his intention, as Holmes treated ancient cases "not as objects of critical historical explanation, but as authoritative precedents, to which Holmes gave ingenious but tendentious lawyerly readings in support of controversial positions of law he favored."<sup>121</sup>

Grey also explored Holmes' complicated relationship with classical orthodoxy. Like Langdell and virtually all leading Anglo-American legal scholars of the late nineteenth and early twentieth centuries, Holmes was a conceptualist who participated in the largely successful project of American law professors to replace the old writ system with a legal structure based on the categories of contract and tort. Yet unlike Langdell and other classical theorists, Holmes did not believe that doctrines extracted from the study of legal history could be arranged in an autonomous deductive system governed by formal reason. For Holmes, legal categories were not ideal realities to be discovered and applied, but instrumental concepts that could take considerations of justice and social policy into account while making law knowable to the general public.<sup>122</sup> Holmes famously criticized the deductive formalism of Langdell, which legal realists subsequently misunderstood as opposition to conceptualism as well. According to Grey, Holmes "loved the logical manipulation of doctrine for its own sake nearly as much as Langdell

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118 *Id.* at 807.

119 *Id.* at 807, 810-11.

120 *Id.* at 812.

121 *Id.* at 813.

122 *Id.* at 816, 822, 824, 825.

did," but disagreed with Langdell's view that "the fundamental principles of the common law, once extracted by induction from the cases, had the status of axiomatic general truths."<sup>123</sup>

Of particular interest for the study of legal historiography, Grey placed Ames and Thayer, close colleagues at Harvard who both wrote legal history and were open admirers of Langdell, into different jurisprudential camps. He identified Ames as one of the three most important disciples of Langdell's classical orthodoxy.<sup>124</sup> While granting that Langdell and his disciples followed Thayer in advocating judicial deference to legislative determinations, Grey claimed that Thayer himself was not a classicist,<sup>125</sup> but was rather an ally of Holmes in opposing deductive formalism.<sup>126</sup> Focusing on Langdell and Holmes, Grey did not substantiate his conclusions about Ames and Thayer by references to their work.

Finally, and in marked contrast from other recent work dealing with history in late nineteenth-century legal scholarship, a long and comprehensive article by Stephen Siegel took this subject as its primary focus, addressed constitutional as well as private law, and provided many specific examples of how three important scholars treated history. Siegel wrote his article to challenge the claim, made early in the twentieth century by Pound and Corwin and subsequently accepted as a truism, that the first proponents of laissez-faire constitutionalism based their arguments on natural law. While acknowledging that some of these laissez-faire constitutionalists believed in natural law, Siegel used the term "historism" to describe what he considered their fundamental jurisprudential approach.<sup>127</sup> Historism maintained that

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123 *Id.* at 816. Alschuler, *supra* note 14, at 84-100, largely agrees with the treatment of Holmes by Reimann and Grey. Horwitz, *supra* note 8, at 141-42, detects a shift away from historical explanation by Holmes in the period between his book, *The Common Law* (1881) and his essay *The Path of the Law* (1897). Oliver Wendell Holmes, *The Common Law* (Mark DeWolfe Howe ed., 1963); Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457 (1897), reprinted in Oliver Wendell Holmes, *Collected Legal Papers* (New York, Harcourt, Brace & Co. 1921).

124 Grey, *supra* note 14, at 2. The other two were Joseph Beale and Samuel Williston.  
125 *Id.* at 34.

126 Grey, *supra* note 13, at 825. Grey identified John Chipman Gray and John Wigmore as other allies of Holmes.

127 Siegel, *supra* note 15, at 1433-36. Siegel contrasted "historism" with the more frequently used term "historicism." He defined historicism as "the general doctrine that societies qualitatively change through secular causes." Historism accepts this doctrine, but also rests on two other tenets that historicism does not share: (1) the universe has an ethical meaning that human beings can understand, and (2) historical studies reveal underlying moral ordering principles that explain social evolution. *Id.* at 1451-52 n.84, 1438.

social norms and institutions evolve over time, not in the random way assumed by Darwinian theory, but according to moral ordering principles that are objective and accessible through historical study.<sup>128</sup> According to historicism, "social practices were not 'made' through will or 'discovered' through reason: they 'grew' through unconscious and uncoordinated popular action."<sup>129</sup>

Historicism, Siegel maintained, was the prevailing school of social thought in the late nineteenth century. Under its influence, legal scholars studied the evolution of Anglo-American culture to discern objective legal principles. Laissez-faire constitutionalism, Siegel emphasized, was one of the principles they found.<sup>130</sup> Siegel thus tried to rescue the intellectual integrity of these scholars from subsequent charges by progressives that they had disingenuously used laissez faire, an anachronistic social theory they could not conceivably have taken seriously, simply to protect the wealthy from the forces of social change.<sup>131</sup>

Siegel explored the relation between historicism and laissez-faire constitutionalism through close textual analysis of the private law and constitutional jurisprudence of three prominent legal scholars: John Norton Pomeroy, Thomas McIntyre Cooley, and Christopher G. Tiedeman. While emphasizing their shared views, he also observed significant differences among them that pointed to a broad shift in intellectual history. Unlike the fully historicist Cooley, Siegel claimed, Pomeroy combined historicism with natural law, and Tiedeman was as much a legal positivist as a historicist. By discussing Pomeroy, Cooley, and Tiedeman in order, Siegel ambitiously sought to demonstrate "the rationalism and theism of the past fading, the positivism of the present emerging, and the historicism of the nineteenth century mediating this fundamental transition."<sup>132</sup>

Because Siegel concentrated on laissez-faire constitutionalists, he did not discuss their close contemporaries who developed different views about constitutional law, such as Thayer and Pound.<sup>133</sup> But Siegel concluded his long article with very suggestive comments about the use of history by Holmes, a key figure in the attack on laissez-faire constitutionalism. Holmes, Siegel remarked, shared the interest in historical study demonstrated by Pomeroy, Cooley, and Tiedeman. Unlike them, however, Holmes denied any prescriptive power to history. Holmes did not view history as the source of

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128 *Id.* at 1438, 1440, 1450-51.

129 *Id.* at 1442.

130 *Id.* at 1543; *see id.* at 1435.

131 *Id.* at 1540-44.

132 *Id.* at 1453.

133 *Id.* at 1452 n.86.

objective legal principles having normative value. On the contrary, as Holmes wrote in a passage of *The Path of the Law*, quoted in part by Siegel, history must be part of the rational study of legal rules "because it is the first step toward an enlightened skepticism, that is, toward a deliberate reconsideration of the worth of those rules."<sup>134</sup>

These recent studies have broadened and deepened our knowledge of the treatment of history by legal scholars in the late nineteenth century. Yet they have not significantly challenged, or really even addressed, the historiographical critiques of doctrinal legal history by Boorstin, Horwitz, and Gordon. Except for Siegel's analysis of Pomeroy, Cooley, and Tiedeman, moreover, neither the historiographical critiques nor the investigations of late nineteenth-century legal thought thoroughly examined the historical views of the earlier scholars, the project on which I am currently working. I close this article by summarizing my own research and indicating the ways in which it reinforces, challenges, and extends the conclusions of these recent studies.

### III. A PRELIMINARY RECONSIDERATION OF THE TREATMENT OF HISTORY IN LATE NINETEENTH-CENTURY AMERICAN LEGAL SCHOLARSHIP

My own exploration of the treatment of legal history in late nineteenth-century American legal scholarship derives from more general interests that arose while I worked on a book about the history of free speech in the United States between the Civil War and the period immediately following World War I.<sup>135</sup> Historiographical issues I confronted during that project<sup>136</sup> prompted me to examine and compare theories of history in intellectual history and in legal history. I found much less historiographical scholarship about legal history than about intellectual history and, within legal history, much less about the period before Hurst than about Hurst and his successors. Much of this literature is excellent and achieves the varied purposes of its authors. None of it, however, contains what I sought: a thorough account of how American legal scholars before Hurst wrote about history and understood its meaning. I, therefore, decided to read the late nineteenth-century scholars myself. I concentrated on nine authors, chosen primarily for the quality and influence

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<sup>134</sup> *Id.* at 1546-47.

<sup>135</sup> David M. Rabban, *Free Speech in Its Forgotten Years* (1997).

<sup>136</sup> *See id.* at 9-21.

of their work. In alphabetical order, they are James Barr Ames,<sup>137</sup> Melville M. Bigelow,<sup>138</sup> James Coolidge Carter,<sup>139</sup> Thomas McIntyre Cooley,<sup>140</sup> William Gardner Hammond,<sup>141</sup> John Norton Pomeroy,<sup>142</sup> James Bradley Thayer,<sup>143</sup> Christopher G. Tiedeman,<sup>144</sup> and Francis Wharton.<sup>145</sup> The oldest, Wharton, was born in 1820. The youngest, Tiedeman, was born in 1857. Their major works appeared from the 1860s through the first decade of the twentieth century.

Though unified by a common interest in the historical study of law, these nine scholars came from quite diverse family and educational backgrounds. Some were born into prominent and wealthy families; others grew up poor. Some attended elite colleges and law schools; others, including some from wealthy families, received legal training in law offices rather than law schools, a typical form of legal education in their time. Cooley, in some ways the most eminent of the entire group, was raised in a pioneering farming family in western New York and did not even attend college.

Many of these scholars had intellectual interests beyond the law. Cooley worked as a journalist before becoming a law professor and judge. Thayer wrote literary criticism for serious popular magazines during his years as a practicing lawyer and was offered a chair of Rhetoric at Harvard before joining its law faculty. Ames taught literature and history at Harvard College

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137 Ames (1846-1910) was a professor and Dean at Harvard Law School.

138 Bigelow (1846-1921) was a professor and Dean at Boston University Law School.

139 Carter (1827-1905) was a prominent corporate lawyer and civic reformer in New York City and an active alumnus of Harvard Law School.

140 Cooley (1824-1898) was professor and Dean at the University of Michigan Law School, a judge on the Michigan Supreme Court, Chairman of the Interstate Commerce Commission, and President of the American Bar Association.

141 Hammond (1829-1894) was a professor at the Iowa Law School and later Dean of St. Louis Law School.

142 Pomeroy (1828-1885) was a professor at New York University Law School and Hastings Law College of the University of California.

143 Thayer (1831-1902) spent eighteen years as a practicing lawyer in Boston before becoming a professor at Harvard Law School in 1874.

144 Tiedeman (1857-1902) was a professor at the University of Missouri Law School and the University of the City of New York and Dean at the University of Buffalo Law School.

145 Wharton (1820-1889) had the most varied career of these scholars. After only a few years as a lawyer in Philadelphia, he taught at Kenyon College in Ohio and at its affiliated theological school. He then became an Episcopalian priest, resigned, and resumed teaching at an Episcopalian seminary and at Boston University Law School. Following extended trips to Europe, he became Solicitor of the Department of State.

while a student at Harvard Law School. Wharton spent several years teaching history and literature as well as constitutional law at Kenyon College and also taught at theological seminaries. Some belonged to discussion clubs in their communities, in which prominent men in business and the professions discussed literary, philosophical, and political issues. Many became active and often held positions of leadership in various professional societies, such as the American Academy of Arts and Sciences, the American Social Science Association, and the American Society for the Advancement of Social Science, and in distinctively legal organizations, such as the Association of American Law Schools, the American Bar Association, the Association of the Bar of the City of New York, and the Selden Society, an organization of legal historians founded in England. Seven of the nine became law professors, sometimes after working as practicing lawyers; Carter and Wharton were the two who did not. Carter remained a Wall Street lawyer, and Wharton, after a career as an Episcopalian priest, became the Solicitor of the Department of State.

Many of these nine scholars did not leave strong traces of their political views, if any, but some did. Raised by a father deeply committed to temperance and abolitionism before the Civil War, Thayer seemed to inherit his commitment to moral reform while advocating better treatment for American Indians and protesting political corruption. Though Carter, Cooley, and Tiedeman have been portrayed by subsequent scholars as apologists for the interests of big business, their views were more complex. Carter typically represented large corporations, but in major Supreme Court cases he defended the redistributive policies of the federal income tax and argued for the constitutional rights of Chinese immigrants and criminal defendants. More actively than Thayer, Carter supported municipal reform, most prominently in representing New York City in a successful prosecution of the Tweed ring for stealing city funds. Beyond opposing corruption, Carter criticized the increasing materialism of American life. Cooley and Tiedeman developed the theory of constitutional limitations on government power, which protected corporations against legislative regulation, but they also opposed government intervention in the economy on behalf of corporate interests. More generally, Carter, Cooley, and Tiedeman bemoaned the growing concentration of economic power in the United States, often seeming to look back nostalgically to an era of greater economic competition and equality before the Civil War. As a group, they were not the conservative defenders of the status quo portrayed by recent scholars.

The current reputations of the nine scholars I discuss do not line up neatly with their productivity. Ames, Cooley, Thayer, and Tiedeman are probably best known today, but largely for reasons unrelated to the quality of their

scholarship. Progressive historians drew attention to Cooley and Tiedeman by claiming that they provided the intellectual justifications for the Supreme Court's support of laissez-faire capitalism in the late nineteenth and early twentieth centuries. More recent revisionist challenges to this interpretation have extended attention to their work. The reputations of Ames and Thayer have benefited from their association with Harvard Law School during its rise to preeminence at the end of the nineteenth century. Though their writing was excellent, even their colleagues commented that Thayer, and particularly Ames, had not been productive scholars. By contrast, Tiedeman and Cooley were prolific scholars, as were Pomeroy and Wharton, who are much less known today.

Of the nine scholars I have selected, only Ames, Bigelow, and Thayer could fairly be described as legal historians who produced original works based on primary sources. Yet the others were all very well read in history, and their scholarship in various areas of substantive law and legal theory was highly informed by historical knowledge and perspectives. Many of these scholars knew and corresponded with each other and with leading legal historians in England and in Germany. Some of them studied in German universities. In a telling measure of respect for American scholarship on English legal history, Pollock and Maitland ended their Introduction to *The History of English Law*, their 1895 book that became a preeminent work in the field, by citing Ames, Bigelow, Thayer, and Holmes as four of the eight leading scholars on whom they had relied.<sup>146</sup>

The work of these scholars was much better, more diverse, more interesting, and more important than suggested by the frequently summary conclusions of its subsequent critics. Some of this scholarship confirms claims by the critics, but much of it does not. Even when it confirms, it merits more attention than it has received.

As recent critics have maintained, some late nineteenth-century legal scholars asserted that law, like language, evolves from the racial and national history of a people in a continuous process of development that reveals underlying principles. These scholars often expressed their evolutionary views through organic metaphors, such as germs ripening into mature fruit or trees sprouting branches. The evolution of their own legal tradition, which they defined as Anglo-American, especially interested them. In addition to searching for its origins in England, they studied its history over centuries and

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146 Of the four others, Brunner and Liebermann were German and Stephen and Vinogradoff were English. 1 Frederick Pollock & Frederick W. Maitland, *The History of English Law* at xxxvii (Cambridge, U.K., Cambridge Univ. Press 1895).

frequently concluded that it had achieved its highest stage of development in the United States of their own time. They most commonly identified individual liberty and local self-government as the underlying principles at the core of this tradition. While acknowledging that Anglo-American law had incorporated elements of various races and cultures, some maintained such mingling could occur only among related races and, on that basis, favored limitations on eligibility for American citizenship. Others assumed that the separate evolution of different races eventually would converge in the perfection of a universal system of justice that would resemble the Christian morality in which they believed.

Yet contrary to the claims of recent historiographical critiques, other late nineteenth-century legal scholars incorporated concepts of fluctuation, discontinuity, contingency, and decay into their evolutionary theories. For example, Wharton maintained that legal evolution is not a process of "fixed and unbroken advance," but is "undulatory."<sup>147</sup> More specifically, Bigelow disagreed with scholars who saw in Salic, Saxon, or Anglo-Saxon versions of ancient German law the "'promise and potency' of the present common law of England." "The pure German law of the Anglo-Saxons," he added, "received in fact a fatal blow at the hands of the Normans."<sup>148</sup> Many scholars agreed, moreover, that some laws and societies had decayed and died. Pomeroy maintained that decline and death occur in all societies as part of an endless cycle and often used Rome as an illustration. Although he believed that English and American law remained capable of further growth toward perfection, he suggested that eventually this growth would be followed by decline, recapitulating the pattern of ancient Rome.<sup>149</sup>

Some of the nineteenth-century scholars, such as Pomeroy and Carter, seemed to believe in the inevitability of evolution, but others did not. Wharton even claimed that "there is no inexorable law, physical or spiritual, binding either men or nations to specific destinies." According to him, laws change as a people's circumstances change, fit laws survive as unfit ones die out, and what may be fit for one nationality may be unfit for another. Disclaiming deterministic conceptions of evolution, he stressed that "with nations, as well as with individuals, spontaneity is the basis for growth." Development, he added, "whether individual or national, is self-elective."<sup>150</sup>

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147 Francis Wharton, *Commentaries on Law* 71 (Philadelphia, Kay & Bro. 1884).

148 Melville Madison Bigelow, *Law Cases William I to Richard I — Placita Anglo-Normannica* at x-xi (London, Sampson, Low, Marston, Searle, & Rivington 1879).

149 John Norton Pomeroy, *An Introduction to Municipal Law* 121-22, 168-70, 208-11 (New York, D. Appleton & Co. 1864).

150 Wharton, *supra* note 147, at 67-69.

Thayer, somewhat less dramatically, emphasized the contingency of history. He observed that had the jury retained its procedure of hearing witnesses in private and without judicial oversight or control, as the grand jury managed to do, the modern law of evidence "never would have taken shape."<sup>151</sup> He recognized contingency in a very different context by observing that the distinctive American concept of judicial review, though "a natural result of" its colonial experience, "was by no means a necessary one."<sup>152</sup>

Many of these scholars, moreover, were especially alert to the very dangers of false analogies between past and present legal categories that the critics have accused them of ignoring. Displaying remarkable historiographical sensitivity, they warned against anachronism and stressed that resemblance between past and present law does not necessarily reveal causal influence. "There can be no greater error in historical investigation," Pomeroy wrote, "than the conclusion that, because of a resemblance between institutions of two different nations, not contemporaneous, the later in time has borrowed from the former."<sup>153</sup> Hammond also warned about inferring a "genetic relation" from resemblance,<sup>154</sup> and Bigelow repeatedly took care to distinguish similarity from causation. He asserted, for example, that the resemblance of an earlier writ to a later one cannot prove "an antecedent lineage."<sup>155</sup>

In applying their evolutionary theories rooted in race and nation, legal scholars often asserted that evolving custom is the source of law. This position played a large role in their interpretations of both common law and constitutional law. Several stressed the importance of evolving custom as the basis for disagreeing with Blackstone's famous assertion that the common law had existed "from time out of mind" based on "immemorial usage."<sup>156</sup> And both Wharton and Tiedemann cited the failure of the constitution John

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151 James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* 180-81 (Boston, Little, Brown 1898).

152 James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, 131 (1883), reprinted in James Bradley Thayer, *Legal Essays* 1, 3 (1908).

153 Pomeroy, *supra* note 149, at 247-48.

154 2 William G. Hammond, *Hammond's Blackstone* 205-06 (San Francisco, Bancroft-Whitney Co. 1890).

155 Bigelow, *supra* note 148, at 148.

156 William Blackstone, *Commentaries on the Laws of England* 67, 68 (reprint 9th ed. 1978). See, e.g., Pomeroy, *supra* note 149, at 19; Wharton, *supra* note 147, at 134-37.

Locke drafted for the Carolina colonies as a negative example of what happens when a constitution does not emerge from lived experience.<sup>157</sup>

From their view of law as the reflection of evolving custom, American legal scholars were particularly creative in extracting principles for interpreting the novel written Constitution of the United States. They asserted that the intent of those who wrote or ratified the Constitution in the late eighteenth century was less important in constitutional interpretation than the changing views of the American people, which some characterized as an "unwritten constitution." The written Constitution, they maintained, could be extended to subjects not contemplated at the time of its framing and ratification. More dramatically, they saw no problem with interpreting the Constitution in ways that clearly deviate from its original intent, even in the absence of written amendments.<sup>158</sup> As examples of such deviations, scholars cited the reduced function of the Electoral College in response to the growth of popular sovereignty and political parties and the expansion of government power over commerce, territorial acquisition, and war as the national experience altered the views of the people. Many treated written amendments to the Constitution as simply recording changes in popular consciousness that had already occurred. While arguing that constitutional law, like the common law, necessarily expresses the evolving customs of the people, some scholars approved the innovation of judicial review of constitutional issues as a needed check on passionate or excessively hasty popular action that did not express what the people really would have wanted after rational reflection.

Many of these scholars maintained that judges are in the best position to conform law to changes in customs produced by new conditions. As a result, they explicitly endorsed the controversial practice of "judicial legislation" in both common law and constitutional adjudication while opposing statutory legislation, including codification. Decisions by judges, they argued, permit the gradual and necessary evolution of law without serious social disruption. They treated Blackstone's assertion that judges must conform to precedent,

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157 Christopher G. Tiedeman, *The Unwritten Constitution of the United States* 19 (New York, G.P. Putnam's Sons 1890); Wharton, *supra* note 147, at 33.

158 The flexible interpretation of these scholars makes Bruce Ackerman's highly controversial views about unwritten constitutional amendments seem tame and conservative by comparison. Unlike the nineteenth-century scholars, Ackerman would require the occurrence of a complex set of circumstances before an unwritten constitutional amendment could be recognized legally. See Bruce Ackerman, *We the People: Foundations* (1991) (especially at 266-94); Bruce Ackerman, *We the People: Transformations* (1998) (especially at 10-31).

like his identification of the common law as having existed from time immemorial, as the unfortunate result of his failure to understand evolution. They believed that as long as judges rely on evolving custom in changing the law, and not on personal or arbitrary criteria, they perform a valuable and appropriate public service.

Statutory legislation, by contrast, seemed generally ineffective and even dangerous to scholars who believed in legal evolution. Statutes, many argued, disrupt the proper gradual evolution of the law and are unable to anticipate the changing needs of a developing society. Scholars often asserted their opposition to codification on this basis. Yet even the most vigorous opponents of legislative action conceded circumstances in which it is proper and even necessary. Many distinguished between subjects of public law related to the business of the state, for which legislation is appropriate, and subjects of private law, for which it is not. But they also identified circumstances in which a legislature should enact statutes governing private law; for example, when certainty in the law is particularly necessary or when a vast gap exists between existing law and needed reform, a situation most likely to occur in periods of dramatic social change. The rapid industrialization of their own society, many of these scholars maintained, justified statutes regulating employment and public health.

The late nineteenth-century American legal scholars who endorsed evolutionary theories of law sometimes differentiated their views both from theories of natural law and from analytic jurisprudence. Many associated themselves with the German historical school of jurisprudence, particularly Savigny, and sometimes also with Edmund Burke, who favorably compared the English common law tradition based on custom with the attempt by the leaders of the French Revolution to impose statutes on unwilling people. Yet while acknowledging intellectual debts to Savigny and Burke, Americans often complained that they were too conservative. They especially disagreed with the extent to which Savigny and Burke used evolutionary theory to justify laws that the nation might have outgrown. Simply identifying a prior custom or precedent, the Americans asserted, should not preclude consideration of whether it should be continued. Americans influenced by Savigny also criticized him for using the concept of a "*Volkgeist*," which unconvincingly treated nations as if they possess as much continuous identity as individual persons.

Many Americans who agreed that law reflects evolving custom were less interested in the theoretical implications of this position than in studying the past to understand, and often to reform, existing law. Arguing against the vanity of mere theory, they maintained that knowledge of the origins and history of law is a necessary prerequisite to any meaningful study of it.

Subsequent critics are correct in concluding that their scholarship frequently combined historical reconstruction with conceptual analysis. Asserting that law is an inductive science, many of these scholars looked to history, especially to the history of case law, as the raw material from which to induce legal principles capable of governing future cases. Much of their work, however, was not the apologetic rationalization of the status quo, as recent historiographical critiques frequently have claimed, but a preliminary effort to reform the law in light of changed conditions that have evolved over time.

Belief in evolutionary theory often coexisted with the view that much existing law constitutes dysfunctional survivals. These unfortunate survivals, scholars frequently observed, may have made sense in the past but have become illogical and repressive over time and impeded legal and social progress. They often studied legal history precisely to uncover dysfunctional survivals of past law and argue that they should no longer govern legal analysis. Thayer, for example, emphasized that the law of hearsay and numerous other rules of evidence are historical byproducts of the development of the English jury system that stand as unfortunate barriers to the creation of a proper scientific law of evidence designed to achieve justice.<sup>159</sup> Ames, Cooley, and Hammond maintained that much of current property law perpetuated obsolete and artificial rules from the Middle Ages while thwarting fair results in the present.<sup>160</sup> And Cooley regretted that rapid social changes in family relationships had not been matched by modification of the common law of family rights, which remained substantially as it was in the primitive days of its origins, treating wives and children as the servants and dependents rather than the equals of husbands and fathers.<sup>161</sup> Contrary to the subsequent assertions of twentieth-century critics, these scholars saw themselves as the leaders, not the servants, of practicing lawyers and judges, as scientists whose legal analysis others should follow to reform the law rather than to justify it.

Given the widespread assumption that American legal historiography prior to Hurst was overwhelmingly internal and doctrinal, particularly as the study of the past approached the present, it is especially important to stress how frequently late nineteenth-century scholars cited external influences on both common law and constitutional law, in the present as well as the past. For

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159 Thayer, *supra* note 151, at 180, 509, 519, 523.

160 James Barr Ames, *Lectures on Legal History and Miscellaneous Legal Essays* 149, 158 (1913); Thomas M. Cooley, *A Treatise on the Law of Torts* 428 (Chicago, Callaghan 1880); 2 Hammond, *supra* note 154, at 653.

161 Cooley, *supra* note 160, at 222.

people who viewed law as the reflection of evolving custom, it was natural, even tautological, to accept the importance of external influences. Few of these people, it is true, dwelled on these external factors. Some treated them as if they were so familiar, and their impact on the law so obvious, that they needed little elaboration from legal scholars, who had the more complicated task of understanding law itself and suggesting reforms. The intricacies of how external factors influenced the law or how the law influenced the broader society, subjects that preoccupy many legal historians today, did not interest them. But they did not deny the existence or significance of external factors. They discussed, for example, the impact of feudalism on the law of evidence and property, the changes in European legal systems produced by the growth of commerce and cities, the relationship of the American colonial experience to the provisions of the Constitution and the distinctively American theory of judicial review, the ways in which territorial expansion and changing views about slavery transformed constitutional interpretation in the United States, and the impact of rapid industrialization in their own time on many areas of the law.

Examining the historical work of a significant but insufficiently studied group of late nineteenth-century legal scholars, finally, places two familiar giants of American legal thought, Oliver Wendell Holmes, Jr. and Roscoe Pound, into a broader and extremely revealing context. Holmes worked hard to be an original, and he largely succeeded. But he is also notorious for denying intellectual influences. He shared many historical interests with his scholarly contemporaries. He knew, corresponded with, and occasionally engaged them in debate about the history of law. Like many of them, he frequently considered history, rather than theories of natural law or analytic jurisprudence, the key to understanding law. Also like them, he viewed legal history as an inductive science, endorsed evolutionary theories of legal development, approved "judicial" legislation, and highlighted false analogies to the past and unfortunate historical survivals. While sharing with some of his contemporaries the view that the study of legal history can enable people in the present to free law from the past, Holmes differed from them by maintaining in the 1890s that the future development of law should be based on the analysis of policy choices through the tools of the new social sciences, particularly statistics and economics. Yet he recognized that his own ideal was unlikely to be realized, that human beings can never escape the laws of evolution and the influence of history. The dominant power in a community that ultimately determines its law, Holmes believed throughout his long life, is achieved through a continuous historical process of social struggle among contending forces for "the survival of the fittest." This social struggle, he believed, is as fundamental a fact of evolution as the struggle for survival in

nature among competing species. His confidence in policy analysis through the social sciences anticipated Pound and other twentieth-century scholars, but his deference to the power of the dominant community resembled his many nineteenth-century contemporaries who stressed evolving custom as the source of law.

During the decade before World War I, Pound contributed substantially to the declining prominence of history in American legal scholarship. Ironically, he did so largely through his own major works of legal history, an important component of his writing that has been surprisingly overlooked even by scholars who recognize him as a major figure in American legal scholarship. "In law, as in everything else," Pound asserted, "the nineteenth century is the century of history."<sup>162</sup> Pound examined the uses of history in nineteenth-century legal scholarship with a comprehensiveness that has not subsequently been duplicated or even approached. He also wrote his own highly influential studies of American legal history.

Pound was highly critical of the historical school that, in his opinion, had dominated American jurisprudence since 1870. According to Pound, historical jurisprudence supported the ultra individualism of American law and prevented legal reform that the public needed and wanted. It treated legal history as revealing and celebrating the gradual growth of individual freedom from restraint at a time when the United States needed collective action to solve its pressing social problems, which could be traced largely to the very excesses of unrestrained individualism. It believed that law develops unconsciously and therefore doubted the value of the conscious process of legislation, which Pound called the key to social progress in a democracy. And it further obstructed needed reforms by reinforcing the tendency of practicing lawyers to treat current legal rules as inevitable and even as reflecting the legal order of nature.

Pound was confident, however, that historical jurisprudence had become obsolete. Using what seems to be an evolutionary model of historical analysis to deny the continuing importance of history itself, Pound claimed that legal history at the turn of the twentieth century had value mainly as "preparatory work"<sup>163</sup> for "an engineering interpretation" of law.<sup>164</sup> Pound translated this "engineering interpretation" into "sociological jurisprudence," which relied on the social sciences as the basis for legal solutions to social problems and

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162 Roscoe Pound, *Interpretations of Legal History* 6 (1923).

163 *Id.* at 91.

164 *Id.* at 164.

whose popularity among American legal scholars eclipsed the historical study of law.

I suspect that much of the current neglect and even disparagement of late nineteenth-century legal scholarship derives from the continuing influence of Pound's critique of historical jurisprudence and his promotion of sociological jurisprudence in its stead. I also suspect that the historiographical critiques of internal legal history reflect their authors' political and intellectual disappointment with the legal history written by their contemporaries, which the critics have projected back to the earlier scholars of the late nineteenth century. But just as some recent work has demonstrated that Cooley and other late nineteenth-century legal thinkers were not nearly as simplistic and conservative as twentieth-century progressives and liberals have maintained,<sup>165</sup> serious attention to the treatment of history by a broader group of scholars should help restore their intellectual reputations. The frequently observed phenomenon of a generation undervalued by its immediate successors, yet subsequently rediscovered and appreciated, may be operating in the ongoing reevaluation of late nineteenth-century legal scholarship. In any event, the existence of a substantial and complex American school of historical jurisprudence, often in close personal and intellectual contact with similar schools in Germany and England, is worthy of recovery and examination.

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165 See especially Alan Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration*, 53 J. Am. Hist. 751 (1967).